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Applicability of Article 102 TFEU as a legal instrument for *ex post* merger control in light of the CJEU judgment in case C-449/21 Towercast

Zastosowanie artykułu 102 TFUE jako prawnego instrumentu kontroli koncentracji *ex post* w świetle wyroku TSUE w sprawie C-449/21 Towercast

Abstract

It has become accepted in existing practice that the principal instrument for the control of concentrations with a Community dimension is the mechanism provided for in Regulation 2004/139/EC. Its essence is the EC's prior control of concentrations assessed from the perspective of a significant impediment of effective competition in the common market or a substantial part of it. In contrast, concentrations which did not exceed the quantitative thresholds stipulated under EU or national law generally remained outside the control system. However, a certain change of approach in this respect has been introduced in the judgment of the Court of Justice of the European Union in case C-449/21 Towercast (ECLI:EU:C:2023:207). It confirms the NCAs' capacity to apply Article 102 TFEU when assessing concentrations that lack a 'community' or even 'national' character under *ex post* control. However, this issue may raise certain doubts, as past practice has indicated that the provisions on the prohibition of abuse of a dominant position for the assessment of a given concentration were applied incidentally and concerned a different legal context. Accordingly, the objective of this paper is to clarify the mutual relations between the provisions arising from the Regulation and the TFEU, including, in particular, their legal nature, functions, objectives and effects.

Keywords: *ex ante* and *ex post* merger control, abuse of a dominant position, community and national concentrations, quantitative thresholds, direct applicability of Article 102 TFEU

Streszczenie

W dotychczasowej praktyce przyjęło się, że podstawowym instrumentem kontroli koncentracji o wymiarze wspólnotowym jest mechanizm przewidziany w rozporządzeniu 2004/139/WE. Jego istotą jest dokonywana przez KE uprzednia kontrola koncentracji oceniana z perspektywy znacznego zakłócenia konkurencji na wspólnym rynku lub znacznej jego części. Koncentracje natomiast, które nie przekraczały progów ilościowych przewidzianych w prawie unijnym czy krajowym, zasadniczo pozostawały poza systemem kontroli. Pewną zmianę podejścia w tym zakresie przynosi jednak wyrok Trybunału Sprawiedliwości Unii Europejskiej w sprawie C-449/21 Towercast. W praktyce potwierdza on możliwość zastosowania (przez krajowe organy ochrony konkurencji) art. 102 TFUE w celu oceny koncentracji niemających przymiotu „wspólnotowych” czy nawet „krajowych” w trybie kontroli *ex post*. Kwestia ta jednak może budzić pewne wątpliwości, ponieważ dotychczasowa praktyka wskazywała, iż przepisy dotyczące zakazu nadużywania pozycji dominującej do oceny danej koncentracji stosowane były incydentalnie i dotyczyły innego stanu prawnego. Celem artykułu jest zatem wyjaśnienie wzajemnych relacji pomiędzy przepisami wynikającymi z rozporządzenia a TFUE, w tym zwłaszcza ich charakteru prawnego, funkcji, celów oraz skutków.

Słowa kluczowe: kontrola koncentracji *ex ante* i *ex post*, nadużywanie pozycji dominującej, koncentracje wspólnotowe i krajowe, progi ilościowe, bezpośrednie stosowanie artykułu 102 TFUE

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Introduction

The control system of concentrations with a Community dimension is essentially based on the control mechanism provided for in Regulation 2004/139/EC (hereinafter the Regulation or Reg. 139/2004, OJ L 24/1). Its essence is preventive (*ex ante*) control of concentrations by the EC, assessed from the perspective of a significant impediment of competition within the common market or a substantial part thereof (the test of a significant impediment of effective competition).[1] Furthermore, the EC may examine a concentration based on a request from the referring competition authority/authorities concerning a concentration which, while not having a Community dimension, affects trade between Member States and threatens competition within the territory of the Member State(s). In this context, *ex post* control of a concentration conducted through the application of Article 102 of the Treaty on the Functioning of the European Union (hereinafter TFEU) may constitute a complementary instrument aimed at closing the regulatory gap in a situation where the concentration in question does not exceed the thresholds arising from both the EU and national regulations (Levy et al., 2021). So far, however, the provisions concerning the prohibition of abuse of a dominant position have been applied incidentally to assessing a given concentration. This circumstance resulted primarily from the well-established conviction (especially of national competition authorities) that Regulation 139/2004, rather than the Treaty rules, is currently the exclusive instrument for assessing concentrations between undertakings.

It appears that a change of approach has been introduced by the judgment of the Court of Justice of the European Union (hereinafter CJEU) of 16 March 2023 in Case C-449/21 Towercast, which perpetuates the possibility of applying Article 102 TFEU to the assessment of a concentration (which does not qualify as 'Community' or even 'national') by way of *ex post* control. Even though the cited judgment is seemingly a natural consequence of the existing legal solutions, to fully comprehend its meaning, it is necessary to define the interrelationship between the provisions arising from the Regulation and the TFEU, particularly their legal nature, functions, objectives and effects. In doing so, addressing the scope of Article 102 TFEU is vital. Although it may potentially find application in the merger control process, it should not be ascribed a necessarily automatic application where the provisions of the Regulation fail to apply. Therefore, these issues will serve as the main focus of the author's considerations in this article.

Facts and the request for a preliminary ruling

The described case concerned the French market for broadcasting services, where Télédiffusion de France (TDF) acquired exclusive control (through the acquisition of all shares) over Itas. As the quantitative (turnover)[2] thresholds were not exceeded, the transaction in question was not subject to *ex ante* control by the EC or the French competition authority (C-449/21 Towercast, para. 17). A complaint against the above-mentioned concentration was lodged with the French Competition Authority by Towercast, a company with competitive activities in the same relevant market. It argued that TDF's acquisition of control over Itas constituted an abuse of its dominant position[3] because, by strengthening TDF's presence (notably on the upstream wholesale market), the concentration hindered competition on the upstream and downstream wholesale markets (digital terrestrial television broadcasting services). Nevertheless, the NCA dismissed the complaint (16 January 2020), finding that the alleged practice had not been proven and that "The adoption of Regulation No 4064/89 had drawn a clear dividing line between the control of concentrations and the control of anti-competitive practices and that Regulation No 139/2004, which replaced it, applied exclusively to concentrations as defined in Article 3 of that regulation, thereby rendering the application of Article 102 TFEU to a concentration operation devoid of purpose where the undertaking concerned has not engaged in abuse which can be separated from that operation".[4] Towercast subsequently challenged this decision before the Paris Court of Appeal. The company argued, *inter alia*, that due to the direct effect of Article 102 TFEU, it is fully applicable to any other concentration that does not meet the conditions inherent in the *ex ante* assessment under EU or national law. Additionally, referring to the judgment of the Court 6/72 in Europemballage and Continental Can v. EC (ECR 1973/00215), the applicant pointed out that the principles according to which it is permissible to subject a concentration to *ex post* assessment under Article 102 TFEU remain valid.[5]

In light of the above, the Court of Appeal raised doubts as to the possibility of the autonomous application of Article 102 TFEU to a transaction that may fit the definition of a concentration in Article 3 of Regulation 139/2004 without being subject to any preventive control under EU or national law.[6] Consequently, the court decided to refer the question to the Court of Justice for a preliminary ruling.

The Court's assessment

Answer to the question referred for a preliminary ruling

The Court began its assessment by analysing Article 21(1) of Reg. 139/2004, which (*inter alia*) excludes the application of Regulation 1/2003 (OJ L1/1) to concentrations within the meaning of Article 3 of the Regulation. As noted by the CJEU, it cannot be clearly inferred from the wording of Article 21(1) of Regulation 139/2004 that the provisions of primary law (in this case, Article 102 TFEU) continue[7] to apply to concentrations between undertakings within the meaning of Article 3 of the Regulation in question.[8] In fact, its wording shows instead that "regulation 'alone is to apply to concentrations as defined in Article 3' thereof, to which Regulation No 1/2003 is not, in principle, applicable".[9] Thus, the interpretation of the provision in question requires recourse to contextual interpretation, teleological interpretation and its origins.[10] For this reason, it is first worth recalling that, historically, this provision mirrors the former Article 22 of Regulation 4064/89 (OJ L 395/1). In the light of Recital 7 in the Preamble to the aforementioned piece of legislation, it was intended to ensure "effective monitoring of all concentrations from the point of view of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations". This objective should have been linked to the need to ensure that the reorganisation of undertakings, particularly in the form of a concentration, would not cause lasting harm to competition (Recital 5 of Reg. 4064/89). The intention of the EU legislator in this regard was then moved to Regulation 139/2004. Referring to the above, the CJEU explained that "Regulation No 139/2004 is the only procedural instrument applicable to the prior and centralised examination of concentrations which, as is stated in recital 6 thereof, must permit effective control of all concentrations in terms of their effect on the structure of competition".[11] Nevertheless, this does not imply that the legislator intended to consider it impermissible to carry out an *ex post* control of a concentration by invoking Article 102 TFEU by the national authority (even taking into account the principle of the "one-stop shop"). Both recital 6 of Regulation 4064/89 and its counterpart, recital 7 of Regulation 139/2004, explain that Articles 101 and 102 TFEU "applied in accordance with the case law (…) to certain concentrations (…) are not sufficient to cover all the activities which may prove incompatible with the system of undistorted competition envisaged in the Treaty". Therefore, as the Court pointed out, Regulation 139/2004 does not deprive the competent (national) authorities of the possibility to apply the TFEU provisions, which, together with Regulation 1/2003, form part of the body of rules aimed at implementing Articles 101 and 102 TFEU and ensuring the functioning of undistorted competition on the EU market (through the control system).

Furthermore, the Court reiterated that "this regulation (139/2004) is neither on the same level as Articles 101 and 102 TFEU in terms of the hierarchy of standards…".[12] Indeed, in accordance with the principles of "the hierarchy of norms and the consequent conflict rule *lex superior derogat legi inferiori*, it follows that a rule of secondary law may not limit the scope or direct application of a rule of primary law".[13] In doing so, the Court recalled the direct effect of Article 102 TFEU[14], indicating that its application could not be made conditional on the prior adoption of a procedural regulation. In other words, Article 21(1) of Regulation 139/2004 cannot produce a blocking effect on the application of Article 102 TFEU to concentrations which, although they fall within the definition of Article 3 of Regulation 139/2004, do not exceed the quantitative thresholds set out in the aforementioned act. In addition, as emphasized by the AG, the failure to reach the quantitative thresholds set out in the Regulation or national law cannot limit or exclude the direct application of Article 102 TFEU.[15] This is primarily due to the function of the quantitative thresholds, which regulate the distribution of competences between the EC and the NCAs and constitute an instrument triggering *ex ante* control against potentially harmful concentrations that exceed the legal thresholds.

In the conclusions to the judgment, the Court also emphasized the obligation incumbent on the authority dealing with a particular case regarding the need to assess the concentration as a whole. According to the Court's view, a national authority cannot confine itself to merely stating that a dominant position has been strengthened. Indeed, it is obliged to show that "the degree of dominance thus reached would substantially impede competition, that is to say, that only undertakings whose behaviour depends on the dominant undertaking would remain in the market".[16]

Limiting the effects of the judgment in time

In addition to directly answering the question submitted, the Court also addressed the objections raised by TDF (and Tivana) involving a potential breach of the principle of legal certainty.[17] The key issue in this case was the assessment of a situation in which those involved in a concentration in good faith would be potentially exposed to negative consequences of their actions (sanctions). In this context, the request of the participants in the proceedings to limit the temporal effects of the present judgment was particularly relevant. However, the Court rejected this claim, pointing out that while good faith may constitute a limiting condition, the Court's interpretation in the present case is merely a continuation of the established case law of the Court and the General Court on the direct effect of Article 102 TFEU.

Secondly, the Court noted that, in order to consider the ruling of the measure commented on to be admissible, a second condition, i.e. the risk of serious difficulties, must also be met.[18] However, in the absence of precise information as to the number of legal relationships which might be affected by the Court's interpretation, it considers that such a condition has not been demonstrated.[19] Somewhat complementary to its position in this regard, the Court noted that applying Article 102 TFEU to certain transactions does not necessarily automatically mean that they are called into question. Following this statement, in the Court's view, there is no existence of a risk of serious difficulties justifying the application of the above measure.[20]

Author's commentary

Sources of divergences in the approach to the application of Article 102 TFEU in the concentration control proceedings

Undoubtedly, in terms of the direct effect and application of Article 102 TFEU, the judgment in question reinforces the previous position of the CJEU. In fact, this issue seems to have been of a nodal nature from the perspective of the answer to the question posed. Although the author generally agrees with the position of the Court (in the present case), the judgment itself gives rise to a certain deficiency in the area of a general assessment of the reasons for divergences in the interpretation of EU law. In the author's opinion, the CJEU lacked, above all, a broader reflection on the source of the doubts of the national competition authorities (French and Dutch) in the sphere of application of the *ex post* merger control mechanism (pursuant to Article 102 TFEU) as a complementary instrument to the *ex ante* control (pursuant to Regulation 139/2004). Although the CJEU provided a fairly comprehensive interpretation of the provisions relevant to the case at hand, the author believes that it failed to adequately explain the motives of the national competition authorities and continued to mistakenly believe that there is a clear line between merger control and the control of anti-competitive practices making the application of Article 102 TFEU pointless. This is all the more surprising given that these authorities are, after all, in close cooperation with the EC (see Article 11 of Reg. 1/2003) in relation to the application of the EU competition rules. Although this issue is of secondary importance from the point of view of answering the question referred for a preliminary ruling, addressing it would be relevant from the perspective of limiting the risk of different interpretations of the EU competition rules in future proceedings (and thus enhancing general legal certainty).

In the author's opinion, the reasons for the occurrence of the interpretation crisis should be sought in the general approach of the EC to concentrations which do not exceed the quantitative thresholds provided for by EU and/or national law. The experience in the application of 22 Reg. 139/2004 may be considered as a certain point of reference. For the record, only this provision establishes a mechanism that allows a concentration to be referred by a Member State(s) to the European Commission in a situation where it does not have a Community dimension (within the meaning of Article 3 in Reg. 139/2003) or a national dimension (under internal rules), but affects trade between Member States and threatens to significantly affect competition within the territory of the requesting Member State(s). Similarly to Article 102 TFEU, this mechanism (although essentially *ex ante* in nature) has a complementary and corrective function in relation to both EU and national merger control mechanisms. This is because it aims to close a regulatory gap where there is no internal merger control legislation or no *ex ante* control because the thresholds under national or EU law are not exceeded (von Koppenfels, 2015, pp. 16–18). Importantly, the EC has developed a practice over the past few years of discouraging referrals under Article 22 of Regulation 139/2004 (EC Guidelines 2021/C 113/01; Case T-227/21 Illumina, ECLI:EU:T:2022:447; Kopera & Wiliński, 2022; Woźniak-Cichuta, 2022). The rationale for this approach was the Commission's experience that such transactions were typically unlikely to have a significant impact on the internal market). Hence, since the EC has been expressing the above view for many years, it may have been perceived by some competition authorities as a general position of the authority on the (in)application of EU competition law for *sui generis* "concentrations of minor importance". This conviction was probably further reinforced by the view that the judgment of the Court in Europemballage and Continental Can v. EC, which confirmed the applicability of Article 102 TFEU as an instrument of *ex post* control of concentrations, was delivered under a different legal framework, i.e. at a time when there was no separate legislation on the control of concentrations with a Community dimension.[21] However, with the creation of the EU merger control regime, the regulatory gap identified by the Court at that time had been closed, making it possible to assume that the continued application of Article 102 TFEU remained pointless. At the same time, it cannot be ignored that from the time of the judgment in question until the preliminary ruling in the Towercast case, neither the EC nor the General Court or the Court took a clear position in this area. At the very least, this was not due to deliberate action by the authorities but to the scarcity of cases in which it could be applied (i.e. *ex post* assessment of concentrations). While this does not explain the NCAs' disregard of established case law on the direct applicability and effectiveness of Article 102 TFEU[22], it does allow for some reconstruction of their original approach. This is all the more so because the Court is somewhat more reticent than the AG about the relevance of the Continental Can judgment to the case under review. On the one hand, while referring to a potential breach of the principle of legal certainty (Mulder & Sauter, 2023), the AG explicitly points out that according to established case law on the indirect application of Article 102 TFEU and the Continental Can judgment, the provision in question could not be interpreted differently from the way it was presented in its opinion.[23] On the other hand, however, in addressing the same issue, the CJEU refers exclusively to the existing case law on the direct effect and application of Article 102 TFEU, ignoring the judgment under consideration.[24] This seems to be a deliberate action on the part of the EU authority, which (generally) avoids a straightforward decision as to the direct applicability of the Continental Can judgment in the present case.[25] The author believes that this demonstrates, at least to some extent, the collateral significance of the judgment in question for the Towercast ruling in favour of the general consolidation of the direct effect and application of Article 102 TFEU.

The CJEU took an even more conservative stance on the permissibility of a possible dual assessment of a concentration, i.e. both *ex ante* and *ex post*. It can only be inferred from the context that these mechanisms are intended to be complementary, as "it is accepted that certain concentrations may (…) avoid *ex ante* control and be subject to *ex post* control".[26] In doing so, the Court does not rule on whether those involved in concentrations previously subjected to *ex ante* control (either on the basis of the internal law of a Member State or Regulation 139/2004) can remain in good faith in the conviction that their conduct does not impede competition in the common market within the meaning of Article 102 TFEU and, therefore, there are no grounds for initiating *ex post* control. On the other hand, this issue is of fundamental importance from the perspective of the principle of legal certainty.[27] Uncertainty of interpretation in this area may, after all, discourage investors from potentially pro-competitive concentrations for fear, *inter alia*, of financial penalties due to possible infringement of the provisions of primary EU law (van Meerbeeck, 2016; Krzykowski et al., 2021). The Court's tacit attitude is all the more surprising given that the issue was taken up by the AG in its opinion, referring to the general principle of *lex specialis derogat legi generali*. In the cited opinion, the AG indicated that the concentration approved on the basis of more specific rules (i.e. Regulation 139/2004/EC or national merger rules), the impact of which on the market structure and the conditions of competition is considered to be compatible with the common market, would in principle exclude the existence of an abuse within the meaning of Article 102 TFEU. In other words, the authority's approval of a concentration under the specific provisions offers a warranty that the concentration does not significantly hinder competition in the internal market. Although with some reservations, such an approach appears to be consistent, logical, entrenching legal certainty among those involved in the merger process. However, it should be borne in mind that the opinions coming from the Advocates General are non-binding. Indeed, EU doctrine and jurisprudence indicate that they only provide indicative guidance as to how certain legal issues may be resolved (Koszowski, 2012; Wąsek-Wiaderek, 2007, p. 83) in a given case (without, however, being binding on any authority). Therefore, since only the Court's judgment has the property of being legally binding in a general manner (Koszowski, 2012), it should be expected that competitors of the entities participating in the concentration (despite the fact that the concentration was previously authorised) will, in the absence of an unambiguous position of the judicial body, challenge the said opinion. Such actions may be primarily aimed at weakening the dominant player. After all, regardless of whether such a practice brings about any real effect, it may delay the process of full implementation of the objectives of the concentration (previously subject to control), due to the fear of being re-examined under Article 102 TFEU. For this reason, I would consider it reasonable for the Court to decide this issue.

Lack of the time limit for initiating proceedings under 102 TFEU – possible consequences

In view of the potential for serious complications in the judgment, the Court's failure to rule on a specific time limit for initiating proceedings in merger cases may also raise some concerns. This creates uncertainty on the part of the parties involved in the merger process as to whether their concentration will not be challenged by the competition authority over an unspecified time horizon (Dentons). This concern seems particularly justified in sectors where the dynamics of structural changes are extremely high (new technologies, pharmaceutical market). Therefore, maintaining a state of uncertainty may inhibit natural market behaviour and adversely affect its development.

Although the internal regulations of the Member States providing for the inadmissibility of instituting proceedings after the expiry of the time limit set by the legislator in connection with infringement of Article 102 TFEU are specific instruments stabilising the situation in question. Their main aim is to ensure certainty of the economic operator's legal situation and stability of economic turnover against negative consequences resulting from prolonged inaction of public authorities. In turn, interference by the antitrust authority in legal relationships that have been formed and that have lasted for a long time could lead to their undermining in a number of often very sensitive areas.[28] By way of example, with regard to proceedings for infringement of Article 102 TFEU under the Polish legal system, such a legal instrument is Article 93(1) of the Act on Competition and Consumer Protection.[29] According to the wording of the cited provision, "Proceedings on competition-restricting practices shall not be initiated if five years have elapsed since the end of the year in which their application was discontinued". Therefore, the expiry of the aforementioned deadline results in the impossibility of examining whether the entrepreneurs' conduct is indeed of an illicit nature and, moreover, prevents the President of the Office for Competition and Consumer Protection from imposing a fine. The latter circumstance results from the fact that the decision to apply such a sanction is always a consequence of proving a violation of the prohibition on abuse of a dominant position (Skoczny, 2009, pp. 1327–1329).

Given the context of the internal regulations, it cannot be overlooked that Regulation 1/2003 also establishes a specific stabilisation mechanism. Reference should be made here to Article 25(1)(b) of this regulation, according to which the power conferred on the Commission to impose fines and periodic penalty payments for, i.a., infringements of Article 102 TFEU become statute-barred after five years (from the date on which the infringement was committed, article 25(1)(a) of Reg. 1/2003). Accordingly, this mechanism, similar to the instrument already cited in national law, even though based on a slightly different legal construction, is aimed at ensuring legal certainty that the Commission will not sanction undertakings after a certain period, i.e. from the date on which they committed a sanctionable infringement (Kohutek, 2015). It is worth noting, however, that due to the adoption of the concept of prescription of the power to impose fines (Skoczny, 2009) theoretically, it is not ruled out that the Commission could initiate proceedings (i.e. even after the expiry of the limitation period) for a mere infringement of Article 102 TFEU in connection with a concentration (which was not subject to *ex ante* control), that is suspected of significantly affecting the market structure. Nevertheless, it should be emphasized that a possible decision determining an infringement would have limited legal effects. This follows first and foremost from the fact that the expiry of the limitation period would deprive the Commission of its powers to impose both fines for abuse of a dominant position and possible periodic penalty payments aimed at coercing the dominant undertaking to behave in accordance with the Treaty and the Regulation and concretised in a Commission decision (Doniec, 2016). In particular, the absence of the latter power could thwart a hypothetical attempt by the authority to enforce behavioural or structural remedies (referred to in Article 7 of Regulation 1/2003). Therefore, it can be ruled out in this respect that a decision of the EC, such as a structural action involving a request to terminate a concentration (with a view to restoring the status quo prior to its completion), would actually be implemented (Stolarski, 2015, pp. 38–40).

The situation may be different, however, if the EC decides to initiate proceedings before the expiry of the limitation period referred to in Article 25(1)(b) of Regulation 1/2003. Although under the previous legal regime, i.e. when Regulation 17/62 (OJ 204/62) was in force, this authority had no power to apply structural measures (Kohutek, 2015), this power was conferred on the Commission explicitly by Article 7(1) of Regulation 1/2003 with the entry into force of Regulation 1/2003. In addition to the order to divide a company, which has the most intrusive effect on its structure, the doctrine also mentions other structural measures aimed at restoring the legality of corporate behaviour. The most important of these include: an obligation to dispose of part or all of the shares that the dominant company holds in another company, an order to dispose of an organised part of the company or its specific assets, or an order for the company to dispose of its subsidiary. It is crucial to mention here that these measures should be proportionate to the infringement committed[30] and used only when other, less restrictive (behavioural) solutions are not capable of restoring legality (Hellström et al., 2009). This approach is confirmed (in addition to the content of Article 7(1) of Regulation 139/2004 itself) in recital 12 of the preamble to Regulation 1/2003, in which the EU legislature stresses that structural changes will only meet the proportionality test if there is a substantial risk of a lasting or repeated infringement caused by the very structure of the undertaking. In other words, it clarifies the content of the proportionality condition (in relation to structural measures) by prescribing that it is to be regarded as being fulfilled only in certain circumstances, i.e. where there is a substantial risk of the infringement caused by the structure of the undertaking being continued or repeated (Kohutek, 2015). It seems that the view of the AG expressed in its Opinion in the Towercast case should be considered precisely through the prism of the proportionality criterion understood in this way and the primacy of behavioural measures over structural ones; namely, that in the event of an infringement of Article 102 TFEU (in connection with a concentration), contrary to some of the participants in the proceedings – as a rule, there is no subsequent threat of nullification of the concentration, but only the imposition of a fine.[31] In the author's view, this statement is correct in principle, although also sufficiently vague that it cannot be seen as an argument excluding the EC's right to decide on the termination of the concentration (article 5 of Reg. 1/2003). In fact, due to the hierarchical nature of the remedies applied by the EC and the fact that there are other conciliatory forms of termination of proceedings for violation of Article 102 TFEU (article 9 of Reg. 1/2003), objectively, there is low risk that the decision in question would have been issued. I make this assessment on the basis that the termination of a concentration (Kohutek, 2013), or its annulment as indicated by AG, should be understood as a restoration to the state of affairs that existed before it was made.[32] Consequently, it constitutes a hierarchical structural measure of last resort. As such, as a proportionate measure, it should only be applied in circumstances where the restoration of effective competition on the market (e.g. by relinquishing control of another company) would not be possible through the introduction of less structural measures such as, for example, an (aforementioned) obligation to dispose of part or all of the shares which the dominant undertaking holds in another undertaking, an order to dispose of an organised part of an undertaking or its specific assets, or an order for an undertaking to dispose of a subsidiary. Furthermore, in a situation where a concentration (consisting, for example, of an acquisition of control) was assessed several years ago, the deconcentration (termination of concentration) process itself may prove extremely difficult. This is primarily due to the fact that, over time, the interrelationships between the undertakings involved in a concentration tend to naturally tighten. Subsequently, in many cases, restoring *explicite* to the status quo prior to its implementation is practically impossible. Therefore, the AG's finding of a low risk of annulment of a concentration, although it may be justified to a certain extent (*inter alia*, by the principle of proportionality), in the author's opinion it does not constitute an irrefutable argument for concluding that the interpretation adopted by the Court would not involve the likelihood of serious distortions of an economic nature (Maciejewski & Theilen, 2017; Gabrielle Defrenne, ECR 1976–00455). Indeed, below the threshold of the decision on the annulment of a merger, there is a range of other structural (or even behavioural) measures implying specific legal effects. Consequently, the circle of entities potentially affected by this judgment, both structurally and financially, appears to be wider than suggested by the AG.

On the other hand, however, as emphasized by the AG[33] and the CJEU[34], the application of Article 102 TFEU is limited to cases dealing with the creation or strengthening of a dominant position as a result of a merger. Even then, it is also necessary to demonstrate that the degree of dominance thus achieved has significantly hindered competition by allowing only subsidiary undertakings to the dominant undertaking in their behaviour to persist. What is equally important (which ignores both the CJEU and the AG referring only to the premise of distortion of competition) is that the application of Article 102 TFEU also requires that the abuse of a dominant position leads to a distortion of trade between Member States.[35] Subsequently, this interpretation by the Court does not necessarily imply ex lege that the concentration in question will be challenged.

Although the arguments of the Court and the AG cannot be denied validity, in the author's opinion, they still fail to address the hypothetical scale of the legal relations that may be affected by the interpretation in question. Moreover, the Court does not specify whether the complementary application of Article 102 TFEU would apply to any specific areas of the economy. There is also a lack of guidance from the EC in this regard.[36] Only the AG suggests, pointing to the similarity between the objectives of Article 102 TFEU and Article 22 of Regulation 139/2004 (gap-filling), that a gap has emerged in previous years concerning the competitive identification and acquisition of innovative start-ups, e.g. in the field of online services, the pharmaceutical industry or medical technology. However, it does not prejudge whether these areas should be the subject of a specific, narrowed focus by the competition authorities. Consequently, the above implies the risk that the interpretation made in the Judgment under review may affect a wider public than originally assumed, leading to potentially adverse consequences for them.

Conclusion

It appears that the potential effect of the judgment under review[37] will come in the form of increased investment uncertainty among companies intending to concentrate. This is primarily because it opens up several doubtful areas, which could lead to distortions in the natural market behaviour of companies and, in the extreme, discourage concentrations (contrary to the concept of the internal market).

Nevertheless, the actual determination of the NCAs and the EC to initiate proceedings by way of *ex post* control will be crucial in practice. In view of the liberalisation of the EC's position on the examination of concentrations that remain outside *ex ante* control (expressed in the EC's 2021 guidelines in relation to Article 22 of Regulation 139/2004) and considering *ex post* control as a complementary instrument, it cannot be ruled out that this body will review the most controversial concentrations. In doing so, it is unclear what time horizon will be adopted. Theoretically, a possible review could cover a period that considers the prescription of sanctions under Article 25(1)(b) of Regulation 1/2003, i.e. up to 5 years backwards.[38] However, it is possible that in aligning to some extent its approach to the referral mechanism set out in Article 22 of Regulation 1/2003, the Commission will decide only to examine concentrations that have been established no later than six months after the opening of proceedings. Undoubtedly, such a position would be reasonable from the point of view of stabilising the legal position of undertakings. Irrespective of this, however, undertakings that decide to carry out a merger process will, in practice, be obliged to carry out an independent, multi-faceted assessment of the concentration from the point of view of their possible infringement of Article 102 TFEU and not only from the point of view of the turnover achieved. In order to eliminate possible interpretation doubts, it is therefore natural to demand that the EC clarify the principles of the control in question. Perhaps this issue will be further addressed in the Commission's announced new exclusionary abuse guidelines, scheduled for adoption in 2025.[39] Such a document would also provide important interpretative guidance to the NCAs as to the specific criteria for applying Article 102 TFEU to concentrations not subject to *ex ante* control since, although so far there has been only one case of the Belgian NCA initiating proceedings[40] (as a follow-up to the judgment under discussion), it is to be expected that these authorities will become increasingly active in this area (at least at the level of preliminary proceedings) once it becomes established. However, given their hitherto divergent positions on applying Article 102 TFEU as a subsequent instrument of review, guidelines would make it possible to harmonise the practice in question, especially on issues the Court did not consider in the judgment under consideration.

Notes/Przypisy

1 It should be added here that the EC's jurisdiction in this respect is conditional (see: article 1 and article 3 of Reg. 139/2004).

2 Both arising from Article 1 of Regulation 2004/139/EC and Article L. 430–2 of the French Commercial Code.

3 Opinion of Advocate General Juliane Kokott, Case C-449/21, para. 19.

4 Case C-449/21, Towercast, para. 21.

5 *Ibidem*, para. 23.

6 *Ibidem*, para. 27.

7 The wording "continue" itself refers (it seems) to the already mentioned judgment of the CJEU in Europemballage and Continental Can v. EC, in which it considered it permissible to subject a concentration to *ex post* assessment on the basis of Article 102 TFEU.

[8] Case C-449/21 Towercast, para. 34.
[9] *Ibidem*, para. 32.
[10] *Ibidem*, para. 31.
[11] *Ibidem*, para. 36.
[12] Opinion of Advocate General Juliane Kokott, Case C-449/21, para. 39.
[13] *Ibidem*, para. 30.
[14] Case C-449/21 Towercast, para. 44, Opinion of Advocate General Juliane Kokott, Case C-449/21, para. 29.
[15] Opinion of Advocate General Juliane Kokott, Case C-449/21, para. 37.
[16] Case C-449/21 Towercast, para. 52.
[17] Opinion of Advocate General Juliane Kokott, Case C-449/21, para. 63.
[18] Case C-449/21 Towercast, para. 67.
[19] *Ibidem*, para. 59.
[20] *Ibidem*, para. 61.
[21] Opinion of Advocate General Juliane Kokott, Case C-449/21, para. 58.
[22] See also C-449/21 Towercast, para. 50.
[23] Opinion of Advocate General Juliane Kokott, Case C-449/21, para. 66.
[24] Case C-449/21 Towercast, para. 58.
[25] *Ibidem*, para. 46, 47.
[26] *Ibidem*, para. 41.
[27] According to the CJUE judgments principle of legal certainty requires that rules of law be clear, precise, predictable as regards their effects and foreseeable by those subject to them, Case C-72/10 Costa (para. 74), EU:C:2012:80; Plantanol C-201/08 (para. 46), ECR 2009 I-08343.
[28] Judgment of the Supreme Court of 16 July 2019 ref. I NSK 5/19.
[29] Journal of Laws. 2007, no. 50 item 33 as amended.
[30] Automec Srl, ECR 1992 II-02223.
[31] Opinion of Advocate General Juliane Kokott, Case C-449/21, para. 63.
[32] Tetra Laval BV, ECR 2002 II-04381.
[33] Opinion of Advocate General Juliane Kokott, Case C-449/21, para. 63.
[34] Case C-449/21 Towercast, para 52 and 60.
[35] Guidelines, 2004/C 101/07
[36] Guidelines, 2021/C 113/01; Announcements, 2009/C 45/02.
[37] At least until the EC guidelines are issued and/or the CJEU clarifies particular issues.
[38] Although there is no legal obstacle that would prevent it from proceeding against concentrations that were carried out earlier.
[39] https://ec.europa.eu/commission/presscorner/detail/en/ip_23_1911 (29.09.2023).
[40] https://www.belgiancompetition.be/sites/default/files/content/download/files/20230322_Press_release_10_BCA_0.pdf (30.09.2023).

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