Editorial: breaking up to make up

Van Rompuy, B.

Editorial – Breaking Up to Make Up

As far as EU competition policy is concerned, 2023 is likely to be remembered as the year that the control of mergers and acquisitions relinquished some of its predictability to assume a more assertive stance. This shift has been driven by many diverse factors but let me mention a few that stand out.

For one, the European Commission has shown that it is perhaps not trigger-happy,[1] but clearly serious about using Article 22 of the EU Merger Regulation (EUMR) as a "corrective mechanism" to establish jurisdiction over non-reportable concentrations of possible concern. Further, in its *Towercast* judgment, the Court of Justice affirmed its 50-year-old *Continental Can* doctrine, reviving another mechanism to capture below-threshold concentrations: under specific circumstances competition authorities may review these transactions *ex post* under Article 102 TFEU.[2] The merger control process has also grown more complex due to the implementation of new or enhanced parallel review mechanisms. Foreign Direct Investment protectionism is gaining momentum, as evidenced by the introduction of new screening mechanisms, the expanding scope of existing ones, and an overall increase in the number of transactions under scrutiny.[3] And in the summer, the Foreign Subsidies Regulation became applicable, subjecting large concentrations fuelled by financial contributions from third countries to heightened scrutiny. Finally, the saga of the takeover of video game publisher Activision Blizzard by Microsoft – which became an international spectacle – exposed contrasting approaches taken by the UK's Competition and Markets authority (CMA) and the European Commission. The clash has prompted pertinent questions about the effectiveness of behavioural remedies in dynamic markets. However, it could also be seen as another manifestation of intensifying rivalry between competition authorities in the digital domain (mirror, mirror, who is the boldest of them all?). The red threat tying these developments together: a small but increasing number of concentrations are facing a more rigorous and unpredictable review process.

In October, and against this background, another merger control saga reached its climax when the Commission ordered Illumina to unwind its acquisition of cancer detection test developer GRAIL. More than two years ago, the parties closed the transaction after the Commission had – in their view illegitimately – opened its phase II investigation. It quickly became clear that the marriage between Illumina and GRAIL was doomed, but the parties refused to part ways. The Commission imposed interim measures, eventually decided to prohibit the acquisition, and then renewed and ad-

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1 J Masson, 'EU is not "trigger happy" in Article 22 approach, senior official says' *Global Competition Review* (28 June 2023) <https://globalcompetitionreview.com/article/eu-not-trigger-happy-in-article-22-approach-senior-official-says>.

2 Case C-449/21 *Towercast v Autorité de la concurrence* ECLI:EU:C:2023:207.

3 See the 2023 forecast in European Commission, Staff Working Document, 'Screening of FDI into the Union and its Member States', SWD (2023) 329 final.

justed the interim measures to make sure that both companies would be kept separate until it would order a divestiture.[4] After the imposition of a considerable fine for gun-jumping, the Commission adopted as a final step the restorative measures that require Illumina to restore GRAIL's independence. This must be executed within strict deadlines and Illumina must ensure that it is "as viable and competitive" after the divestment as it was before the unlawful acquisition.[5]

There are several jurisdictions, particularly those without a mandatory and suspensory notification requirement, where competition authorities have *ex post* merger review powers and occasionally order the breakup of a consummated concentration. The CMA's 2022 order requiring Meta to sell off the animated-gif search engine Giphy, which it had acquired in 2020, is a case in point. But for the European Commission, ordering the divestiture of an already acquired business is unprecedented.

Of course, Illumina/Grail is an exceptional scenario. The Court of Justice still must definitively confirm the Commission's assumed competence in the case, so the parties had compelling reason for standing their ground. That uncertainty will soon be resolved. However, at the national level, we are bound to see more *ex post* control of concentrations. Although the Court in *Towercast* seemed to provide only a narrowly tailored mechanism for national competition authorities to challenge early acquisitions post-completion, the Belgian competition authority (BCA)'s recent application of that judgment demonstrates that it leaves room for diverse interpretations.

Less than a week after its delivery, the BCA relied on the *Towercast* judgment to initiate antitrust proceedings against Proximus, the Belgian incumbent telecommunications operator, with respect to its acquisition of the activities of the small niche player EDPnet. Due to EDPnet's limited turnover, the transaction was not subject to national merger control. In fact, EDPnet was insolvent, and the sale took place in the context of court-supervised insolvency proceedings. Out of the three companies that had shown interest to purchase EDPnet's assets, Proximus had made the highest bid. The BCA, however, considered that the takeover may constitute a violation of Article 102 TFEU and imposed interim measures on Proximus to suspend the integration of EDPnet and ensure its operational autonomy pending the investigation.[6] The BCA decision on interim measures constitutes the first application of the *Towercast* case law in the EU, and it raises at least three important questions.

First, can a concentration that has been subject to an *ex ante* assessment still be subject to an *ex post* review under Article 102 TFEU? The BCA suggests yes or maybe.

4 European Commission, 'Mergers: Commission renews interim measures to ensure Illumina and GRAIL continue to be kept separate following the prohibition decision' (press release, 29 October 2022) <https://ec.europa.eu/commission/presscorner/detail/en/mex_22_6467>.

5 European Commission, 'Commission orders Illumina to unwind its completed acquisition of GRAIL' (press release, 12 October 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4872>.

6 BCA, 'The Belgian Competition Authority imposes on Proximus to provisionally ensure the operational autonomy of EDPnet under the supervision of an independent trustee' (press release, 22 June 2023) <https://www.belgiancompetition.be/sites/default/files/content/download/files/20230622_Press_release_26_BCA.pdf> accessed 11 December 2023.

While the Advocate-General considered that legal certainty precludes a double assessment under a merger control regime and antitrust, the Court of Justice remained silent on the issue. Proximus' acquisition of EDPnet was not assessed under the merger rules, but it was reviewed from a competition law standpoint by the court that approved the transaction. According to the Commercial Court of Ghent, there was no *prima facie* evidence to suggest a possible violation of Article 102 TFEU. The Court also deemed it implausible that the BCA would further review a transfer of a business under judicial authority.[7] Yet that is exactly what happened. In its decision, the BCA denied Proximus' assertion of violating the principle of legal certainty, stressing that it is not bound by the interpretation of the competition rules given by the Commercial Court and that it swiftly intervened after the acquisition. The BCA considered that that the situation *may* have been different if a competition authority had issued a clearance decision.[8]

Second, in circumstances where a below-threshold concentration remains a potential (or even suitable) candidate for a referral under Article 22 EUMR, should the competition authority first make a referral request before exercising its jurisdiction under Article 102 TFEU? The BCA suggests no. In its *Towercast* judgment, the Court of Justice noted that, for reasons of legal certainty, merger control law should be given precedence.[9] The BCA effectively initiated abuse of dominance proceedings in a quasi-*ex ante* manner, as the acquisition had been finalized but EDPnet's activities had not yet been fully integrated. However, the authority rejected the idea that there exists a clear hierarchy between the two instruments. Article 22 EUMR referrals are discretionary and, in the BCA's view, more appropriate for concentrations that impact competition across multiple Member States.[10]

Third, can a below-threshold concentration, which has not been referred to the European Commission, be challenged on the basis of Article 102 TFEU outside the scenario explicitly outlined by the Court? The BCA suggests yes. In *Towercast*, the Court reaffirmed the substantive standard established in *Continental Can* (an abuse may occur if the dominant undertaking substantially impedes competition on the market it dominates through the acquisition of another undertaking), while specifically mentioning the most plausible scenario: the target company operates on the same market.[11] The Belgian case is different. Proximus is the dominant operator in the wholesale market for broadband Internet access. The insolvent EDPnet was its wholesale customer, who delivered, via the Proximus network, downstream internet services to about 46.000 customers (as well as telephone services to 13.500 customers). Nonetheless, the BCA considered them to be important rivals in the same relevant market. It reasoned that EDPnet's activities could pave the way for new market entrants if acquired by another company, whereas under Proximus' ownership, the competitive pressure EDPnet's of-

7 A Van Hoe, 'Insolventie-en mededingingsrecht: zeker niet in isolatie' (*Corporate Finance Lab*, 23 March 2023).

8 BCA, Décision n° ABC-2023-RPR-17 du 21 juin 2023 en application de l'article IV.73 CDE, paras 101-104, 115.

9 *Towercast* (n 2), para 40.

10 BCA, Décision n° ABC-2023-RPR-17 du 21 juin 2023 en application de l'article IV.73 CDE, paras 110-112.

11 *Towercast* (n 2), para 52.

fer exerted would cease to exist. In its decision, the BCA further points out that the Advocate-General had referred to "emerging companies … on the same market, a neighbouring market, upstream or downstream" in her opinion and that, in any event, the list of practices covered under Article 102 TFEU is non-exhaustive.[12]

It is regrettable that a final determination on the merits of the case will not be forthcoming. In November, Proximus announced that it had finalised an agreement to divest EDPnet to Citymesh, a challenger in the Belgian telecom sector who had submitted the second-highest bid in the insolvency proceedings. Since the preferred counterfactual envisioned by the BCA materialised, the authority opted to close its abuse of dominance proceedings on priority grounds.[13] However, now that the BCA has demonstrated how effective the initiation of Article 102 TFEU proceedings (coupled with interim measures) can be in halting acquisitions by dominant undertakings in their tracks, there is a growing likelihood that we will see more *ex post* reviews of consummated mergers - and possible early breakups – going forward. A more comprehensive discussion of the aforementioned questions is undoubtedly on the horizon.

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In this final issue of CoRe for this year, Njomëza Zejnullahu and Egzone Osmanaj comparatively examine the effectiveness and alignment with EU law of the competition law regimes in Albania and Kosovo, with a specific focus on enforcement against unilateral practices. And in *Regulating Digital Gatekeepers – The Digital Markets Act*, Fatma Ceren Morbel explores the complex interaction between the enforcement of the Digital Markets Act and the enforcement of the EU antitrust rules.

As always, the Reports section provides a valuable resource for anyone interested in staying up to date on the latest competition law and regulatory law developments at the national level: Heinrich Kuhnert and Mirko Marjanovic discuss how the Austrian Supreme Court has recently applied the Court of Justice's case law on *ne bis in idem* in the sugar cartel case; Jeroen-Dewispelaere and Rasmus Van Heddeghem discuss the Belgian Market Court's review of the BCA decision fining several tobacco manufacturers for exchanging sensitive information; Michael Petr discusses the latest amendments to the Czech Competition Act; Andrea Mezzeti and Andrea Tassoni discuss a recent Italian Decree that imposes obligations on electronic communications device manufacturers in relation to the use of parental control applications; Haakon Rønn Stensæth discusses the first ever merger case to reach the Norwegian Supreme Court; Jerónimo Maíllo González-Orus and Ignacio Fornaris Valls discuss the exclusion of bidders in case of competition violations under the Spanish legal framework; and Kiran Desai discusses the CMA's initial report on AI foundation models.

12 BCA, Décision n° ABC-2023-RPR-17 du 21 juin 2023 en application de l'article IV.73 CDE, paras 108-109.

13 BCA, 'Proximus/EDPnet (Towercast case law): the Belgian Competition Authority terminates proceedings following the divestiture of EDPnet to Citymesh' (press release, 6 November 2023) <https://www.belgiancompetition.be/sites/default/files/content/download/files/20231106_Press_release_51_BCA.pdf> accessed 11 December 2023.

Finally, the Case note section contains commentaries on two Court of Justice judgments: Michele Giannino on *Lithuanian Railways* (Case C-42/21 P) and Shafi U Khan Niazi on *Fossil (Gibraltar)* (Case C-705/20).

Ben Van Rompuy
Managing Editor