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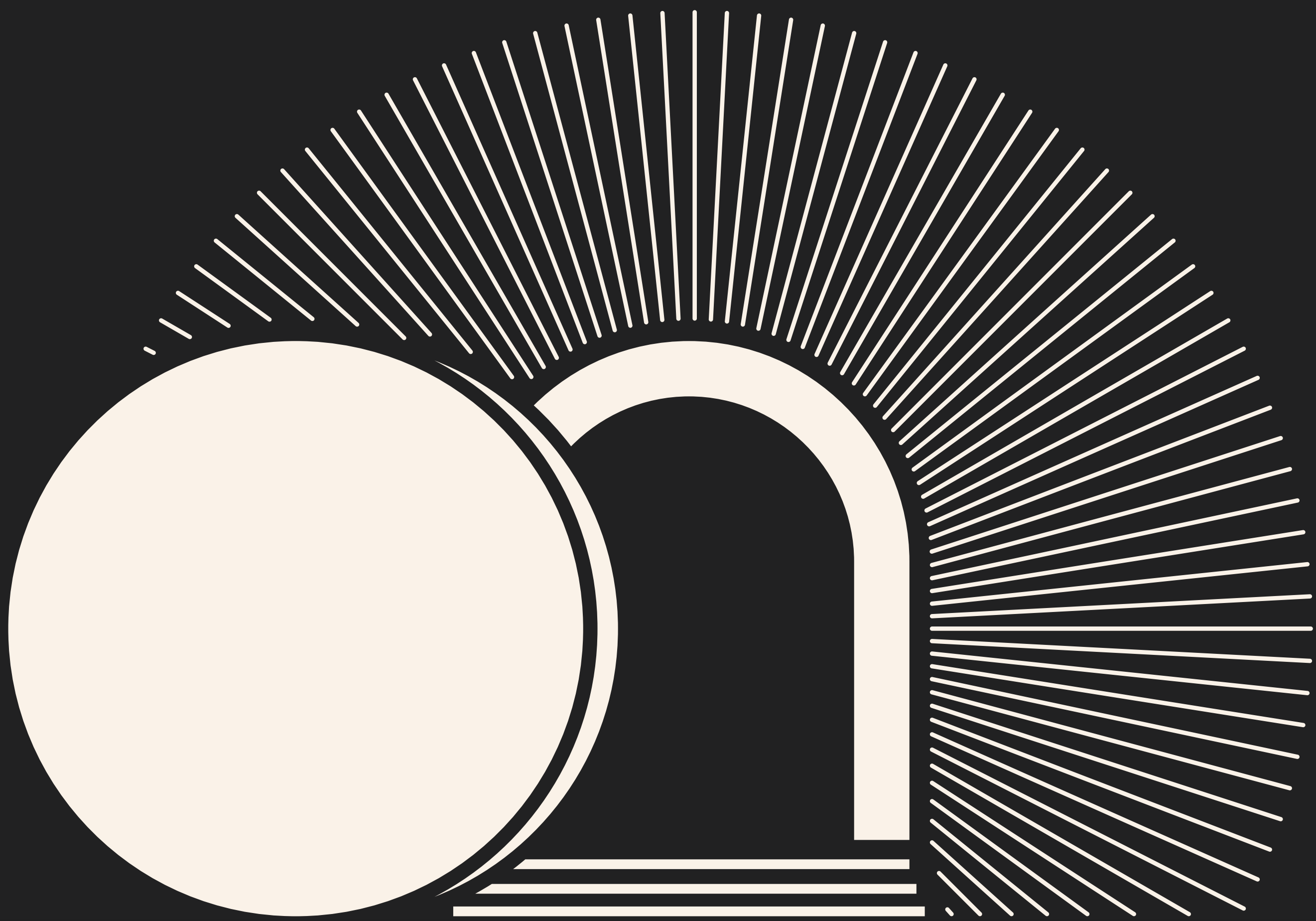
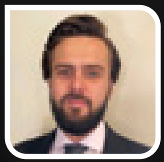


BY RICHARD PEPPER & ROQUE BOTAS ARMERO[1]



1 Richard Pepper and Roque Botas Armero are, respectively, partner and stagiaire in the Brussels office of Macfarlanes LLP. They are grateful for the valuable input of Christophe Humpe; any errors are their own.

THE RESURRECTION OF THE APPLICATION OF ARTICLE 102 TO MERGERS AND ACQUISITIONS

By Richard Pepper & Roque Botas Armero

Article 102 of the Treaty on the Functioning of the European Union prohibits the abuse of a dominant position. The European Commission has generally used this power to sanction dominant companies who have foreclosed rivals and exploited their customers. However, a 1973 European Court judgment, *Continental Can*, held that acquisitions can also infringe Article 102 where they sufficiently strengthen a dominant position. This article provides a brief history of the application of Article 102 to mergers and acquisitions, and addresses an ongoing preliminary ruling request to the European Court of Justice that considers the relevance of the principle following the introduction of the EU Merger Regulation.

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This article provides a brief history of the application of Article 102 to mergers and acquisitions, and addresses an ongoing preliminary ruling request to the European Court of Justice that considers the relevance of the principle following the introduction of the EU Merger Regulation.

I. EARLY CASE LAW ON THE APPLICATION OF ARTICLE 102 TO MERGERS AND ACQUISITIONS

The large majority of the Commission's enforcement under Article 102 has related to the behavior of dominant firms who have foreclosed rivals (known as exclusionary abuse) and, to a lesser extent, exploited their customers. However, the text of Article 102 is not exhaustive — in fact it makes scant reference to exclusionary abuse — and several other categories of behavior have been subject to enforcement.

Notably, a 1971 Commission decision found that an acquisition of a competitor had infringed Article 102. The Commission concluded that Continental Can had abused a dominant position in markets for certain light metal containers and metal closures for glass jars, through the acquisition of a rival.[3] The principle was supported by the European Court, which found that an acquisition by a dominant firm can indeed infringe Article 102 where it "*strengthens [the position of the dominant firm] in such a way that the degree of dominance substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one.*"[4] The European Court took issue with the Commission's factual assessment in the case, and annulled the decision. However, the judgment nevertheless provided a firm basis for the principle that Article 102 can sanction acquisitions by dominant companies.

Coming at a time when there was little national merger control in Europe, and some fifteen years before the first EU Merger Regulation entered into force, this provided the Commission with a valuable tool that it leveraged in several cases in the 1970s and 1980s. For instance:

Fortia / Wright Scientific. In the early 1980s Amicon submitted a complaint to the Commission claiming that the anticipated acquisition by Fortia of Wright Scientific would violate Article 102, as it would have increased Fortia's dominant position in the chromatography column market or even led to a monopoly. The Commission requested comments from Fortia and Wright, informing them of the possibility of interim measures. Wright responded by notifying the Commission it had ceased merger negotiations, allowing the Commission to close the file.[5]

Consolidated Gold Fields / Minorco. Following a complaint by Consolidated Gold Fields in the late 1980s against a takeover bid, Minorco offered the Commission assurance that it would sell the platinum interests of Consolidated Gold Fields within a specific time frame, that it would not sell those interests to Anglo American or De Beers, and that Minorco would not meanwhile involve itself in those businesses. Based on those reassurances, the Commission concluded that the complaint should be rejected (although the bid was ultimately prevented by court action in the U.S.).[6]

Tetra Pak. Most prominently, the Commission concluded in 1988 that a 1986 acquisition of Liquipack strengthened Tetra Pak's dominant position in the market for machines and technology used to fill board cartons under aseptic conditions with UHT treated liquids. The Commission found that this violated Article 102 as a result of an exclusive license that Liquipack held and that prevented or at least delayed the entry of a new rival into that market.[7] The European Court upheld the Commission's decision on appeal.[8]

2 For the purposes of simplicity, we refer throughout to Article 102 as shorthand for Article 102 of the Treaty on the Functioning of the European Union and its predecessors, Article 82/86 of the EC Treaty.

3 Case IV/26811 – *Continental Can Company*, OJ 1972 L 7.

4 Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission*, paragraph 26.

5 *Fortia / Wright Scientific, see* the Eleventh Report on Competition Policy (1981), paragraph 112.

6 *Consolidated Goldfields / Minorco, see* the Nineteenth Report on Competition Policy (1989), paragraph 68.

7 Commission Case IV/31.043 - *Tetra Pak I (BTG Licence).*

8 Case T-51/89, *Tetra Pak v. Commission.*

II. THE ARRIVAL OF THE EU MERGER REGULATION

The first EU Merger Regulation was adopted in 1989, introducing a system of *ex ante* merger control review in the EU. It was a success, providing a well-functioning system that enabled the Commission to review mergers and acquisitions, and was increasingly reinforced by the proliferation of national merger control throughout Europe. In itself, this reduced the need for the Commission to leverage Article 102 when investigating potentially problematic transactions. In addition, the EU Merger Regulation explicitly conceived that it alone would apply to concentrations, disapplying the procedural rules implementing Article 101 and 102.[9] This formulation was broadly maintained in the current form of the EU Merger Regulation, adopted in 2004.[10]

It is, therefore, little surprise that the application of Article 102 to M&A has not been in the spotlight since 1989, even though the European Court's *Continental Can* judgment has not been overturned. However, this started to change with increasing discussion on the implications of acquisitions by large companies of small, innovative rivals with insufficient revenue to trigger mandatory merger control notifications (commonly referred to as "killer acquisitions") especially in the pharmaceutical and digital industries.

In response, the European Commission and several national competition authorities in Europe considered whether to change the thresholds that trigger mandatory filing obligations. Following a consultation in 2016-2017,[11] the Commission decided not to pursue any amendments to the EU Merger Regulation (including because of a lack of political support). It did, however, elect to make greater use of a mechanism under Article 22 of the EU Merger Regulation that enables Member States to request the referral of concentrations to the Commission, including where they did not trigger any national filings. The Commission issued guidance on this new policy in 2021,[12] and is currently defending its ability to make use of Article 22 in front of the European Court following its prohibition of the *Illumina/Grail* deal.[13]

While this policy shift and national legislative amendments[14] have gone some way to addressing concerns about problematic acquisitions of innovative companies, a potential enforcement gap does remain for deals that do not meet the mandatory filing thresholds in Member States, are not eligible for referral under Article 22 of the EU Merger Regulation (e.g. because they could not affect trade between Member States), and/or are not identified called-in for review on announcement.[15]

This has led to debate over the potential application of Article 102 to M&A, culminating in an ongoing preliminary ruling request from the French Court of Appeal to the European Court of Justice, in Case C-449/21 *Towercast v. Autorité de la concurrence and Ministère de l'Économie*.

III. TOWERCAST

The underlying case relates to a completed acquisition in the French television broadcasting sector. Prior to the contested deal, only three companies were active in French terrestrial television broadcasting: TDF (clearly the largest player); TowerCast; and Itas. TDF acquired Itas in 2016 in a deal that did not require prior approval under the EU Merger Regulation or French merger control rules. TowerCast subsequently complained to the French Competition Authority that the transaction amounted to an abuse of a dominant position by TDF.

The authority rejected the complaint on the basis that Article 102 is no longer applicable to a concentration absent anticompetitive con-

9 Article 22, Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings: "*This Regulation alone shall apply to concentrations … Regulations No 17 (6), (EEC) No 1017/68 (7), (EEC) No 4056/86 (8) and (EEC) No 3975/87 (9) shall not apply to concentrations.*"

10 Article 21 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings: "*This Regulation: alone shall apply to concentrations … Regulations (EC) No 1/ 2003 (1), (EEC) No 1017/68 (2), (EEC) No 4056/86 (3) and (EEC) No 3975/87 (4) shall not apply, except in relation to joint ventures that do not have a Community dimension and which have as their object or effect the coordination of the competitive behaviour of undertakings that remain independent.*"

11 Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control.

12 Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of case.

13 Case C-611/22P, *Illumina v. Commission.*

14 Notably, Germany and Austria introduced new mandatory notification thresholds for deals that feature a transaction value above a certain threshold (EUR 400 million for Germany; EUR 200 million in Austria) and the target company is active to a significant extent within the relevant country.

15 That said, in Case T-227/21 *Illumina v. Commission*, the General Court held that a 15 working day time limit for Article 22 referral requests does not start with the announcement of a transaction, but only by the "*active transmission of … sufficient information to enable that Member State to carry out a preliminary appraisal*" (paragraph 204). In this case, it was a Commission letter to the national competition authorities inviting a referral request, rather than the public announcement of the deal, that started the clock. This appears to mean that limitation period might never end in some cases; the issue will form a key part of Illumina's ongoing appeal to the European Court of Justice.

duct that is distinct from the deal. TowerCast appealed the decision to the Paris Court of Appeal. In turn, the Paris Court referred to the European Court of Justice the question of whether a concentration that has not been subject to prior review under EU or national merger control law can be reviewed under Article 102.

The case should determine whether and when Article 102 can apply to M&A following the advent of European merger control. It is still pending judgment by the European Court, but Advocate General Kokott issued an opinion on the matter in October 2022.

Kokott starts by acknowledging that the EU Merger Regulation disapplies the procedural rules for antitrust enforcement with respect to concentrations (paragraph 31). However, the Opinion focuses on the supremacy of Article 102 over the EU Merger Regulation: Article 102 is directly applicable primary law; as a provision of secondary legislation the EU Merger Regulation is not capable of restricting Article 102, but must rather be interpreted restrictively in light of it (paragraphs 29-30). While the EU Merger Regulation may preclude the application of the relevant antitrust procedural rules (paragraph 31), individuals must always be able to enforce their rights under Article 102, and public authorities must always be obliged to protect those rights (paragraph 32).

Kokott disagrees with a view proposed by the French Competition Authority that the EU Merger Regulation enjoys the status of a *lex specialis* (and therefore should take precedence over Article 102 with respect to concentrations), including because the legislature could not have adopted a rule of secondary law that precluded the application of the higher-ranking Article 102 (paragraph 43). Finally, Kokott notes that the supplementary application of Article 102 has policy advantages as it "*is likely to contribute to the effective protection of competition in the internal market, in so far as concentrations which are problematic under competition law do not meet the thresholds under merger control and are therefore not subject, in principle to ex ante control*" (paragraph 48).

So far so good. However, the downside of this approach is of course that both Article 102 and merger control can be applied to one and the same concentration. This is not relevant for transactions that are not subject to prior merger control, which Kokott notes are unambiguously capable of review under Article 102. But it leaves a risk of "double assessment" for concentrations that have already been reviewed under EU or national merger control rules.

To address the issue, Kokott confirms that there may be room for the application of the principle of *lex specialis* to those deals, as the approval of a concentration under merger control law "*exclude[s] the factual existence of abuse within the meaning of Article 102" (paragraph 62). This "reduces the possible supplementary application of Article 102 TFEU in legal practice to those cases which require control under competition law from the outset due to the market power of such an undertaking, but which are not subject to ex ante assessment on the basis of merger control law*" (paragraph 63).

It may be that this is the only way to resolve the tension. However, it is unclear whether Kokott is proposing that a factual finding by a merger control authority would <u>legally</u> exclude a different conclusion under Article 102, or whether this is the <u>practical</u> reality. The former sits uneasily with the observations made by Kokott on the supremacy of Article 102. The latter, however, is a fudge.

At first blush, Kokott's assertion that there is little (if any) consequence of the parallel application of the two regimes seems fair: a finding that a concentration would strengthen a pre-existing position of dominance in a way that "substantially fetters competition" would clearly seem to fall foul of the substantive test under the EU Merger Regulation (whether the transaction results in a significant impediment to effective competition).

Accordingly, any gap between the tests should remain a theoretical issue[16] where the Commission has issued a merger control decision, as national Courts should find it difficult to conclude that a transaction infringed Article 102.[17] However, there would seem to be greater scope for a national court to find an abuse following a merger control decision by the competition authority in a different Member State.[18] This gives rise to the risk of inconsistent approaches between Member States that could be utilized by complainants looking to oppose deals that are not subject to Commission review.

16 For example, could transaction-specific efficiencies result in the approval of an otherwise anticompetitive merger, yet be insufficient for an Article 102 analysis in light of European Court jurisprudence in that area? Very few cases will actually raise issues of this nature, but it bears emphasis that the two regimes do not dovetail into each other in an entirely seamless manner.

17 The European Court has held that national courts ruling on whether certain behavior is compatible with Articles 101/102 cannot take a contradictory position to a prior Commission decision (see Case C-344/98 *Masterfoods v. HB Ice Cream*). There are good reasons to consider this principle would apply here, notwithstanding the distinction between the two regimes.

18 The issue may be compounded by the possibility for Article 101 to also be applied to concentrations. The practical implications of a concentration being subjected to another legal test (whether the merger agreement prevents, restricts, or distorts competition) necessarily invites further complication.

In sum, while the building blocks for the Kokott opinion appear reasonable, there are inherent tensions in the parallel application of merger control enforcement and antirust rules to the same deals. The European Commission and national competition authorities around Europe will be watching with keen interest to see whether the European Court can resolve these issues with some further creative thinking.