Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 13 October 2022[1]

Case C-449/21

Towercast
v
Autorité de la concurrence,
Ministère de l'Économie,
Other parties:
Tivana Topco S.A.,
Tivana Midco S.A.R.L.,
TDF Infrastructure Holding S.A.S.,
TDF Infrastructure S.A.S.,
Tivana France Holdings S.A.S.

(Request for a preliminary ruling from the Cour d'appel de Paris (Court of Appeal, Paris, France))

(Competition – Control of concentrations between undertakings ('merger control') – Article 21 of Regulation (EC) No 139/2004 (the EC Merger Regulation) – Exclusive applicability of merger control law – National merger control – Thresholds not met – Article 102 TFEU – Abuse of a dominant position on the market – Direct applicability – Regulation (EC) No 1/2003)

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[1] Original language: German.

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I. Introduction

1. By its question referred for a preliminary ruling concerning the relationship between the rules of *ex ante* merger control and *ex post* control of abuse under Article 102 TFEU, the referring court seeks to ascertain, in essence, whether it is possible for a national competition authority to subject a concentration operated by an undertaking with a dominant position to an *ex post* assessment against the standard of Article 102 TFEU where that concentration does not meet the relevant turnover-related thresholds of Regulation (EC) No 139/2004 ('the Merger Regulation')[2] and national merger control law, and therefore no *ex ante* assessment has taken place in that regard.

2. Specifically, the dispute in the main proceedings concerns the question as to a supplementary or gap-closing application of Article 102 TFEU in relation to the national rules on merger control. The question referred seeks to clarify, in essence, whether Article 21(1) of the Merger Regulation has the effect that concentrations are to be assessed exclusively on the basis of merger control law, and a parallel or subsequent application of Article 102 TFEU is excluded (referred to as a 'blocking effect'). In order to determine the relationship between those rules more precisely, it is necessary to consider their respective legal nature and function within the system, under EU law, for the protection of competition in the internal market and the fundamental objectives of that system.

3. To that end, after presenting the legal framework (section II) and the facts of the case (section III), I will discuss the relationship between Article 21(1) of the Merger Regulation and Article 102 TFEU, taking into account its position in the hierarchy of norms and its direct applicability (section IV.A). I will then review the result of that analysis in the light of the objectives of the system under EU law of protecting competition from distortions (section IV.B). Lastly, I will address the question as to whether and to what extent the result reached can be reconciled with the Court's case-law to date and the principle of legal certainty (section IV.C).

[2] Council Regulation of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1).

II. Legal framework

A. Secondary European Union law

1. Regulation (EC) No 139/2004

4. Recitals 2 and 6 of the Merger Regulation state as follows:

‘(2) For the achievement of the aims of the Treaty, Article 3(1)(g) gives the Community the objective of instituting a system ensuring that competition in the internal market is not distorted. …

…

(6) A specific legal instrument is therefore necessary to permit effective control of all concentrations in terms of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations. …’

5. Recital 7 of the Merger Regulation states the following in relation to the legal basis:

‘Articles 81 and 82, while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty. This Regulation should therefore be based not only on Article 83 but, principally, on Article 308 of the Treaty …’

6. Recitals 8 and 9 of the Merger Regulation concern the allocation of jurisdiction and the scope of that regulation:

‘(8) The provisions to be adopted in this Regulation should apply to significant structural changes, the impact of which on the market goes beyond the national borders of any one Member State. … Concentrations not covered by this Regulation come, in principle, within the jurisdiction of the Member States.

(9) The scope of application of this Regulation should be defined according to the geographical area of activity of the undertakings concerned and be limited by quantitative thresholds in order to cover those concentrations which have a Community dimension. …’

7. Article 1 of the Merger Regulation determines the scope of that regulation, in accordance with, inter alia, the turnover thresholds in paragraph 2:

‘1. Without prejudice to Article 4(5) and Article 22, this Regulation shall apply to all concentrations with a Community dimension as defined in this Article.

2. A concentration has a Community dimension where:

…’

8. Article 3 of the Merger Regulation defines the term 'concentration':

'1. A concentration shall be deemed to arise where a change of control on a lasting basis results from:

(a) the merger of two or more previously independent undertakings or parts of undertakings, or

(b) the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.

…'

9. Article 21(1) of the Merger Regulation concerns the delimitation of the scope of the Merger Regulation in relation to other EU acts:

'This Regulation alone shall apply to concentrations as defined in Article 3, and … Regulations (EC) No 1/2003 … 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.'

10. Lastly, Article 22 of the Merger Regulation provides, inter alia:

'1. One or more Member States may request the Commission to examine any concentration as defined in Article 3 that does not have a Community dimension within the meaning of Article 1 but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.

…

3. …

The Member State or States having made the request shall no longer apply their national legislation on competition to the concentration.

…'

2. Regulation (EEC) No 4064/89

11. Regulation (EEC) No 4064/89[3] is the predecessor regulation to the current Merger Regulation.

[3] Council Regulation of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1; 'Regulation No 4064/89').

12. The sixth to eighth recitals of that regulation stated as follows:

‘(6) Whereas Articles 85 and 86, while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not, however, sufficient to cover all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty;

(7) Whereas a new legal instrument should therefore be created in the form of a Regulation to permit 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;

(8) Whereas this Regulation should therefore be based not only on Article 87 but, principally, on Article 235 of the Treaty, under which the Community may give itself the additional powers of action necessary for the attainment of its objectives …’

13. Article 22 of Regulation No 4064/89 contained, in paragraphs 1 and 2, the predecessor provision to Article 21(1) of the Merger Regulation and, in paragraph 3, the predecessor provision to Article 22 of the Merger Regulation:

‘1. This Regulation alone shall apply to concentrations as defined in Article 3.

2. Regulations No 17, (EEC) No 1017/68, (EEC) No 4056/86 and (EEC) No 3975/87 shall not apply to concentrations as defined in Article 3.

3. If the Commission finds, at the request of a Member State, that a concentration as defined in Article 3 that has no Community dimension within the meaning of Article 1 creates or strengthens a dominant position as a result of which effective competition would be significantly impeded within the territory of the Member State concerned it may, insofar as the concentration affects trade between Member States, adopt the decisions provided for in Article 8(2), second subparagraph, (3) and (4).

…’

B. National law

14. Article L. 490-9 of the French Code de commerce (Commercial Code) states, inter alia:

‘For the purposes of applying Articles 81 to 83 of the Treaty establishing the European Community, the competition authority [inter alia] … shall enjoy the powers conferred on [it] by the articles of this book and by Regulation (EC) No 139/2004 … and Regulation (EC) No 1/2003 … The procedural rules provided for in those texts shall apply to them.’

15. French law also provides for *ex ante* merger control. The concept of ‘concentration’ is defined in Article L. 430-1 of the Commercial Code. Article L. 430-2 sets out the turnover thresholds which give rise to the application of merger control law.

16. Article L. 430-9 of the Commercial Code further provides that:

'The competition authority may, in the event of the abuse of a dominant position or of a state of economic dependence, enjoin, by reasoned decision, the undertaking or group of undertakings involved to amend, supplement or cancel, within a specified period, all agreements and all acts by which the concentration of economic power allowing the abuse has been carried out …'

III. Facts and request for a preliminary ruling

17. The dispute in the main proceedings and the request for a preliminary ruling are based on an action brought by the French company Towercast S.A.S.U., having its registered office in Paris, France ('Towercast'), against the decision of the French Autorité de la concurrence ('the French competition authority') dismissing a complaint by Towercast alleging abuse of a dominant position by the French company TDF Infrastructure Holding S.A.S. ('TDF'). [4]

18. On 15 November 2017, Towercast had lodged a complaint with the French competition authority in relation to the acquisition (of control) of the company Itas S.A.S. by TDF on 13 October 2016. Towercast had alleged that that acquisition constituted an abuse of a dominant position, in that TDF hindered competition on the upstream and downstream wholesale markets for digital transmission of terrestrial television services (digital video broadcasting – terrestrial or DVB-T) by significantly strengthening its dominant position on those markets.

19. The French market for terrestrial television broadcasting, on which TDF originally held a statutory monopoly, was liberalised at the beginning of 2004. A strong concentration has re-emerged in recent years, however, with the result that, in Towercast, Itas and TDF, only three companies were still active on that market at the time of the contested acquisition, with TDF indisputably having by far the largest market share.

20. TDF's acquisition of Itas was below the thresholds provided for in Article 1 of the Merger Regulation and in Article L. 430-2 of the Commercial Code and was thus not subject to *ex ante* control by the Commission or the French competition authority. Nor was there a referral to the Commission under Article 22 of the Merger Regulation.

21. By decision of 16 January 2020, the French competition authority rejected Towercast's complaint on the ground that the alleged abuse of a dominant position had not been demonstrated. According to the French competition authority, it is true that TDF holds such a position. Since the adoption of Regulation No 4064/89, however, a clear dividing line has been drawn between merger control and the control of anticompetitive practices under Articles 101 and 102 TFEU, with the result that the Merger Regulation applies solely and exclusively to concentrations within the meaning of Article 3 thereof. Therefore, in the view of the French competition authority, Article 102 TFEU is no longer applicable where no anticompetitive conduct distinct from the concentration is manifested. However, that is not the case here.

22. Towercast lodged an appeal against that decision before the Cour d'appel de Paris (Court of Appeal, Paris, France).

[4] According to the findings of the referring court, TDF is a subsidiary of the Luxembourg company Tivana Topco S.A.

23. By order of 1 July 2021, received on 21 July 2021, the Court of Appeal, Paris referred the following question to the Court of Justice for a preliminary ruling under Article 267 TFEU, referring in particular to the divergent application of Article 21(1) of the Merger Regulation in the Member States:

'Is Article 21(1) of [the Merger Regulation] to be interpreted as precluding a national competition authority from regarding a concentration which has no Community dimension within the meaning of Article 1 of that regulation, is below the thresholds for mandatory *ex ante* assessment laid down in national law, and has not been referred to the European Commission under Article 22 of [that regulation], as constituting an abuse of a dominant position prohibited by Article 102 TFEU, in the light of the structure of competition on a market which is national in scope?'

24. Towercast, the French competition authority, France, Italy, the Netherlands, the European Commission, TDF and Tivana Topco submitted written observations and, with the exception of Italy, participated in the hearing of 6 July 2022.

IV. Legal assessment

A. Relationship between Article 21 of the Merger Regulation and Article 102 TFEU

1. Definition of the scope of the Merger Regulation in Article 21 thereof

25. Article 21(1) of the Merger Regulation governs the scope of that regulation with regard to the assessment of concentrations in relation to, or as distinct from, the application of the other rules of secondary EU competition law. Amongst other things, that provision expressly excludes the application of Regulation No 1/2003[5] to concentrations unless they are (cooperative) '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' and therefore come within the scope of Article 101 TFEU.

26. Accordingly, in *Austria Asphalt*, the Court affirmed exclusive applicability of the Merger Regulation to the assessment of concentrations and excluded the applicability of Regulation No 1/2003 in that regard.[6] According to the Court, that regulation applies only to the actions of undertakings which, as in the case of cooperative joint ventures, do not qualify as a concentration but may involve coordination in breach of Article 101 TFEU.[7] The judgment in *Austria Asphalt* therefore does not contain any general statement on the relationship between merger control law on the one hand and Articles 101 and 102 TFEU on the other.

[5] Council Regulation of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 [EC] and 82 [EC] (OJ 2003 L 1, p. 1; 'Regulation No 1/2003').

[6] Judgment of 7 September 2017, *Austria Asphalt* (C-248/16, EU:C:2017:643, paragraph 32): 'As follows from Article 21(1) of Regulation No 139/2004, that regulation alone is to apply to concentrations as defined in Article 3 of the regulation, to which Regulation No 1/2003 is not, in principle, applicable.' That case concerned a full-function joint venture, within the meaning of Article 3(4) of the Merger Regulation, which fulfilled the criteria for the concept of concentration. See also judgment of 31 May 2018, *Ernst & Young* (C-633/16, EU:C:2018:371), and order of 29 January 2020, *Silgan Closures and Silgan Holdings* v *Commission* (C-418/19 P, not published, EU:C:2020:43, paragraph 50).

[7] Judgments of 7 September 2017, *Austria Asphalt* (C-248/16, EU:C:2017:643, paragraph 33), and of 31 May 2018, *Ernst & Young* (C-633/16, EU:C:2018:371, paragraph 57).

27. However, the exclusion, prescribed in Article 21(1) of the Merger Regulation, of the applicability of Regulation No 1/2003 to concentrations does not answer the question as to the applicability of Article 102 TFEU. The answer to that question is all the more important where, as in the present case, the concentration in question does not meet either the EU or the national thresholds and has not been referred to the Commission under Article 22 of the Merger Regulation, with the result that there is no *ex ante* assessment under merger control law. [8]

28. In answering the question as to whether Article 21(1) of the Merger Regulation precludes the application of Article 102 TFEU, particular importance is to be attached to the latter's status of primary law and its direct applicability.

2. Direct applicability of Article 102 TFEU

29. Article 102 TFEU is a provision of primary law, the direct applicability of which has long been recognised by the Court. [9]

30. Moreover, it follows from the principle of the hierarchy of norms [10] and the principle *lex superior derogat legi inferiori* deriving therefrom, that a provision of secondary law is not capable of restricting the scope or direct applicability of a provision of primary law, but rather must comply with its requirements and must in turn be interpreted restrictively in the light of them, where necessary. [11]

31. It is true that, for that reason, Article 21(1) of the Merger Regulation may exclude the application to concentrations of Regulation No 1/2003, which serves to implement, inter alia, Article 102 TFEU. [12] Irrespective of that, however, and contrary to the view taken by the French competition authority, the prohibition in Article 102 TFEU remains directly applicable and its enforcement is not blocked. That prohibition is sufficiently clear, precise and unconditional, with the result that there is no need for a rule of secondary law expressly prescribing or authorising its application by national authorities and courts. [13]

32. The direct applicability of Article 102 TFEU enables individuals to enforce the legal position conferred on them before the authorities and courts of the Member States; this correlates, in a mirror image, with a duty incumbent on those public authorities to protect that legal position. [14] The Court has also concluded from that direct applicability and the associated primacy of Articles 101 and 102 TFEU that national competition authorities are obliged to disapply national legislation which contravenes those provisions. [15]

8 See, in that regard, judgment of the General Court of 13 July 2022, *Illumina* v *Commission* (T-227/21, EU:T:2022:447).

9 See, inter alia, judgments of 21 March 1974, *BRT and Société belge des auteurs, compositeurs et éditeurs* (127/73, EU:C:1974:25, paragraphs 15 and 16); of 5 June 2014, *Kone and Others* (C-557/12, EU:C:2014:1317, paragraph 20); and of 14 March 2019, *Skanska Industrial Solutions and Others* (C-724/17, EU:C:2019:204, paragraph 24).

10 See judgment of 26 June 2012, *Poland* v *Commission* (C-335/09 P, EU:C:2012:385, paragraph 127).

11 See, regarding interpretation in conformity with primary law, judgment of 20 January 2021, *Commission* v *Printeos* (C-301/19 P, EU:C:2021:39, paragraph 70 et seq.).

12 See recital 1 of Regulation No 1/2003.

13 See, to that effect, judgment of 11 April 1989, *Saeed Flugreisen and Silver Line Reisebüro* (66/86, EU:C:1989:140, paragraph 32).

14 As made particularly clear in the judgment of 20 September 2001, *Courage and Crehan* (C-453/99, EU:C:2001:465, paragraphs 19 to 24).

15 Judgment of 9 September 2003, *CIF* (C-198/01, EU:C:2003:430, paragraphs 49 and 50), referring to the judgment of 22 June 1989, *Costanzo* (Case 103/88, EU:C:1989:256, paragraph 31).

33. If, however, it follows from the direct applicability of Article 102 TFEU that national authorities are even obliged to apply that provision, a rule of secondary law such as Article 21(1) of the Merger Regulation is in that regard all the less capable of having the blocking effect advocated by the French competition authority.

34. This is not altered by the wording of that rule, which uses the term 'alone'.[16] This also applies to the wording of recital 6 of the Merger Regulation, according to which the latter is to be 'the only instrument applicable to such concentrations [within the meaning of Article 3]'.[17]

35. This is confirmed by the choice to make Article 103 TFEU – in addition to Article 352 TFEU – the legal basis for the Merger Regulation.[18] As the Court has already held, the Merger Regulation also serves to implement Articles 101 and 102 TFEU and forms part of a legislative whole intended to ensure the protection of competition in the internal market in a comprehensive manner.[19] This shows, in turn, that that regulation is neither on a level with Articles 101 and 102 TFEU in the hierarchy of norms, nor capable, as an implementing provision, of modifying, let alone limiting, the scope of those reference provisions.

36. Since, by virtue of the primacy of EU law, contrary rules of national law cannot preclude the implementation of Article 102 TFEU, which must be interpreted uniformly throughout the EU,[20] the reference by Towercast, TDF and Tivana Topco to the possibility that it is applied differently in the legal systems of the Member States is also of no consequence and cannot have any bearing on the answer to the question referred.

37. With regard to the argument put forward in particular by TDF, that a concentration which is below the thresholds and therefore does not have to be notified may no longer be called into question *ex post* by way of application of Article 102 TFEU, I would like to add that the thresholds provided for in Article 1 of the Merger Regulation or in corresponding national rules are no more capable than Article 21(1) of the Merger Regulation of limiting or excluding the direct applicability of Article 102 TFEU.

38. This also follows from the function of the thresholds. On the one hand, they regulate the distribution of competences between the Commission and the national competition authorities and, on that basis, determine the law applicable to the assessment of a concentration.[21] On the other hand, they are based on the legislature's assessment, and associated rebuttable presumption, that mergers that exceed certain turnover thresholds are particularly significant and can have harmful effects on the market structure and competition, such that they require *ex ante* control by the authorities.[22] Conversely, where those turnover thresholds are not reached, there is a presumption that the concentration in question does not require such *ex ante* control. However, the thresholds as such say nothing about whether, in certain cases, *ex post* control of the conduct of undertakings with a dominant position in connection with a concentration is possible on the basis of Article 102 TFEU.

16 See also, for example, 'allein' in the German-language version, 'seul' in the French-language version, 'solo' in the Italian-language version and 'uitsluitend' in the Dutch-language version.

17 See also the seventh recital of Regulation No 4064/89.

18 See recital 7 of the Merger Regulation.

19 Judgments of 7 September 2017, *Austria Asphalt* (C-248/16, EU:C:2017:643, paragraph 31), and of 31 May 2018, *Ernst & Young* (C-633/16, EU:C:2018:371, paragraph 55), and my Opinion in *Austria Asphalt* (C-248/16, EU:C:2017:322, point 35).

20 Judgment of 9 September 2003, *CIF* (C-198/01, EU:C:2003:430, paragraphs 49 and 50). See also judgment of 13 February 1969, *Wilhelm and Others* (14/68, EU:C:1969:4, paragraph 6).

21 See recitals 8 and 9 of the Merger Regulation.

22 See recitals 3 to 5 and 8 of the Merger Regulation.

B. Functioning and scheme of the protection, under EU law, against distortions of competition

39. The direct applicability of Article 102 TFEU and its position in the hierarchy of norms, as explained in points 29 to 38 above, are in fact sufficient to justify the conclusion that its applicability to concentrations cannot be excluded by Article 21(1) of the Merger Regulation. Furthermore, the functioning and scheme of the protection, under EU law, against distortions of competition in the internal market also militate in favour of Article 102 TFEU applying to a concentration on a supplementary basis.

40. Whereas the Merger Regulation provides for a system of preventive and mandatory *ex ante* control applicable to changes in the structure of the market, the behaviour in which undertakings engage on the market – be this coordinated practices or unilateral acts – is subject, pursuant to Regulation No 1/2003, only to punitive *ex post* control. That function was further strengthened by the legal exception system introduced by that regulation, in so far as it transferred, on the basis of the (now full) direct applicability of Articles 101 and 102 TFEU, control and enforcement tasks to a large extent to the national authorities and courts (decentralisation).[23] However, their discretion in implementing Articles 101 and 102 TFEU is in turn limited by the principles of direct applicability and primacy.[24]

41. It is true that the independence of *preventive* merger control is emphasised by recital 6 of the Merger Regulation.[25] According to that recital, the Merger Regulation, as a 'specific legal instrument', is to be the 'only' instrument applicable to the legal assessment of the effect of concentrations on competition in the internal market.[26] In addition, the Court objected to an impermissible extension of the scope of that regulation to transactions not contributing to the implementation of a concentration.[27] It thereby prevented the rules of that regulation from 'permeating' other regulatory areas of competition law.[28]

42. Contrary to the view taken by the French Government and the French competition authority, it cannot be concluded therefrom that the Merger Regulation definitively has the status of a *lex specialis*.

43. Nor does such a conclusion follow from the fact that, according to Article 21(1) of the Merger Regulation, Regulation No 1/2003, amongst others, is not to apply to concentrations. It is true that it can be inferred therefrom that the assessment of possible anticompetitive effects of a concentration is attributed primarily to merger control law, as a special regime in relation to Articles 101 and 102 TFEU. However, this does not exclude the possibility of *ex post* control of the conduct of an undertaking with a dominant position in connection with such a

[23] See recital 4 and Articles 5 and 6 of Regulation No 1/2003.

[24] Accordingly, unlike the Commission, national competition authorities cannot, in particular, stop investigating the conduct of undertakings with a dominant position because of a lack of 'Union interest'; see, inter alia, judgments of 4 March 1999, *Ufex and Others* v *Commission* (C-119/97 P, EU:C:1999:116, paragraphs 88 and 89); judgments of the General Court of 16 May 2017, *Agria Polska and Others* v *Commission* (T-480/15, EU:T:2017:339, paragraph 34 et seq.); and of 13 July 2022, *Design Light & Led Made in Europe and Design Luce & Led Made in Italy* v *Commission* (T-886/19, not published, EU:T:2022:442, paragraph 38 et seq.).

[25] See also recital 7 of Regulation No 4064/89.

[26] See also order of 29 January 2020, *Silgan Closures and Silgan Holdings* v *Commission* (C-418/19 P, not published, EU:C:2020:43, paragraph 50).

[27] Judgment of 31 May 2018, *Ernst & Young* (C-633/16, EU:C:2018:371, paragraph 58).

[28] See also Opinion of Advocate General Wahl in *Ernst & Young* (C-633/16, EU:C:2018:23, points 68 and 69). See also my Opinion in *Austria Asphalt* (C-248/16, EU:C:2017:322, point 37), and judgment of the General Court of 20 November 2002, *Lagardère and Canal+* v *Commission* (T-251/00, EU:T:2002:278, paragraphs 77 to 79).

concentration. Moreover, it would not have been legally possible for the legislature to adopt a rule of secondary law which excluded the application of the higher-ranking and directly applicable Article 102 TFEU.

44. The fact that the Merger Regulation is – as can be seen from recital 7 thereof – based not only on Article 103 TFEU but also on the power to supplement the Treaties in Article 352 TFEU equally militates in favour of applying Article 102 TFEU in addition to the Merger Regulation. The sixth recital of Regulation No 4064/89 (see point 12 above) confirms this in so far as it clarifies that the introduction of a merger control regime was intended to fill gaps in the system of protection against distortions of competition in relation to concentrations.

45. Conversely, settled case-law of the Court shows that Article 102 TFEU has a wide field of application, especially given that its general examples of abusive practices are not exhaustive.[29] Accordingly, conduct of undertakings in a dominant position when preparing the ground for or carrying out the acquisition of a competitor may also come within the material scope of that provision and be subject to its direct effect. This is all the more true given that the abusive exclusion of a competitor from the market can take a variety of forms[30] and a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition in the internal market.[31]

46. Contrary to the submissions of TDF, Tivana Topco, the French competition authority and the French and Netherlands Governments, that outcome is entirely consistent with my Opinion[32] and the Court's judgment in *Austria Asphalt*.[33] This is because that judgment concerned only the delimitation of the scope of the Merger Regulation from that of Regulation No 1/2003 with regard to the *ex ante* assessment of a concentration which had as its object the creation of a full-function joint venture. However, questions regarding a possible *ex post* control of the concentration or the conduct of the undertakings involved in it, in particular in the light of Article 102 TFEU, were not part of the subject matter of the proceedings.[34]

47. Contrary to the view taken by the French competition authority, the French Government, Tivana Topco, TDF and the referring court, the referral mechanism in Article 22 of the Merger Regulation, by means of which the Commission's competence in respect of concentrations which do not have a Community dimension may be established on an exceptional basis at the request of Member States, is also irrelevant to the interpretation of the relationship between Article 21(1) of the Merger Regulation and Article 102 TFEU.[35] This is because Article 22 of the Merger Regulation, as a norm of secondary law, cannot provide justification for excluding the direct applicability of Article 102 TFEU in a case such as the present one (see points 29 to 33).

[29] See, inter alia, judgments of 14 November 1996, *Tetra Pak* v *Commission* (C-333/94 P, EU:C:1996:436, paragraph 37); of 15 March 2007, *British Airways* v *Commission* (C-95/04 P, EU:C:2007:166, paragraph 57); of 14 October 2010, *Deutsche Telekom* v *Commission* (C-280/08 P, EU:C:2010:603, paragraph 173); and of 17 February 2011, *TeliaSonera Sverige* (C-52/09, EU:C:2011:83, paragraph 26).

[30] See, regarding the various forms of 'abusive exclusionary conduct', Communication from the Commission – Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (OJ 2009 C 45, p. 7).

[31] Judgment of 30 January 2020, *Generics (UK) and Others* (C-307/18, EU:C:2020:52, paragraph 153).

[32] See my Opinion in *Austria Asphalt* (C-248/16, EU:C:2017:322, points 36 and 37).

[33] Judgments of 7 September 2017, *Austria Asphalt* (C-248/16, EU:C:2017:643, paragraphs 31 to 33), and of 31 May 2018, *Ernst & Young* (C-633/16, EU:C:2018:371, paragraph 54 et seq.).

[34] The same is true of the order of 29 January 2020, *Silgan Closures and Silgan Holdings* v *Commission* (C-418/19 P, not published, EU:C:2020:43, paragraph 50).

[35] See, in that regard, judgment of the General Court of 13 July 2022, *Illumina* v *Commission* (T-227/21, EU:T:2022:447).

48. Rather, supplementary application of Article 102 TFEU, similar to that of Article 22 of the Merger Regulation, 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 law and are therefore not subject, in principle, to *ex ante* control. This is because, as the Italian Government and the Commission point out, a gap in protection has emerged in recent years in the coverage and control, under competition law, of acquisitions of innovative start-ups, for example in the fields of internet services, pharmaceuticals or medical technology ('killer acquisitions'). This concerns situations in which established and powerful undertakings acquire emerging undertakings which do not yet have a large turnover and which operate in the same, neighbouring, upstream or downstream markets, at an early stage of their development in order to eliminate them as competitors and consolidate their own market position. [36] In order to ensure effective protection of competition in that respect also, it should therefore be possible for a national competition authority to resort at least to the 'weaker' [37] instrument of punitive *ex post* control under Article 102 TFEU, provided that the conditions for it are met. Such a need may also exist in the case of acquisitions in highly concentrated markets, such as that in the present case, where the aim of such acquisitions is to eliminate competitive pressure from an emerging competitor.

49. This leads to the question, which is a matter of dispute between the parties to the proceedings, as to whether and to what extent the principles established in the judgment in *Continental Can* [38] in relation to the applicability of Article 102 TFEU to concentrations continue to apply.

C. Significance of the judgment in Continental Can and legal certainty

50. On the basis of the foregoing considerations, the statements in the judgment of the Court in *Continental Can* must in any event be clarified.

51. In that case, the Court stated the following regarding the applicability of Article 86 of the EEC Treaty (now Article 102 TFEU):

'The restraint of competition which is prohibited if it is the result of behaviour falling under Article 85, cannot become permissible by the fact that such behaviour succeeds under the influence of a dominant undertaking and results in the merger of the undertakings concerned. …

Abuse may therefore occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one.' [39]

52. It might even be deduced from this that Article 102 TFEU is fully applicable to the control of concentrations.

[36] See, in greater detail, European Commission, Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases (OJ 2021 C 113, p. 1), paragraphs 9 and 10, and judgment of the General Court of 13 July 2022, *Illumina* v *Commission* (T-227/21, EU:T:2022:447).

[37] See my Opinion in *Austria Asphalt* (C-248/16, EU:C:2017:322, point 36).

[38] Judgment of 21 February 1973, *Europemballage Corporation and Continental Can Company* v *Commission* (6/72, EU:C:1973:22).

[39] Judgment of 21 February 1973, *Europemballage Corporation and Continental Can Company* v *Commission* (6/72, EU:C:1973:22, paragraphs 25 and 26).

53. However, that judgment must be understood against the background of the legal situation existing at the time, in particular the fact that the Court considered that it was necessary, 'in the absence of explicit provisions',[40] to control concentrations in the light of Article 86 of the EEC Treaty in order to ensure sufficient protection of the proper functioning of competition in the common market. Such 'explicit provisions' undoubtedly exist today, however, by virtue of the Merger Regulation; moreover, according to the legislature's intention, they explicitly serve to close the regulatory gap identified by the Court at the time.[41]

54. However, with regard to the supplementary applicability of Article 102 TFEU, advocated above, for the purpose of controlling abusive practices in connection with a concentration, that case-law has not been rendered entirely devoid of purpose despite the creation of a system of merger control EU law. This is confirmed by both recital 7 of the Merger Regulation (point 5 above), which appears to refer to that case-law, and the fact that the judgment in *Continental Can* itself refers to the objective of the Treaties of maintaining the most effective and complete protection of competition within the common market.[42] The brief statement in a footnote to my Opinion in *Austria Asphalt*, much quoted by the parties to the proceedings, according to which that judgment 'became obsolete',[43] related to a different question referred for a preliminary ruling and thus to different subject matter (namely the application of Article 101 TFEU to joint ventures) and cannot therefore be generalised.

55. Therefore, it remains necessary to clarify the question raised by the parties to the proceedings as to the conditions under which a supplementary application of Article 102 TFEU in connection with a concentration can be considered in the light of the judgment in *Continental Can* and the principle of legal certainty.

56. In that regard, a distinction must be drawn between two situations, namely, on the one hand, the situation underlying the present proceedings, in which no *ex ante* assessment of the concentration under merger control law took place because the thresholds were not met, and, on the other hand, the situation of a possible parallel or successive 'double assessment' of a concentration in the light of both merger control law and Article 102 TFEU.

57. As stated in points 29 to 48 of this Opinion, the direct applicability of Article 102 TFEU to concentrations is not excluded by law. That statement applies without qualification in a case such as the present one, in which, as is apparent from point 20, no *ex ante* assessment of the concentration under merger control law took place, there is therefore no risk of 'double assessment'.

58. That would not be the case, however, in the hypothetical situation in which an *ex ante* assessment had in fact taken place, whether by the national competition authority on the basis of national merger control law or by the Commission on the basis of the Merger Regulation. Can such a concentration be subject to additional *ex post* control on the basis of Article 102 TFEU?

[40] Judgment of 21 February 1973, *Europemballage Corporation and Continental Can Company* v *Commission* (6/72, EU:C:1973:22, paragraph 25).

[41] Recitals 5 to 8 of the Merger Regulation and, respectively, the sixth and seventh recitals of Regulation No 4064/89.

[42] Judgment of 21 February 1973, *Europemballage Corporation and Continental Can Company* v *Commission* (6/72, EU:C:1973:22, paragraph 25).

[43] C-248/16, EU:C:2017:322, point 37 and footnote 18.

59. With regard to observance of the principle of legal certainty, importance is to be attached to the fact that the legislature intended to exclude such a double assessment in principle, as is apparent from Article 21(1) of the Merger Regulation (point 43 above). In my view, therefore, there remains room for the application of the principle *lex specialis derogat legi generali*, notwithstanding the fact that Article 102 TFEU has the status of primary law and is directly applicable.

60. That does not contradict the principle of the hierarchy of norms referred to in point 30 of this Opinion. This is because Article 102 TFEU would indeed remain applicable in principle. However, a concentration which has been approved under the more specific rules of merger control, and the effects of which on market structure and competition conditions have been declared to be compatible with the internal market, could not as such be qualified (any longer) as an abuse of a dominant position within the meaning of Article 102 TFEU, unless the undertaking concerned has engaged in conduct which goes beyond that and could be found to constitute such an abuse. The statements made in the judgment in *Continental Can*, which, in such a case also, could be misunderstood in the sense of a possible double assessment of a concentration, should therefore be clarified accordingly.

61. Taking those requirements into account, the legal consequences resulting from the supplementary applicability of merger control law and Article 102 TFEU have far less impact on the implementation of concentrations and on legal certainty than what, for example, the Netherlands Government and TDF claim.

62. On the one hand, this follows from the application of the principle of *lex specialis derogat legi generali*, according to which the approval of a concentration under merger control law and the resulting change in the market structure and the conditions of competition necessarily exclude the factual existence of abuse within the meaning of Article 102 TFEU (points 59 and 60 above). Therefore, such a merger could also not be the subject of a subsequent order, for example under Article 7(1) of Regulation No 1/2003, to dissolve the merged undertaking. On the other hand, *ex post* control under Article 102 TFEU can concern only concentrations operated by an undertaking with a dominant position.

63. 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. And even in those cases – contrary to the fears expressed by some of the parties to the proceedings – in view of the primacy of behavioural remedies and the principle of proportionality, there is not usually a threat of subsequent dissolution of the concentration,[44] but rather only the imposition of a fine.[45]

64. Lastly, having regard to the principle of legal certainty, I would like to address Tivana Topco's request in the alternative, for the temporal effects of the Court's judgment to be limited.

65. In that regard, it should be recalled that the interpretation which, in the exercise of the jurisdiction conferred on it by Article 267 TFEU, the Court gives to rules of EU law clarifies and defines the meaning and scope of those rules as they must be or ought to have been understood and applied from the time of their entry into force. It is only exceptionally that the Court may, in application of the general principle of legal certainty inherent in the EU legal order, be moved to

[44] Regarding the Commission's power to impose structural remedies in exceptional cases only, see Article 7(1) of Regulation No 1/2003.

[45] See Articles 23 and 24 of Regulation No 1/2003.

restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling into question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation – which may be allowed only in the actual judgment of the Court – can be imposed, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties. [46]

66. I cannot see how the latter conditions would be met in the present case. First, in view of the settled case-law on the direct applicability of Article 102 TFEU and the judgment in *Continental Can*, those concerned cannot have developed a belief, in good faith, that that provision would be interpreted differently from how it is in point 29 et seq. above. Second, having regard to the statements made above in point 55 et seq., a risk of serious difficulties is also excluded.

67. In the light of the foregoing, there is not a convincing reason for either categorically excluding the application of Article 102 TFEU to a case such as the present one or limiting the temporal scope of the Court's judgment.

V. Conclusion

68. For the above reasons, I propose that the Court answer the question referred for a preliminary ruling as follows:

Article 21(1) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) must be interpreted as not prohibiting a national competition authority from reviewing a concentration which has no Community dimension within the meaning of Article 1 of that regulation, is below the thresholds for mandatory *ex ante* assessment laid down in national law, and has not been referred to the Commission under Article 22 of that regulation, in order to determine whether it constitutes an abuse of a dominant position under Article 102 TFEU, in the light of the structure of competition on a market which is national in scope.

[46] See judgment of 22 June 2021, *Latvijas Republikas Saeima (Penalty points)* (C-439/19, EU:C:2021:504, paragraphs 132 and 133 and the case-law cited).