

Note on Case C-449/21 Towercast

Article 102 TFEU - Merger Control - Continental Can - Ex-ante and Ex-post Control - Concentrations

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Introduction

In March 2023 the Court of Justice handed down a preliminary ruling in Case C-449/21 Towercast.^[1] This is an interesting judgment since it revisits the interaction between the application of the rules on merger control and of those dealing with abuse of dominance, in scenarios in which a dominant undertaking acquires control over another undertaking. It is not surprising that the *Towercast* case reopened a discussion many thought to be closed for good, namely whether the *Continental Can*^[2] approach to controlling concentration operations via what is now Art. 102 TFEU is still good law, now that the EU itself and almost all Member States have developed specific merger control mechanisms to control such transactions. Advocate General Kokott's Opinion^[3] also discusses the significance of the *Continental Can* judgment in light of the legal certainty that market players engaging in concentration transactions should enjoy, when it comes to implementing their deal.

The fundamental question here is under what circumstances can an EU primary law provision, originally not constructed with the intention to control structural market changes resulting from concentrations, still be applied, in an *ex post* manner, to such transactions, where, despite the fact that functional *ex ante* EU and national merger control regimes exist, such transactions fall below the jurisdictional thresholds of national and EU mandatory merger control? This discussion is important because it sheds light on the relationship between Art. 102 TFEU and EU and national merger control from multiple standpoints, such as that of hierarchy of norms, primacy of EU law, connection between substantive and procedural matters, but also because it may trigger some (significant) changes in the way national competition law (enforcement) interacts with the EU competition norms.

Status quo & facts of the case

While the EEC Treaty did not contain any merger control provisions, during the 70s and 80s, the Court of Justice gave green light to the possibility to control concentrations through the lens of the EU antitrust provisions (i.e. Art. 101 and 102 TFEU).^[4] One of such occasions was the *Continental Can* judgment in which the Court of Justice, in the words of AG Kokott,^[5] signalled that Art. 102 TFEU is fully applicable to the control of concentrations. The business community did not take lightly at that time the possibility of *ex post* control of concentrations, considering, among other fears, the lack of legal certainty stemming from such an approach. The first Merger Control Regulation 4064/89,^[6] replaced by the current Regulation 139/2004^[7] seemed to have addressed those concerns, by introducing a one-stop-shop system of control, based on clear thresholds, mandatory notification of concentrations and a standstill obligation. Two remarks are important at this point as far as the relationship between the EU antitrust provisions and the merger control rules is concerned: first, Recitals 6 and 7 of Regulation 139/2004 show that Art. 101 and 102 TFEU, “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 is why, “[a] specific legal instrument is [...] necessary to permit effective control of all concentrations in terms of their effect on the structure of competition in the [Internal Market] [...]”. Connected to this, second, Art. 21(1) of the same Regulation provides that it is the Merger Control Regulation *alone* that applies to concentrations as defined in the Regulation (i.e. mergers, acquisitions of shares or assets, full-function-joint ventures), while disapplying Regulation 1/2003^[8] on the implementation of Art. 101 and 102 TFEU to such transactions.

The *Towercast* preliminary ruling puts the spotlight exactly on the system created by Art. 21(1) of Regulation 139/2004, by addressing the question whether this provision precludes a NCA from finding that a concentration with no EU dimension, that is below the national thresholds for mandatory *ex ante* assessment laid down in national law, and that has not been referred to the Commission under Art. 22 of Regulation 139/2004 (i.e. the so-called Dutch clause referral), can amount to an abuse of a dominant position prohibited by Art. 102 TFEU, in the light of the structure of competition on a market which is national in scope. In fact, Télédiffusion de France, a provider of digital terrestrial television broadcasting services in France, acquired sole control of Itas, a company active in the same sector, by acquiring all of its shares. This operation was below the notification thresholds of both EU and French merger control regimes and was therefore not notified, neither examined under the prior control of concentrations, nor referred to the Commission via the Dutch clause. The

domestic procedure originated from a complaint lodged by Towercast a competitor of the merging parties, alleging that the acquisition of shares constitutes an abuse of dominance, since it hindered competition on the upstream and downstream wholesale markets for digital terrestrial television broadcasting, by significantly strengthening the dominant position of Télédiffusion de France on those markets. Towercast contends that the principles set out in the *Continental Can* judgment are still relevant and the entry into force of the EU Merger Control Regulation(s) has not rendered the application of Art. 102 TFEU to concentration without an EU dimension devoid of purpose. Furthermore, that Treaty provision has direct effect, and therefore an *ex post* control of such a concentration's compatibility with that article is not per se excluded.

Discussion

The Court's answer to the preliminary question is not surprising: in a nutshell, NCAs are not precluded from finding that concentrations not subject to *ex ante* national or EU merger control may constitute abuses of dominance caught by Art. 102 TFEU. What is more interesting to dwell upon is how the Court arrived at this answer and what are the ruling's implications.

First, the outcome seems reasonable if one looks at the relationship between the abuse of dominance and merger control provisions. Both sets of provisions aim to "establish a system of control ensuring that competition is not distorted in the Internal Market". Such distortions may occur through corporate reorganizations which might result in lasting damage to competition.^[9] Before the 1989 Merger Control Regulation was adopted, such transactions were handled, more or (probably) less conveniently under the antitrust provisions, by way of the *Continental Can* and *Philip Morris* doctrines.^[10] Once the Merger Control Regulation entered into force, the enforcement gap which might have been left open by the antitrust provisions when being applied to concentrations was closed.^[11] However, Recital 7 of Regulation 139/2004 makes it clear that while applicable, according to the case-law of the Court of Justice, to certain concentrations, Art. 101 and 102 TFEU are not sufficient to control *all* such operations. This assertion leads to the conclusion that antitrust and merger control are indeed parts of the same legislative whole,^[12] which can, one way or another address market occurrences which might be incompatible with the system of undistorted competition envisaged by the Treaty.

Second, the dual legal basis of the Merger Control Regulations tells the same story, as both the Advocate General and the Court correctly observe. Art. 103 TFEU speaks of acts of EU secondary law, directives or regulations, which may be adopted to give effect to the principles set out in Art. 101 and 102 TFEU. The Merger Control Regulations thus share the purpose that EU antitrust law was endowed with. It is thus no surprise that, from the early stages of designing the EU merger control system, aspects relating to addressing market power and coordination between undertakings were central to this project: see in this respect the role the dominance test played in the 1989 Merger Control Regulation and also, the relevance of the Art. 101 TFEU test when it comes to coordination aspects of full-function joint ventures. The second legal basis, Art. 352 TFEU makes sense too in the context of treating antitrust and merger control as parts of the same whole. This Treaty provision allows the EU to adopt, under strict conditions, the appropriate measures meant to achieve certain objectives defined in the Treaties, where it had no powers to do so within the framework of the policies defined in the Treaties. Recitals 5 and 6 of the current Regulation 139/2004 add clarity in this respect: “[EU] law must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it; and [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 [EU]...”. While the *Continental Can* and *Philip Morris* doctrines validated the *substantive* coverage of concentrations by antitrust law, for the attainment of the objectives relating to the structure of the market, timely *control* of such transactions had to be ensured. This was achieved by adopting a coherent *ex anteprocedural* framework, embedded in the Merger Control Regulation.^[13] All in all, the TFEU antitrust provisions and the Merger Control Regulation are part of the same competition law family, yet covering different (if you will, temporal) dimensions of the enforcement exercise.

Moving on, the judgment makes sense also viewed from the perspective of hierarchy of norms. This discussion has two dimensions: first, the relationship between Art. 102 TFEU and the Merger Control Regulation, and also the relationship between the latter and other pieces EU secondary law. Second, the relationship between EU norms and national laws, particularly when it comes to enforcement matters. I will come back to this second discussion below. For now, from the outset, Art. 102 TFEU has direct effect. Furthermore, its application is not conditional on the adoption of specific procedural rules.^[14] For the sake of clarity, the directives and regulations that Art. 103 TFEU speaks of, such as Regulation 1/2003, the Merger Control Regulations 4064/89 and 139/2004, the Private Damages Directive 2014/104^[15] and the ECN+

Directive 2019 /1,^[16] are adopted to *give effect to the principles* set out in Art. 101 and 102 TFEU, and *not to enable altogether the application* of the said Treaty articles. The procedural rules embedded in these pieces of EU secondary legislation allow the authorities and other stakeholders to either perform their tasks appropriately, or to exercise their rights that relate to the enforcement process, as the case may be. It follows that a piece of secondary EU law, such as the Merger Control Regulation, cannot preempt the application of a hierarchically superior norm of EU law, which above all creates rights for individuals which must be protected.^[17] The same stands with reference to the provisions of Regulation 1/2003, which gives powers of enforcement not only to the Commission, but also to NCAs and national courts. Recalling that Art. 21(1) of Regulation 139/2004 disapplies Regulation 1/2003 when it comes to concentrations as defined in Art. 3 of Regulation 139/2003, it becomes apparent that this article clarifies the relationship between two pieces of secondary EU law concerning competition^[18] and not between a provision of primary EU law (i.e. Art. 102 TFEU) and the Merger Control Regulation. Therefore, when it comes to the Commission, things are rather clear: though Art. 102 TFEU might still theoretically be applicable to such concentrations, in reality the Commission is deprived of the *procedural tools* embedded in Regulation 1/2003, for applying this Treaty provision to concentrations. Put bluntly, this renders Art. 102 TFEU 'effectively inapplicable' to concentrations notified under Regulation 139/2004. Indeed, the *Towercast* judgment makes it clear in par. 49 that, when it comes to assessing concentration transactions, the entry into force of autonomous provisions on the control of concentrations (Regulations 4064/89 and 139/2004), recourse to the *procedural rules* relating to the implementation of Art. 101 and 102 TFEU, set out by Regulations 17/62^[19] and 1/2003, has become devoid of purpose. Luckily, the Commission is nevertheless endowed with plenty powers, and on top of that also with provisions of substantive / material nature,^[20] to address concentrations in the Merger Control Regulation itself. Therefore, a scenario in which the Commission might enforce Art. 102 TFEU against concentrations with an EU dimension is highly unlikely, as the Advocate General also advocates.^[21]

The situation stands differently when it comes to national enforcement, and this is where I move to the second facet of the hierarchy of norms discussion, relating to EU law on one hand and domestic enforcement on the other hand. To start off, it is already established that secondary EU law cannot preclude the application of primary EU law,^[22] that Art. 102 TFEU has direct effect, creating rights which national authorities (i.e. NCAs and courts) must protect, and that Art. 3 of Regulation 1/2003 mandates such national authorities to apply the EU antitrust provisions when the

trade between the Member States might be impacted. Where does this leave the national authorities when it comes to applying Art. 102 TFEU, given that Regulation 1/2003 is inapplicable to concentrations, with a special focus on Art. 5 and 6 of this Regulation, which gives antitrust enforcement powers to NCAs and national courts? Similar to the remark above pertaining the Commission, this procedural arrangement does not take away the national entities' powers to apply the (primary law) TFEU antitrust prohibitions. The procedural dimension of the discussion is however different: these national courts and administrative authorities must in such a setting apply the TFEU prohibitions, while making use of their domestic procedural laws.^[23] This makes sense, having in mind the classic arrangement in which, by virtue of the Member States procedural and institutional autonomy, the TFEU provisions are applied domestically making use of national law procedures, which in absence of EU harmonization, must observe the principles of equivalence and effectiveness.^[24] We now have an answer to the question why it was useful that Art. 10-16 of the ECN+ Directive 2019/1 elaborated on the exact powers that NCAs enjoyed based on Art. 5 of Regulation 1/2003, while also harmonizing the national legal regimes dealing with the decision-making powers of NCAs. A scenario such as the case at hand shows how important it is the national authorities are indeed endowed with the appropriate enforcement toolkits when applying the EU antitrust provisions.

The *Towercast* case brings to light an extra facet of the TFEU antitrust provisions – national enforcement relationship, in light of the hierarchy of norms discussion. The answer to the preliminary question posed by the French court signals that Art. 102 TFEU applies, provided that the concentration has no EU dimension, sits below the national mandatory *ex ante* merger control thresholds, and has not been referred for appraisal to the Commission through a Dutch clause procedure. What attracts attention here is that, if phrased differently, if such a concentration were appraised under *national* merger control, the *EU law* provisions in Art. 102 TFEU would no longer apply. This might come across as odd, in light of the principle of supremacy of EU law, stemming from the landmark cases *Costa v ENEL* and *Simmenthal*:^[25] how could national laws and enforcement processes negate the application of primary EU law substantive provisions? Wasn't this supposed to be the other way around, namely EU law precluding national approaches which stifle the application of the said EU law?^[26] To draw a simple parallel in this respect, one needs to look no further than Art. 3 of Regulation 1/2003, which obliges national authorities to apply EU law, which, I might add, 'overrides' national laws dealing with cartels and abuse of dominance. The key to this puzzle here lies precisely in the specific mention that the Court of Justice makes as to the coverage of the relevant market in this case: in par. 53 of the

ruling the Court essentially speaks of concentrations (with no EU, nor national dimension) taking place in a market that is national in scope. I interpret this as if the concentration were to have a 'national dimension', or in other words if the concentration had to be notified domestically, the national merger control regime could have been applied, meaning that the impact of that transaction on competition would have been assessed. Does this preclude the subsequent and supplementary application Art. 102 TFEU? In theory, no, given the direct applicability of this article and its nature of primary law. However, even if this were exceptionally the case, the practical problematic consequences of this are rather unlikely and of limited magnitude, as the Advocate General shows in par. 60-63 of the Opinion.

Therefore, while expanding this reasoning, to my mind, par. 53 of the *Towercast* ruling suggests that what counts, at the end of the day, is that a concentration transaction is subject to some sort of review of its impact on the competition structure in the market: either under domestic merger control law if it has now EU dimension, either under Regulation 139/2004 if it has an EU dimension or if it were referred to the Commission under a Dutch clause procedure, either by applying Art. 102 TFEU, if none of the above possibilities are in the cards. Indeed, par. 40 of the *Towercast* ruling states that "for reasons of legal certainty, the mechanism for the prior control of concentrations as defined in Art. 3 of Regulation 139/2004 must be applied as a matter of priority"; however, that cannot "preclude the possibility for a competition authority to capture a concentration operation under Article 102 TFEU under certain conditions." Furthermore, Advocate General Kokott argues in par. 48 of the Opinion, with examples coming from highly concentrated market, or by pointing to the problem of killer acquisitions, that "[i]n order to ensure effective protection of competition [...], it should therefore be possible for a national competition authority to resort at least to the 'weaker' instrument of punitive *ex post* control under Art. 102 TFEU, provided that the conditions for it are met." Viewed this way, I find that the primacy of EU law is not necessarily at stake here, and I argue that the Court of Justice was probably more concerned in the *Towercast* scenario with ensuring that competition effects are not left unaddressed. Advocate General Kokott also argues in par. 58 *et seq* of the Opinion that the principle of hierarchy of norms is not infringed here. To my mind, from a legal certainty and legitimate expectations perspective, this is a reasonable outcome, which is also in line with the discussion above, that merger control and antitrust are part of the same whole that addresses competition issues from different standpoints and with different mechanisms, be them preventive (as is the case of merger control), or punitive (as is the case of antitrust).[\[27\]](#)

Speaking of the different approaches in antitrust and merger control as far as the enforcement exercise is concerned, it is worth investigating whether those differences carry through when it comes to the substantive tests that these two branches of competition law employ. In substance, it is by now clear that Art. 102 TFEU covers abuses of dominance, defined as behaviour of dominant undertakings which are such as to influence the structure of the market by means which do not amount to competition on the merits, thus hindering the maintenance or development of competition on the market.^[28] Art. 2(2) and (3) of Regulation 139/2004, on the other hand, catches concentrations which would significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position. As pointed out above, the *Continental Can* judgment made it clear that the concept of abuse of dominance in Art. 102 TFEU is able to address concentrations. This is where the shared history of antitrust law and merger control when it comes to the concept of dominance began. This developed into the so-called 'dominance test' embedded in the first Merger Control Regulation 4064/64, which used very similar wording with Regulation 139/2004, in force today, yet importantly placing the focus on creation or strengthening of dominance, rather than on the significant impediment to effective competition. It is therefore no surprise that over the years theories of harm and approaches developed under Art. 102 TFEU have made their way into merger control, thoroughly influencing its development. This is so even when speaking of the law currently in force (i.e. Art. 2(2) and (3) of Regulation 139/2004), which continues to refer to theories of harm relating to dominance as likely examples of impediments to competition, despite the fact that it is the significant impediment to effective competition that at the end of the day counts in merger control. Coming back to the *Towercast* ruling, it is refreshing to observe that a substantive standard clearly inspired by merger control makes its way back into Art. 102 TFEU. In par. 52, the Court of Justice signals that while applying Art. 102 TFEU to a concentration, one needs to "verify that a purchaser who is in a dominant position on a given market and who has acquired control of another undertaking on that market has, by that conduct, *substantially impeded competition* on that market." Several observations are in order. First, the circle is now complete: after decades of antitrust concepts and principles shaping merger control, it is now time for reverse spill-overs, namely for merger control substantive benchmarks such as substantial impediment to competition (despite the slight difference in language from 'significant impediment to effective competition') to penetrate the list of abuse benchmarks under Art. 102 TFEU. Speaking of this list, second, it has to be recalled that the enumeration of abuses in Art. 102 TFEU is not exhaustive. As the Court eloquently states in par. 46 of the *Towercast* ruling, while building on the Advocate General's

statement in par. 45 of the Opinion, “the list of abusive practices contained in that provision does not exhaust the methods of abusing a dominant position prohibited by EU law.” Concentrations that substantially impede competition fall nicely into that list too. Third, and lastly for now, not all concentrations qualify here though. The Court pointed out in par. 52 of the ruling that “the mere finding that an undertaking’s position has been strengthened is *not sufficient* for a finding of abuse, since it must be established 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.” Such reasoning is very much in tune with established case-law under Art. 102 TFEU. For example, in the *MEO* case dealing with discriminatory pricing which distorts competition, the Court stated that for such an abuse to exist, *it takes more* than simply finding an inconvenience experienced by the trading partners. In the words of the Court, “[i]n order to establish whether the price discrimination on the part of an undertaking in a dominant position vis-à-vis its trade partners tends to distort competition on the downstream market, [...] the mere presence of an immediate disadvantage affecting operators who were charged more [...] does not, however, mean that competition is distorted or is capable of being distorted. [...] [i]n order for it to be capable of creating a competitive disadvantage, the price discrimination referred to in [...] Art. 102 TFEU *must affect the interests of the operator* which was charged higher tariffs compared with its competitors.”^[29] All in all, when it comes to substantive assessment benchmarks, antitrust and merger control are very much on the same frequency. This is comforting to observe, given that antitrust and merger control, are after all, part of the same competition law family.

Before concluding, I would like to point out some (intended and unintended) consequences of the *Towercast* ruling. First, Advocate General Kokott explicitly mentions in par. 48 of the Opinion the recent problems created by the need to address so-called killer acquisitions. Member States like Austria and Germany have already adjusted their national merger control thresholds to catch such transactions in their nets. The Commission has also recently adopted guidelines on the Dutch clause referral mechanism,^[30] for exactly the same purpose, yet approaching the problem from a completely different standpoint: non-notifiable concentrations (i.e. even concentrations sitting below the national notification thresholds) may now be referred by the NCAs to the Commission for substantive appraisal under the Merger Control Regulation. The Article 22 Guidelines thus provide the authorities with a mechanism to review killer acquisitions and have already started being ‘tested in court’.^[31] The Guidelines are nevertheless not entirely free of criticism,^[32] especially

when it comes to the timing of the referral: such referrals may be performed even after the implementation of the transaction, however, the Commission would generally not consider a referral appropriate where more than six months has passed after the implementation.^[33] This *ex post* merger control of non-notifiable concentrations is now augmented by the Court's *Towercast* ruling which adds an extra layer of potential control of such deals, through the *ex post* application of Art. 102 TFEU. Applying this tool is not time barred, its scope of application is broader than merger control, and its procedural blueprint might very well entail significant extra complications and costs for the merging parties, and especially for the dominant acquirer.^[34]

Second, by (re-)validating the application of Art. 102 TFEU to non-notifiable concentrations, the *Towercast* judgment (re-)opens the door for such transactions to access the national private law courts. Such an exercise is now considerably more prominent than it used to be back in the *Continental Can* and *Philip Morris* days. This is because aggrieved third-parties do not only have a refreshed incentive to seek remedies in front of such courts, via e.g. injunctive relief applications when the abuse of dominance hurts their immediate interests; such parties may also sue for damages if the concentration that amounts to an abuse of dominance leads to injury which might be financially compensated. The already emerging case-law on the Private Damages Directive 2014/104 will likely be enriched with fascinating analyses, especially when it comes to, for example, quantifying the harm resulting from the infringement of Art. 102 TFEU.

Finally, the national law of some Member States might be put in the spotlight by the *Towercast* ruling. For example, the Dutch Mededingingswet ('Competition Law') provides in Art. 24(2) that "[t]he implementation of a concentration, as described in Article 27, shall not be deemed to be an abuse of a dominant position." Article 27 of that law defines concentrations only with a view to the type of transaction (i.e. mergers, acquisitions, full-function joint ventures). The scope of application of the provisions dealing with merger control, namely the financial thresholds, are then spelled out in Art. 29 *et seq* of the Dutch Competition Law. The question that may be raised here is whether Art. 24(2) of the Dutch Competition Law is in line with EU law, considering the *Towercast* ruling. After all, Advocate General Kokott indicated clearly in par. 36 of the Opinion that "by virtue of the primacy of EU law, contrary rules of national law cannot preclude the implementation of Art. 102 TFEU". In this light, Art. 24(2) of the Dutch Competition Law seems problematic. This is so, since nothing in the wording of Art. 24 and 27 of the law points to their application solely to situations

not exceeding national boundaries. Thus, when a concentration, be it of small national size might potentially impact the trade between the Member States, Art. 102 TFEU kicks in, and a provision such as that of Art. 24(2) of the Dutch Competition Law might be in trouble as far as its compatibility with EU law is concerned. A different way of looking at this issue is with reference to situations in which such potential trade between the Member States is lacking. We are then dealing with pure national matters, falling outside the scope of Art. 102 TFEU, which might alleviate any problems associated with Art. 24(2) of the Dutch Competition Law.^[35]

Conclusion

All in all, the *Towercast* judgment of the Court packs more than meets the eye. Going beyond reaffirming the already established hierarchy of norms, both within EU law and when it comes to the EU law – national enforcement relationship, this judgment brings to the forefront, above all, the fact that antitrust rules and merger control rules are part of the same family of norms, that essentially aim to address behaviour which might be incompatible with the system of undistorted competition envisaged by the TFEU. Being part of the same legislative whole, antitrust and merger control supplement each other in addressing such market occurrences. Despite the much-desired clarity which stems from the statements above, the *Towercast* judgment also raises some interesting points, which market players should not lose sight of. After this judgment, dominant undertakings must not exclude the possibility of either merger control (national, or EU, possibly through the use of the Dutch clause) or antitrust review (Art. 102 TFEU) when acquiring (small) targets. Neither should they dismiss the possibility of being called into domestic private law courts by aggrieved third-parties in search for remedies to address the consequences of possible abuses of dominance.

[1] ECLI:EU:C:2023:207.

[2] Case 6/72 *Europemballage and Continental Can v Commission*, ECLI:EU:C:1973:22.

[3] ECLI:EU:C:2022:777.

[4] See the *Continental Can* case mentioned above and also Joined cases 142 and 156/84 *BAT and Reynolds*, ECLI:EU:C:1987:490.

[5] *Towercast* Opinion, par. 52.

[6] OJ L 395, 1998.

[7] OJ L 24, 2004.

[8] OJ L 1, 2003.

[9] *Towercast* Judgment, par. 36, 39; Regulation 139/2004, Recitals 5-7.

[10] See notes 2 and 4 above.

[11] *Towercast* Opinion, par. 44, 53.

[12] *Towercast* Judgment, par. 39; *Towercast* Opinion, par. 35.

[13] See *Towercast* Judgment, par. 36.

[14] Case C-127/73 *BRT v SABAM*, ECLI:EU:C:1974:25; *Towercast* Judgment, par. 44, 51; *Towercast* Opinion, par. 29-30.

[15] OJ L 349/2014.

[16] OJ L 11/2019.

[17] *Towercast* Judgment, par. 44, 47; *Towercast* Opinion, par. 32, 35.

[18] *Towercast* Judgment, par. 33.

[19] OJ 13, 1962.

[20] See Art. 2 of Regulation 139/2004, which contains the so-called SIEC substantive test of assessment of concentrations and also the factors which play a role in such assessment.

[21] *Towercast* Opinion, par. 61-63.

[22] *Towercast* Opinion, par. 30, 33.

[23] See *Towercast* Judgment, par. 47-48.

[24] See case 33/76 *Rewe*, ECLI:EU:C:1976:188; case 45/76 *Comet*, ECLI:EU:C:1976:191; case C-681/11 *Schenker*, ECLI:EU:C:2013:404; case C-439/08 *VEBIC*, ECLI:EU:C:2010:739.

[25] Case 6/64 *Costa v ENEL*, ECLI:EU:C:1964:66; case 106/77 *Simmenthal*, ECLI:EU:C:1978:49.

[26] See also *Towercast* Opinion, par. 32, 36.

[27] See *Towercast* Opinion, par. 40.

[28] See e.g. case 85/76 *Hoffmann-La Roche*, ECLI:EU:C:1979:36, par. 91; case C-52/09 *TeliaSonera*, ECLI:EU:C:2011:83, par. 27.

[29] Case C-525/16 *MEO*, ECLI:EU:C:2018:270, par. 26, 30.

[30] Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, C(2021) 1959 final.

[31] Case T-227/21 *Illumina v. Commission*, ECLI:EU:T:2022:447.

[32] See A. Looijestijn-Clearie, C.S. Rusu, J.M. Veenbrink, 'In Search of the Holy Grail? EU Commission's New Approach to Article 22 of the EU Merger Regulation', 29 *Maastricht Journal of European and Comparative Law* 4, 2022.

[33] Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, C(2021) 1959 final, par. 21.

[34] For further analysis of the interaction between the Dutch clause referrals of killer acquisitions and the *Towercast* approach as laid out by Advocate General Kokott, see also D. Mandrescu, 'Opinion of AG Kokott in Case-449/21 (*Towercast*): filling gaps in EU merger control and creating new routes for dealing with killer acquisitions through the DMA', available at <https://www.lexxion.eu/coreblogpost/opinion-of-ag-kokott-in-case-449-21-towercast-filling-gaps-in-eu-merger-control-and-creating-new-routes-for-dealing-with-killer-acquisitions-through-the-dma/>, accessed on 12 April 2023.

[35] See also 'Towercast: yet another way to thwart killer acquisitions. What happens to non-notifiable acquisitions in the Netherlands?', available

at <https://www.vandoorne.com/en/knowledge-sharing/towercast-yet-another-way-to-thwart-killer-acquisitions.-what-happens-to-non-notifiable-acquisitions-in-the-netherlands/>, accessed on 12 April 2023.