ALERT MEMORANDUM

First Move by the French Competition Authority to Analyze Non-Reportable Mergers under Article 101

May 21, 2024

On May 2, 2024, the French Competition Authority ("**FCA**") issued a decision following the post-closing review of several non-reportable mergers in the French meat-cutting sector under Article 101 of the Treaty on the Functioning of the European Union ("**TFEU**") (the "**Decision**", made public on May 15, 2024).[1]

Although the case was ultimately dismissed due to lack of evidence, this is the first time that the FCA analyzes non reportable transactions under article 101 TFEU, following a broad interpretation of the European Court of Justice ("**ECJ**")'s Towercast precedent.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

PARIS

Séverine Schrameck
+33 1 40 74 69 36
sschrameck@cgsh.com

Frédéric de Bure
+33 1 40 74 69 22
FdeBure@cgsh.com

Stéphanie Patureau
+33 1 40 74 69 32
spatureau@cgsh.com

Martha Smyth
+33 1 40 74 69 19
msmyth@cgsh.com

Paulina Espinoza
+33 1 40 74 69 75
pespinoza@cgsh.com

[1] FCA decision 24-D-05 of May 2, 2024 regarding practices implemented in the meat-cutting sector.

Background

Article 101 and 102 TFEU are *ex post* antitrust law tools used to sanction undertakings which have entered into anticompetitive agreements (101 TFEU) [2] or abused their dominant position (102 TFEU). [3] By contrast, EU merger control rules provide for an *ex ante* review of transactions meeting certain thresholds prior to their implementation. The same is true at national level in (almost all) EU countries. Since the entry into force of the merger regulation in 1989, this traditional distinction between *ex post* antitrust review and *ex ante* EU merger control review has structured the enforcement of competition rules under the assumption that both set of rules apply in an alternative – not in a cumulative - manner. In the 70's, the ECJ had ruled in the *Continental Can* case that the Commission could legally apply [Article 102] TFEU to mergers.[4] However, the EU merger control regime was not yet applicable.

The Continental Can precedent remained isolated for more than 60 years until, in 2023, when the ECJ found in the *Towercast* case that non-reportable mergers can be reviewed *ex post* using antitrust law provisions.[5]

In particular, in the *Towercast* case, the ECJ clarified that competition authorities (in this case, the FCA) could review acquisitions by dominant undertakings under abuse of dominance rules (*i.e.* article 102 TFEU and corresponding national provisions), provided said acquisitions were not initially subject to EU or national *ex ante* merger control and were not reviewed under merger control rules (following referral).

The FCA investigation

In 2015, three French meat-cutting companies, Akiolis, Saria and Verdannet (the "**Companies**") entered into several asset swap transactions which materialized in the form of five mergers.[6] None of these mergers were subject to an *ex ante* merger review by the FCA as they did not exceed the applicable turnover thresholds (*see* Articles L.430-2 and L.430-3 of the French Commercial code).

In 2019, the FCA initiated *ex officio* Article 101 TFEU proceedings relating to these merger agreements based on suspicions of alleged anticompetitive geographic market sharing practices between the Companies.

In its Decision, which ended a five-year investigation, the FCA dismissed the case due to lack of evidence. The FCA found that the information exchange between the Companies did not lead to an anticompetitive plan to allocate geographic markets, insofar as the information exchange took place solely in the context of preparatory discussions for the mergers. Second, the FCA found that the merger agreements did not have an anticompetitive object but rather aimed to improve the competitiveness of the Companies. Also, in parallel to the alleged anticompetitive discussions, the Companies continued to exert competitive pressure on each other in order to secure the most advantageous deal. Last, the

[2] European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, 21 July 2023, para 9.

[3] European Commission, Amendments to the 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, 31 March 2023, para 3

[4] Europemballage Corporation and Continental Can Company Inc. v Commission (Case C-6/72), ECLI:EU:C:1975:50. Note that this judgment was handed down in a context where there was no EU Merger Regulation as opposed to the Towercast precedent cited below which resurrected the control of transactions through the abuse of a dominant position (*i.e.* Continental Can precedent) for transactions which escaped initial merger control review because they were below relevant regulatory thresholds.

[5] *Towercast* v Autorité de la concurrence (Case C-449/21), ECLI :EU :C :2023 :207.

[6] FCA Decision 24-D-05, para 122.

information in the case file did not allow for an analysis of the effects of the agreements on the relevant meat-cutting market.

Although the case was dismissed, the FCA seized this opportunity to clarify its interpretation of the *Towercast* ruling.

By reference to the *Towercast* case,[7] the FCA found that it can review non-reportable transactions not only under the abuse of dominance rules (article 102 TFEU and article L.420-2 of the French Commercial code) but also under anti-collusion rules (article 101 TFEU and article L.420-1 of the French Commercial code). In particular, the FCA rejected the *non bis in idem* defense as the transactions were not reportable under merger control rules.[8]

Key Take-aways

The Decision confirms what the *Towercast* case had forewarned: the increasing complexity and uncertainty of M&A regulatory review. In particular :

- **The interpretation of the *Towercast* case in the Decision increases the complexity and legal uncertainty around M&A transactions.** In light of the Decision, companies whose M&A activity escaped initial merger review may still face article 101 and/or article 102 TFEU antitrust enforcement later on, with a risk of fines being imposed and/or divestments ordered, potentially a decade after the merger.
- **National competition authorities exercising jurisdiction over non-notifiable deals follows a broader trend of stricter regulatory scrutiny of M&A transactions by competition authorities**. Indeed the Decision and the *Towercast* judgment follow the new interpretation of the article 22 EUMR referral mechanism, which now also catches below-threshold M&A transactions.[9]
- **The Decision reflects the FCA's continued commitment to pursue novel theories of harm** with the claimed objective to effectively adapt to the evolving landscape of competition law.

…

CLEARY GOTTLIEB

[7] In particular, see FCA Decision 24-D-05, para 134 and European Court of Justice, *Towercast v Autorité de la Concurrence,* (Case C-449/21), ECLI:C:2023:207, para. 38 and 39.

[8] FCA Decision 24-D-05, para 127.

[9] In an opinion dated 21 March 2024 in joined Cases C-611/22 P, Illumina, Inc v European Commission and C-625/22 P Grail LLC v European Commission and Illumina, Inc, Advocate General Emiliou challenged this interpretation. The ECJ judgement on the matter is still pending.