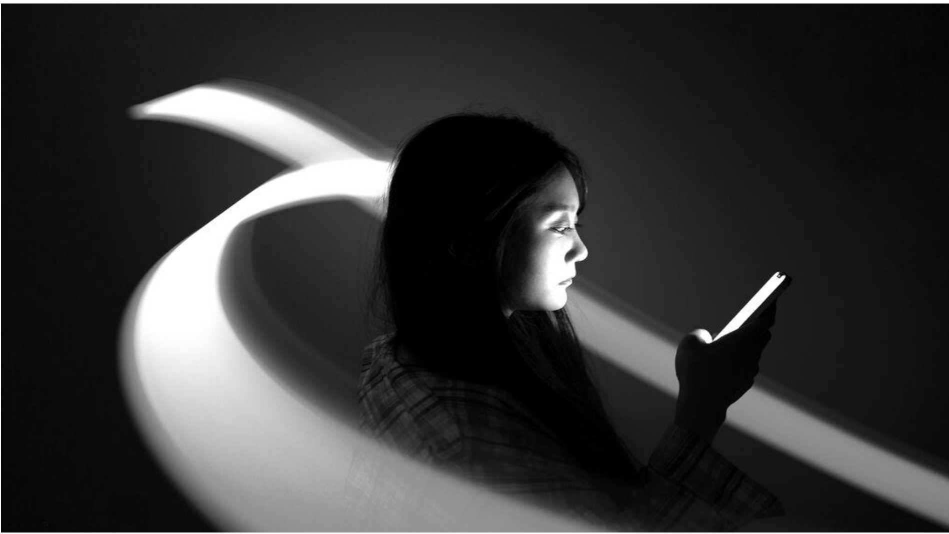

A&O SHEARMAN

Hungarian "Towercast" judgment highlights difficulties of challenging a merger under EU abuse of dominance rules

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A Hungarian court recently upheld the rejection of a complaint by the Hungarian Competition Authority (GVH). Inspired by the European Court of Justice's recent landmark judgment in C-449/21 Towercast, the GVH had been asked to investigate a transaction—that was exempt from a national merger control review—under abuse of dominance rules. The Hungarian judgment is an excellent illustration of the practical difficulties of enforcing Article 102 TFEU in relation to transactions which do not fall under merger control regimes.

BACKGROUND

On January 8, 2023, the Hungarian telecommunications and IT company 4iG agreed to buy a controlling stake in Vodafone Hungary. The transaction resulted in overlaps in a number of telecoms markets, apparently including mobile telephony (a four to three merger) and multiple local fixed line telecoms markets (three to two, or even two to one mergers).

The transaction did not meet the mandatory notification thresholds of the EU Merger Regulation or of any national merger control regimes outside Hungary. While it met Hungarian merger thresholds, the government issued a decree declaring it a transaction with an “importance of national strategy”. Under the Hungarian Competition Act, such transactions are exempt from a mandatory merger notification. Relying on this exemption, the parties closed the transaction very soon after signing, on January 31, 2023, without any prior merger approvals.

The Hungarian opposition party Momentum submitted a complaint to the GVH, alleging that the transaction constituted an abuse of a dominant position, both under Article 102 TFEU and under its national equivalent, Article 21 of the Competition Act.

The complaint focused primarily on the effects of the transaction on local fixed line telecoms services. It argued that the parties operated the only parallel fixed networks in 117 municipalities, essentially resulting in a two to one merger in those territories. The complaint alleged that the around 300,000 subscribers affected constituted around 8 to 9% of all Hungarian fixed line subscribers, and that these subscribers are likely to suffer from horizontal anticompetitive effects of the transaction such as price increases and quality degradation. Separately, the complaint suggested that the transaction results in anticompetitive vertical effects, because the merged 4iG/Vodafone business would have the ability and incentive to restrict its competitors’ access to wholesale fixed line services as well as television program distribution services in the affected territories.

The GVH rejected the complaint. The complainant challenged this decision in the Budapest-Capital Regional Court.

The court (judgment 105.K.703.330/2023/9) largely upheld the rejection decision of the GVH. It ordered the GVH to partially re-examine the complaint to assess whether the combined 4iG/Vodafone entity abused its dominant position after the merger, but this aspect of the ruling does not appear to relate to the transaction itself.

THE COURT’S REASONING

The court’s reasoning offers key insights into the practical difficulties of challenging a merger under the EU and national abuse of dominance regimes.

First, the court agreed with the GVH that it had no powers under national law to examine the transaction after the government declared it as having an “importance of national strategy”.

The complainant argued that national law (Section 24/A of the Competition Act) only exempts such transactions from a merger notification but does not expressly exempt them from any other prohibition. This, according to the complainant, leaves the GVH free to examine them under any other legal basis, including abuse of dominance. However, the court pointed out that the exemption can only be effective if it completely removes the GVH’s ability to apply the substantive test for mergers. The court pointed out that a key part of the Hungarian substantive merger test is identical to the test under abuse of dominance (see Section 30 of the Competition Act, under which a merger must be prohibited if it “significantly reduces competition…in particular as a result of the creation or strengthening of a dominant position”). Thus, according to the court, if the GVH was allowed to examine whether one of the parties abused its dominant position through the transaction, it would necessarily apply the merger test, which would circumvent the exemption regime for strategically important transactions.

Second, for two different reasons, the court held that the GVH was justified in also rejecting an examination of the transaction under Article 102 TFEU.

As a first reason, the court held that “the GVH was not required to provide a detailed reasoning to the rejection of the complaint, because the complaint defined the relevant market as not exceeding the territory of Hungary, not

affecting trade between member states" [para 12]. Because Article 102 TFEU only applies to conduct that affects trade between member states, the court was apparently satisfied that there was no basis for a GVH investigation.

As a second reason, the court pointed out that EU member states have a certain degree of flexibility to apply Article 102 (or 101) TFEU when they apply national merger control rules. In relation to national merger control enforcement, the GVH is not bound by Article 3(1) of Regulation 1/2003, which requires that "[w]here the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article [102] of the Treaty, they shall also apply Article [102] of the Treaty". Instead, Article 3(3) of Regulation 1/2003 provides that this obligation does "not apply when the competition authorities and the courts of the Member States apply national merger control laws".

COMMENTS

The case serves as an excellent illustration of two key hurdles faced by complainants and antitrust authorities when challenging a merger in the "Towercast" manner, i.e., as an abuse of a dominant position.

First, in Article 102 TFEU cases against mergers, a crucial question is whether the conduct **affects trade between member states**. This issue is rarely so fundamental in national enforcement of Article 102 TFEU from a practical perspective. Due to the convergence between national and EU antitrust laws, the outcome of an abuse of dominance investigation typically does not depend on whether only national law or Article 102 TFEU also applies. However, as the Hungarian 4iG/Vodafone case shows, when a national authority assesses a merger under Article 102 TFEU, and cannot also apply national abuse of dominance rules, the lack of effect on trade between member states can be fatal to the entire case.

As a result, if a transaction involves **local geographic markets**, such as retail trade or fixed line telecoms, it is likely to be immune to challenges in a Towercast-style investigation, to the extent it is based only on Article 102 TFEU. However, perhaps a criticism of the Hungarian court's judgment in 4iG/Vodafone is that it fails to offer convincing arguments as to why conduct relating wholesale fixed line access as well as television program distribution did not affect trade between member states, despite an apparently national geographic market definition. In any case, such criticism only highlights how important this issue is in this context.

Second, the case highlights that an authority cannot act against a transaction under Article 102 TFEU, unless one of the parties is **dominant in a relevant market before the transaction**. The 4iG/Vodafone transaction resulted in a four to three merger in the mobile telephony market and many local fixed line telecommunications markets. Yet, these markets were not addressed in the complaint, and no reasons were given for ignoring them. It seems likely that this is because it would have been difficult to argue for an operator's dominance pre-merger when it competed with two or three other serious market players.

In recent years, the European Commission (**EC**) and many EU national antitrust authorities have been keen to expand their toolbox in order to intervene in problematic transactions that fall below merger control notification thresholds. In a recent client alert, we discussed a setback suffered by the EC in a similar effort, concerning the Illumina/GRAIL transaction, reviewed under the EC's revised Article 22 referral policy. After the French Competition Authority's success before the ECJ in the Towercast case (discussed in our March 2023 newsletter), many companies and authorities are eagerly watching how mergers can be challenged as abuses of dominance. The Hungarian case serves as an excellent illustration of the limitations of such an approach.

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