JUDGMENT OF THE COURT (Second Chamber)

16 March 2023 (*)

(Reference for a preliminary ruling – Competition – Control of concentrations between undertakings – Regulation (EC) No 139/2004 – Article 21(1) – Exclusive application of that regulation to operations covered by the concept of 'concentration' – Scope – Concentration operation which has no Community dimension, is below the thresholds for mandatory ex ante control laid down in the law of a Member State and has not been referred to the European Commission – Control of such an operation by the competition authorities of that Member State in the light of Article 102 TFEU – Whether permissible)

In Case C-449/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the cour d'appel de Paris (Court of Appeal, Paris, France), made by decision of 1 July 2021, received at the Court on 21 July 2021, in the proceedings

Towercast SASU

v

Autorité de la concurrence,

Ministre chargé de l'économie,

other parties:

Tivana Topco SA,

Tivana Midco SARL,

TDF Infrastructure Holding SAS,

TDF Infrastructure SAS,

Tivana France Holdings SAS,

THE COURT (Second Chamber),

composed of A. Prechal, President of the Chamber, M.L. Arastey Sahún, F. Biltgen, N. Wahl (Rapporteur) and J. Passer, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure and further to the hearing on 6 July 2022,

after considering the observations submitted on behalf of:

– Towercast SASU, by P. Mèle and D. Théophile, avocats,

– the Autorité de la concurrence, by E. Combe and J. Neto, acting as Agents, and by Y. Anselin, avocat,

– Tivana Midco SARL and Tivana Topco SA, by S. Hamon and M.-C. Rameau, avocates,

– Tivana France Holdings SAS, TDF Infrastructure SAS and TDF Infrastructure Holding SAS, by H. Calvet, Y. Chevalier, A. Helfer, F. Salat-Baroux and Y. Trifounovitch, avocats,

– the French Government, by G. Bain, A.-L. Desjonquères and P. Dodeller, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and by G. Aiello, avvocato dello Stato,

– the Netherlands Government, by M.K. Bulterman, P. Huurnink and C.S. Schillemans, acting as Agents,

– the European Commission, by T. Baumé, P. Berghe and F. Castillo de la Torre, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 October 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 21(1) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1).

2 The request has been made in proceedings between Towercast SASU, on the one hand, and the Autorité de la concurrence (Competition Authority, France) and the ministre chargé de l'économie (Minister for Economic Affairs, France), on the other, concerning a decision rejecting a complaint lodged by Towercast in respect of abuse of a dominant position.

Legal context

European Union law

Regulation (EEC) No 4064/89

3 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1) entered into force on 21 September 1990. Under the sixth to eighth recitals of that regulation:

'Whereas Articles 85 and 86 [of the EEC Treaty], 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;

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 [European Economic] Community and to be the only instrument applicable to such concentrations;

Whereas this Regulation should therefore be based not only on Article 87 [of the EEC Treaty] but, principally, on Article 235 of the [EEC] Treaty, under which the Community may give itself the additional powers of action necessary for the attainment of its objectives, and also with regard to concentrations on the markets for agricultural products listed in Annex II to the [EEC] Treaty'.

4 Article 22 of that regulation provided:

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

2. [EEC Council Regulation No 17 of 6 February 1962: First Regulation implementing Articles 85 and 86 of the [EEC] Treaty (OJ, English Special Edition 1959-1962, p. 87)], [Regulation (EEC) No 1017/68 of the Council of 19 July 1968 applying rules of competition to transport by rail, road and inland waterway (OJ, English Special Edition 1968 (I), p. 302)], [Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the [EEC] Treaty to maritime transport (OJ 1986 L 378, p. 4)] and [Council Regulation (EEC) No 3975/87 of 14 December 1987 laying down the procedure for the application of the rules on competition to undertakings in the air transport sector (OJ 1987 L 374, p. 1)] shall not apply to concentrations as defined in Article 3.

3. If the [European] 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, in so far as the concentration affects trade between Member States, adopt the decisions provided for in Article 8(2), second subparagraph, (3) and (4).

…

5. Pursuant to paragraph 3 the Commission shall take only the measures strictly necessary to maintain or restore effective competition within the territory of the Member State at the request of which it intervenes.

…'

Regulation No 139/2004

5 Without prejudice to the transitional provisions laid down in Article 26(2) thereof, Regulation No 139/2004 repealed and replaced Regulation No 4064/89 with effect from 1 May 2004.

6 Recitals 2, 5 to 9, 20 and 24 of Regulation No 139/2004 state:

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

…

(5) … it should be ensured that the process of reorganisation does not result in lasting damage to competition; Community 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.

(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. [Regulation No 4064/89] has allowed a Community policy to develop in this field. In the light of experience, however, that Regulation should now be recast into legislation designed to meet the challenges of a more integrated market and the future enlargement of the European Union. In accordance with the principles of subsidiarity and of proportionality as set out in Article 5 [EC], this Regulation does not go beyond what is necessary in order to achieve the objective of ensuring that competition in the common market is not distorted, in accordance with the principle of an open market economy with free competition.

(7) Articles 81 and 82 [EC], 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 [EC] Treaty. This Regulation should therefore be based not only on Article 83 [EC] but, principally, on Article 308 [EC], under which the Community may give itself the additional powers of action necessary for

the attainment of its objectives, and also powers of action with regard to concentrations on the markets for agricultural products listed in Annex I to the [EC] Treaty.

(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. Such concentrations should, as a general rule, be reviewed exclusively at Community level, in application of a "one-stop shop" system and in compliance with the principle of subsidiarity. …

(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. …

…

(20) It is expedient to define the concept of concentration in such a manner as to cover operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market. It is therefore appropriate to include, within the scope of this Regulation, all joint ventures performing on a lasting basis all the functions of an autonomous economic entity. It is moreover appropriate to treat as a single concentration transactions that are closely connected in that they are linked by condition or take the form of a series of transactions in securities taking place within a reasonably short period of time.

…

(24) In order to ensure a system of undistorted competition in the common market, in furtherance of a policy conducted in accordance with the principle of an open market economy with free competition, this Regulation must permit effective control of all concentrations from the point of view of their effect on competition in the Community. Accordingly, [Regulation No 4064/89] established the principle that a concentration with a Community dimension which creates or strengthens a dominant position as a result of which effective competition in the common market or in a substantial part of it would be significantly impeded should be declared incompatible with the common market.'

7 Article 1 of Regulation No 139/2004 defines the scope of that regulation in the following terms:

'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:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 5 000 million; and

(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 250 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

3. A concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than EUR 2 500 million;

(b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than EUR 100 million;

(c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of each of at least two of the undertakings concerned is more than EUR 25 million; and

(d) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million,

unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

…'

8 Article 3 of that regulation defines the concept of 'concentration' as follows:

'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.

2. Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking.

3. Control is acquired by persons or undertakings which:

(a) are holders of the rights or entitled to rights under the contracts concerned; or

(b) while not being holders of such rights or entitled to rights under such contracts, have the power to exercise the rights deriving therefrom.

…'

9 Article 21 of that regulation, entitled 'Application of the Regulation and jurisdiction', states:

'1. This Regulation alone shall apply to concentrations as defined in Article 3, and [Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 [EC] (OJ 2003 L 1, p. 1)], [Regulation No 1017/68 of the Council, and Council Regulations No 4056/86 and No 3975/87] 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.

2. Subject to review by the Court …, the Commission shall have sole jurisdiction to take the decisions provided for in this Regulation.

3. No Member State shall apply its national legislation on competition to any concentration that has a Community dimension.

…'

10 Article 22 of Regulation No 139/2004, entitled 'Referral to the Commission', provides, in paragraph 1 thereof:

'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.

Such a request shall be made at most within 15 working days of the date on which the concentration was notified, or if no notification is required, otherwise made known to the Member State concerned.'

Regulation No 1/2003

11 Article 3 of Regulation No 1/2003, entitled 'Relationship between Articles [101] and [102 TFEU] and national competition laws', provides:

'1. … Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article [102 TFEU], they shall also apply Article [102 TFEU].

2. … Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.

3. Without prejudice to general principles and other provisions of [EU] law, paragraphs 1 and 2 do not apply when the competition authorities and the courts of the Member States apply national merger control laws …'

12 The first paragraph of Article 5 of that regulation provides that 'the competition authorities of the Member States shall have the power to apply [Articles 101 and 102 TFEU] in individual cases' and may, for this purpose, take decisions (i) requiring that an infringement be brought to an end; (ii) ordering interim measures; (iii) accepting commitments; and (iv) imposing fines, periodic penalty payments or any other penalty provided for in their national law.

French law

13 Under Article L. 420−2 of the Code de commerce (Commercial Code):

'In the circumstances provided for in Article L. 420-1, the abusive exploitation of a dominant position by an undertaking or by a group of undertakings in the internal market or in a substantial part of it shall be prohibited. Those abuses could consist in particular of a refusal to sell, tied sales or discriminatory sales conditions as well as the termination of an established business relationship on the sole basis that the partner refuses to meet terms of trade that are unjustified.

Moreover, since it is capable of affecting the operation or the structure of competition, the abusive exploitation by an undertaking or by a group of undertakings of the state of economic dependence in which a customer or a supplier finds itself shall be prohibited. Those abuses could consist in particular of a refusal to sell, tied sales, discriminatory practices covered by Articles L. 442-1 to L. 442-3 or exclusive distribution arrangements.'

14 Article L. 490-9 of the Code de commerce states:

'For the purposes of applying Articles [101] to [103 TFEU], the Minister for Economic Affairs and the officials appointed or empowered by him or her in accordance with the provisions of this Book, on the one hand, [and] the Competition Authority, on the other, shall enjoy the powers conferred on them by the articles of this Book and by [Regulation No 139/2004] and [Regulation No 1/2003]. The procedural rules laid down in those texts shall apply to them.'

15 French law also provides for a procedure of mandatory *ex ante* control of concentration operations under the conditions set out in the Code de commerce. Article L. 430-1 of that code defines a concentration and Article L. 430-2 thereof sets the turnover thresholds above which the national control of concentrations is applicable.

16 Article L. 430-9 of the Code de commerce provides, moreover, that 'in the event of the abusive exploitation of a dominant position or of a state of economic dependence, the Competition Authority may, by means of a reasoned decision, require the undertaking or group of undertakings concerned to amend, supplement or terminate, within a specified period, all the agreements and acts by which the concentration of economic power making the abuse possible was implemented, even if such acts have been the subject of the procedure provided for in this Title.'

The dispute in the main proceedings and the question referred for a preliminary ruling

17 On 13 October 2016, Télédiffusion de France (TDF), which provides digital terrestrial television ('DTT') broadcasting services in France, acquired sole control of Itas, a company which is also active in the DTT broadcasting sector, by acquiring all of its shares.

18 The operation of acquiring Itas, which was below the thresholds defined in Article 1 of Regulation No 139/2004 and Article L. 430-2 of the Code de commerce, was not notified or examined under the prior control of concentrations. Moreover, that operation did not give rise to a procedure for referral to the Commission under Article 22 of Regulation No 139/2004.

19 On 15 November 2017, Towercast, a company providing DTT broadcasting services in France, lodged a complaint with the Competition Authority concerning a practice in the terrestrial broadcasting sector. Towercast alleged that the acquiring of control of Itas by TDF, on 13 October 2016, constituted an abuse of a dominant position, inasmuch as that acquisition of control hindered competition on the upstream and downstream wholesale markets for DTT broadcasting by significantly strengthening the dominant position of TDF on those markets.

20 On 25 June 2018, a statement of objections was addressed to TDF infrastructure and TDF infrastructure Holding, as well as Tivana France Holdings, Tivana Midco and Tivana Topco (together, 'Tivana'), in which it was alleged that, 'on 13 October 2016, [they had], as a single undertaking for the purposes of competition law, abused the dominant position held by that single undertaking on the downstream wholesale market for DTT broadcasting services by acquiring sole control of the Itas group' and that that practice was liable to have the effect of preventing, restricting or distorting competition on the downstream wholesale market for DTT broadcasting services, a practice prohibited under Article L.420-2 of the Code de commerce and Article 102 TFEU.

21 By Decision No 20-D-01 of 16 January 2020, the Competition Authority decided that the complaint brought against the companies in the TDF group was not made out and that it was not appropriate to continue with the procedure concerned. That authority performed a different analysis to that conducted by its investigating departments, taking the view, in essence, that the adoption of Regulation No 4064/89 had drawn a clear dividing line between the control of concentrations and the control of anti-competitive practices and that Regulation No 139/2004, which replaced it, applied exclusively to concentrations as defined in Article 3 of that regulation, thereby rendering the application of Article 102 TFEU to a concentration operation devoid of purpose where the undertaking concerned has not engaged in abuse which can be separated from that operation.

22 On 9 March 2020, Towercast brought an action challenging that decision before the referring court.

23 In support of that action, Towercast relies on the judgment of 21 February 1973, *Europemballage and Continental Can* v *Commission* (6/72, EU:C:1973:22), arguing that, by that judgment, the Court held that the Commission could lawfully apply Article 86 of the EEC Treaty (thereafter Article 82 EC, now Article 102 TFEU) to concentrations between undertakings. Towercast takes the view that the principles set out in that judgment are still relevant. It argues that the introduction by Regulations No 4064/89 and No 139/2004 of a prior control of concentrations has not rendered the application of Article 102 TFEU to a concentration which does not have a Community dimension devoid of purpose, and that Regulation No 139/2004 applies exclusively only to concentrations which fall within its scope, that is to say, concentrations with a Community dimension or those which have been referred to the Commission by a national competition authority. It also points to the direct effect of Article 102 TFEU and claims that, in so far as concentration operations below the thresholds are concerned, it is possible to conduct an *ex post* control of compatibility with that article.

24 Before the referring court, the Competition Authority stands by the analysis set out in its decision, in particular as regards the scope of the case-law resulting from the judgment of 21 February 1973, *Europemballage and Continental Can* v *Commission* (6/72, EU:C:1973:22), which, in its view, has become devoid of purpose since the creation of a specific control system applicable to concentration operations. It takes the view that the mechanism thus introduced excludes, in essence, the *ex post* examination applicable to anti-competitive practices. It contends that Article 3 of Regulation No 139/2004 defines concentration operations by reference to substantive criteria, and not by reference to the thresholds defined in Article 1 of that regulation, so that its scope cannot be limited to concentration operations with a Community dimension above those thresholds.

25 The referring court notes that Article 102 TFEU has direct effect and that its application is not conditional on the prior adoption of a procedural regulation. It also observes that recital 7 of Regulation No 139/2004 states that 'Articles [101 and 102 TFEU], while applicable, according to the case-law of the Court …, 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'. Therefore, it questions whether the exclusion provided for in Article 21(1) of Regulation No 139/2004 also applies to concentration operations which have not been subject to any *ex ante* control.

26 The referring court points out that, although the Court of Justice stated, in the judgment of 7 September 2017, *Austria Asphalt* (C−248/16, EU:C:2017:643), that Regulation No 139/2004 alone is applicable to concentrations as defined in Article 3 of that regulation, to which Regulation No 1/2003 does not, in principle, apply, the Court did not give further details regarding the possible exceptions to that principle and did not rule on whether the interpretation given in the judgment of 21 February 1973, *Europemballage and Continental Can* v *Commission* (6/72, EU:C:1973:22), was still capable of applying, in particular, to concentrations below the thresholds for mandatory control, which have neither been analysed in the context of a mandatory *ex ante* control nor been referred to the Commission under Article 22 of Regulation No 139/2004.

27 The referring court considers that there is still therefore some doubt as to the interpretation to be given to those provisions, regarding whether it is indeed impossible, 'in principle', to apply independently the rules on competition which stem from primary law to an operation which, as in the present case, (i) is capable of meeting the definition provided in Article 3 of Regulation No 139/2004; (ii) has not been the subject of any prior control, either on the basis of EU law or on the basis of the national law applicable to concentration operations; and (iii) does not thus give rise, by reason of the fact that such an operation is below the thresholds for *ex ante* control, to any risk of Regulations No 139/2004 and No 1/2003 being applied cumulatively or of any contradictory outcome arising from a double – *ex ante* and *ex post* – analysis.

28 That court also notes that Article 21(1) of Regulation No 139/2004 has been applied differently in different Member States.

29 In those circumstances, the cour d'appel de Paris (Court of Appeal, Paris, France) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 21(1) of [Regulation No 139/2004] to be interpreted as precluding a national competition authority from regarding a concentration which has no Community dimension within the meaning of Article 1 [thereof], 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?'

Consideration of the question referred

30 By its question, the referring court asks whether Article 21(1) of Regulation No 139/2004 is to be interpreted as precluding a national competition authority from regarding a concentration of undertakings which has no Community dimension within the meaning of Article 1 thereof, is below the thresholds for mandatory *ex ante* control laid down in national law, and has not been referred to the Commission under Article 22 of that regulation, as constituting an abuse of a dominant position

prohibited under Article 102 TFEU, in the light of the structure of competition on a market which is national in scope.

31 According to settled case-law, the interpretation of a provision of EU law requires account to be taken not only of its wording, but also of the context in which it occurs, as well as the objectives and purpose pursued by the act of which it forms part. The legislative history of a provision of EU law may also reveal elements that are relevant to its interpretation (judgment of 25 June 2020, *A and Others (Wind turbines at Aalter and Nevele)*, C−24/19, EU:C:2020:503, paragraph 37 and the case-law cited).

32 First of all, as regards the wording of Article 21(1) of Regulation No 139/2004, it is apparent from that wording that that regulation 'alone [is to] apply to concentrations as defined in Article 3' thereof, to which Regulation No 1/2003 is not, in principle, applicable.

33 Article 21(1) of Regulation No 139/2004 is therefore intended to govern the scope of that regulation with regard to the examination of concentration operations in relation to the scope of other pieces of secondary EU legislation concerning competition.

34 By contrast, the examination of the wording of that provision does not answer the question of whether the provisions of primary law, and, in particular, Article 102 TFEU, remain applicable to a concentration of undertakings, within the meaning of Article 3 of Regulation No 139/2004, in particular in a situation, such as the situation at issue in the main proceedings, where the concentration concerned, first, has not met the thresholds for control laid down by EU and national law and, second, has not been referred to the Commission under Article 22 of that regulation, with the result that no *ex ante* control under the law on concentrations has been carried out.

35 Next, as regards the legislative history of Article 21(1) of that regulation, that provision, which reproduces *mutatis mutandis* the substance of Article 22 of Regulation No 4064/89 that was previously applicable, reflects the intention of the EU legislature, alluded to in the seventh recital of Regulation No 4064/89, to specify that the other regulations implementing competition law cease, in principle, to be applicable to all concentrations, that is to say, both to those constituting an abuse of a dominant position and to those which give the undertakings concerned the power to hinder effective competition in the internal market.

36 Lastly, as regards the objectives and general scheme of Regulation No 139/2004, it should be pointed out that, as is stated in recital 5 thereof, that regulation seeks to ensure that corporate reorganisations, particularly in the form of concentrations, do not result in lasting damage to competition. EU law must therefore include provisions governing those concentrations which may significantly impede effective competition in the internal market or in a substantial part of it. The EU legislature intended, in that regard, to make clear that Regulation No 139/2004 is the only procedural instrument applicable to the prior and centralised examination of concentrations which, as is stated in recital 6 thereof, must permit effective control of all concentrations in terms of their effect on the structure of competition (see, to that effect, judgments of 7 September 2017, *Austria Asphalt*, C−248/16, EU:C:2017:643, paragraph 21, and of 31 May 2018, *Ernst & Young*, C−633/16, EU:C:2018:371, paragraph 41).

37 Although that regulation, under the 'one-stop shop' system introduced thereby, is a specific procedural instrument intended to apply exclusively to concentrations of undertakings involving significant structural changes, the impact of which on the market goes beyond the national borders of any one Member State, as is apparent from recital 8 of that regulation, it cannot, however, be inferred from this that the legislature intended to render the control carried out at national level on a concentration operation in the light of Article 102 TFEU devoid of purpose.

38 Thus, it is stated in recital 7 of Regulation No 139/2004 that 'Articles [101 and 102 TFEU], while applicable, … are not sufficient to control all operations which may prove to be incompatible with the system of undistorted competition envisaged in the Treaty'.

39 It is apparent from that last statement that, far from depriving the competent authorities of the Member States of the possibility of applying the Treaty provisions on competition to concentrations, as defined in Article 3 of Regulation No 139/2004, that regulation forms part of a legislative whole intended to implement Articles 101 and 102 TFEU and to establish a system of control ensuring that competition is

not distorted in the internal market of the European Union (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).

40 In addition, it should be borne in mind that, in order to close gaps in the system of protection against distortions of competition which may result from corporate reorganisations, that regulation was adopted on the basis of Article 83 EC (now Article 103 TFEU), which concerns the regulations or directives that may be adopted in order to give effect to the principles set out in Articles 101 and 102 TFEU, and of Article 308 EC (now Article 352 TFEU), under which the Union may give itself the additional powers of action necessary for the attainment of its objectives. Although the functioning and general scheme of the protection afforded by EU law against possible distortions of competition arising from concentration operations support the proposition that, for reasons of legal certainty, the mechanism for the prior control of concentrations as defined in Article 3 of Regulation No 139/2004 must be applied as a matter of priority, that cannot, however, preclude the possibility for a competition authority to capture a concentration operation under Article 102 TFEU under certain conditions.

41 It thus follows from the scheme of Regulation No 139/2004 that, although that regulation introduces an *ex ante* control for concentration operations with a Community dimension, it does not preclude an *ex post* control of concentration operations that do not meet that threshold. While it is true that Article 3 of that regulation sets out a substantive definition of a concentration of undertakings without reference to the thresholds mentioned in that regulation, the regulation must be read in the light of its context, and in particular of Article 1 and recitals 7 and 9 thereof. It follows from this, first, that that regulation applies only to concentrations with a Community dimension and, second, that it is accepted that certain concentrations may both escape an *ex ante* control and be subject to an *ex post* control.

42 The interpretation put forward in the present case by the Competition Authority, Tivana and TDF, as well as by the French and Netherlands Governments, ultimately amounts to ruling out the direct applicability of a provision of primary law by reason of the adoption of a piece of secondary legislation covering certain types of conduct of undertakings on the market.

43 In that regard, it must be borne in mind that, under Article 102 TFEU, any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it is to be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.

44 It is well established that that article is a provision having direct effect and that its application is not conditional on the prior adoption of a procedural regulation. That article creates rights for individuals which national courts must protect (see, to that effect, judgment of 14 March 2019, *Skanska Industrial Solutions and Others*, C−724/17, EU:C:2019:204, paragraph 24 and the case-law cited).

45 In that connection, it is also important to clarify that no exemption may be granted, in any manner whatsoever, in respect of abuse of a dominant position; such abuse is simply prohibited by the Treaty. It is for the competent national authorities or the Commission, as the case may be, to act on that prohibition within the limits of their powers (judgment of 11 April 1989, *Saeed Flugreisen and Silver Line Reisebüro*, 66/86, EU:C:1989:140, paragraph 32).

46 The Court has held that the list of practices and types of conduct contained in Article 102 TFEU is not exhaustive, so that the list of abusive practices contained in that provision does not exhaust the methods of abusing a dominant position prohibited by EU law (see, to that effect, judgments of 21 February 1973, *Europemballage and Continental Can* v *Commission*, 6/72, EU:C:1973:22, paragraph 26, and of 17 February 2011, *TeliaSonera Sverige*, C−52/09, EU:C:2011:83, paragraph 26).

47 As has been stated by the Commission, the inapplicability of Regulation No 1/2003, and in particular of Article 5 thereof, which concerns the power of the competition authorities of the Member States to apply Articles 101 and 102 TFEU to the concentration operations defined in Article 3 of Regulation No 139/2004, cannot result in national competition authorities being prohibited from applying Article 102 TFEU to concentrations.

48 Notwithstanding the principle, set out in Article 21(1) thereof, that Regulation No 139/2004 is the only regulation applicable to concentration operations, it is the procedural law of the Member States that is applicable to concentrations with a non-Community dimension.

49 It is true that the application, in the judgment of 21 February 1973, *Europemballage and Continental Can* v *Commission* (6/72, EU:C:1973:22), of Article 86 of the EEC Treaty (thereafter Article 82 EC, now Article 102 TFEU) in the specific context of concentration operations was used and perceived as a means of overcoming the absence in the EEC Treaty of any express provision for the control of those operations. That said, with the entry into force of autonomous provisions on the control of concentrations, as now laid down in Regulation No 139/2004, recourse to the procedural rules relating to the implementation of Articles 81 and 82 EC (now Articles 101 and 102 TFEU), set out initially by Regulation No 17 and subsequently by Regulation No 1/2003, has become devoid of purpose.

50 Thus, Regulation No 139/2004 cannot preclude a concentration operation with a non-Community dimension, such as the operation at issue in the main proceedings, from being subject to a control by the national competition authorities and by the national courts, on the basis of the direct effect of Article 102 TFEU, having recourse to their own procedural rules.

51 The prohibition laid down in Article 102 TFEU 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 the national authorities and courts.

52 It follows that a concentration operation which does not meet the respective thresholds for prior control laid down by Regulation No 139/2004 and by the applicable national law may be subject to Article 102 TFEU where the conditions laid down in that article for establishing the existence of an abuse of a dominant position are satisfied. In particular, it is for the authority in question 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. In that regard, 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 (see, to that effect, judgments of 21 February 1973, *Europemballage and Continental Can* v *Commission*, 6/72, EU:C:1973:22, paragraph 26, and of 16 March 2000, *Compagnie maritime belge transports and Others* v *Commission*, C−395/96 P and C−396/96 P, EU:C:2000:132, paragraph 113).

53 In the light of all the foregoing considerations, the answer to the question referred is that Article 21(1) of Regulation No 139/2004 must be interpreted as not precluding the competition authority of a Member State from regarding a concentration of undertakings which has no Community dimension within the meaning of Article 1 thereof, is below the thresholds for mandatory *ex ante* control laid down in national law, and has not been referred to the Commission under Article 22 of that regulation, as constituting an abuse of a dominant position prohibited under Article 102 TFEU, in the light of the structure of competition on a market which is national in scope.

Limitation of the temporal effects of the present judgment

54 In their written and oral observations, TDF and Tivana have requested that the Court limit the temporal effects of the present judgment in the event of a finding, by the Court, that an operation which does not exceed the thresholds for the control of concentrations and which is not referred to the Commission on the basis of Article 22 of Regulation No 139/2004 may be analysed in the light of Article 102 TFEU.

55 In support of their request, TDF and Tivana argue, in essence, that such a judgment would have serious consequences in terms of legal certainty not only for TDF and Tivana, but also for all undertakings which have in good faith carried out concentration operations below the thresholds, which would now be challengeable before the national authorities or courts on the basis of Article 102 TFEU.

56 It should be recalled in this connection that, according to settled case-law, the interpretation which, in the exercise of the jurisdiction conferred upon it by Article 267 TFEU, the Court gives to a rule of EU

law clarifies and defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the date of its entry into force. It follows that the rule as thus interpreted may and must be applied by the courts to legal relationships arising and established before the delivery of the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing before the courts having jurisdiction an action relating to the application of that rule are satisfied (judgment of 24 November 2020, *Openbaar Ministerie (Forgery of documents)*, C−510/19, EU:C:2020:953, paragraph 73 and the case-law cited).

57 It is only quite exceptionally that the Court may, in application of the general principle of legal certainty inherent in the EU legal order, be moved to restrict the opportunity, open to any person concerned, 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 can be imposed: those concerned must have acted in good faith and there must be a risk of serious difficulties (judgment of 24 November 2020, *Openbaar Ministerie (Forgery of documents)*, C−510/19, EU:C:2020:953, paragraph 74 and the case-law cited).

58 In the present case, as regards, in the first place, the criterion that those concerned must have acted in good faith, it must be held that the interpretation of EU law given by the Court in the present judgment is a continuation of the well-established case-law of the Court of Justice and of the General Court on the direct effect of Article 102 TFEU and its associated consequences. TDF and Tivana cannot reasonably argue that they could have expected the concentration operation at issue in the main proceedings not to be examined in the light of Article 102 TFEU by reason of objective, significant uncertainty regarding the legal scope of that article of the FEU Treaty.

59 In the second place, it should be pointed out that neither the request for a preliminary ruling nor the observations submitted to the Court contain evidence capable of proving that the interpretation given by the Court in the present judgment would entail a risk of serious difficulties, since there is no precise indication as to the number of legal relationships which might be affected by that interpretation.

60 Furthermore, the interpretation of EU law given by the Court in the present judgment concerns the question whether a national competition authority may examine in the light of Article 102 TFEU a concentration operation which has no Community dimension within the meaning of Article 1 of Regulation No 139/2004, is below the thresholds for mandatory *ex ante* control laid down in national law, and has not been referred to the Commission under Article 22 of that regulation. Such an interpretation does not necessarily imply that such an operation would be under threat of being challenged, thereby infringing the right to property and entailing considerable financial consequences.

61 Accordingly, the existence of a risk of serious difficulties such as to justify limiting the temporal effects of the present judgment cannot be regarded as established either.

62 In those circumstances, the temporal effects of the present judgment should not be limited.

Costs

63 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 21(1) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings

must be interpreted as not precluding the competition authority of a Member State from regarding a concentration of undertakings which has no Community dimension within the meaning of Article 1 thereof, is below the thresholds for mandatory *ex ante* control 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 under Article 102 TFEU, in the light of the structure of competition on a market which is national in scope.

[Signatures]

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* Language of the case: French.