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General Court Strikes Blow to EU Commission in Mobile Telecoms Merger

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In May 2016, the European Commission ("Commission") blocked CK Hutchison's ("Hutchison") £10.25 billion acquisition of Telefónica UK ("O2").[1] The Commission had previously cleared a series of "4-to-3" telecoms mergers across Europe, subject to increasingly far-reaching remedies.[2] Specific features of the UK mobile telecoms market led the Commission to reject the remedies offered by Hutchison and issue its prohibition decision. The transaction collapsed but Hutchison appealed the decision.

On 28 May 2020, the General Court comprehensively overturned the Commission's decision.[3] The ruling represents a highly significant loss for the Commission led by Executive Vice President *Margrethe Vestager*, under whose leadership the Commission has adopted on average one prohibition decision per year in the last six years, with a peak of three in 2019.[4] In parallel, the Commission has increasingly come under political pressure from major Member States to relax its approach.

Unless overturned by the European Court of Justice, the judgment is set to become a seminal case in European merger control. For the first time since the EU Merger Regulation's ("EUMR") revision in 2004, the Court has interpreted the substantive criteria for establishing a "significant impediment to effective competition" ("SIEC") in cases which do not lead to single firm

dominance, or to coordinated effects in oligopolistic markets.[5] The judgment is the *Airtours*[6] equivalent for unilateral effects "gap" cases and gives guidance on the standard of proof needed to establish an SIEC.

The Commission's 2016 prohibition

The acquisition by Hutchison would have created a new market leader in the UK, combining Three and O2, ahead of the two other mobile network operators (Vodafone and BT's EE). It would also have combined two companies that each were a party to one of the only two network sharing agreements in the UK (EE and Three, on the one hand, and Vodafone and O2, on the other).

More specifically, the Commission found that:[7]

- The merger would have eliminated competition between two strong players in the UK mobile market, leading to higher prices and reduced choice and quality of service for consumers. According to the Commission, Hutchison's Three, the latest (but not recent) UK market entrant, was an important driver of competition. Together with O2, the number 2 in the market by revenues and subscribers,[8] the merged entity would have been the market leader in the UK mobile market with a share of more than 40%.
- Future development of the UK mobile network infrastructure would have been hampered (e.g. with regard to the roll-out of 5G technology), the quality of service for consumers reduced and competitors weakened given that the merged entity would have been part of both network sharing agreements.
- The transaction would have reduced the number of mobile network operators willing to host mobile virtual network operators and left them in a weaker negotiating position to obtain favourable wholesale access terms.

The Commission rejected Hutchison's proposed largely behavioural remedies including opening up the combined network infrastructure to new rivals, divesting part of O2's stake in Tesco Mobile, freezing prices in the wholesale market, and investing heavily in the combined network.[9]

The General Court's main findings

The General Court's ruling addresses the standard of proof for establishing an SIEC under Article 2(3) EUMR where a merger does not lead to a dominant position or coordinated effects in oligopolistic markets. The judgment mandates that the Commission must produce sufficient evidence to demonstrate with "a *strong probability*" the existence of an SIEC in these circumstances.[10] The evidentiary standard is stricter than "*more likely than not*", although does not require proof that an SIEC will arise "*beyond all reasonable doubt*".[11]

In reference to recital 25 of the EUMR the Court lays down two conditions for non-coordinated effects to result in an SIEC:[12]

1. the elimination of important competitive constraints that the merging parties had exerted upon each other; and
2. a reduction of competitive pressure on the remaining competitors.

The Court also states that Article 2(3) EUMR should be interpreted as allowing a prohibition of a merger in oligopolistic markets if the merger would be liable to affect competitive conditions to an

"*extent equivalent*" to the effect of dominance,[13] thereby applying a strict standard.

According to the Court, the Commission failed to provide convincing evidence to establish an SIEC in the Hutchison decision:

"*(…) the Commission did not at any point specify in the contested decision whether the non-coordinated effects identified would be 'significant' or would result in the present case in a significant impediment to effective competition (…)*"[14]

Instead, the Commission applied a lower "significance" standard that would allow it to block any merger in an oligopolistic market, thereby illegally overreaching its discretion:

"*The approach taken by the Commission in the contested decision amounts in practice to* ***confusing three concepts****, namely the concept of a '****significant impediment to effective competition****', which is the legal criterion referred to in Article 2(3) of Regulation No 139/2004, the concept of '****elimination of [an] important competitive [constraint]****', referred to in recital 25 of that regulation, and the concept of elimination of an '****important competitive force****', used in the contested decision and based on the Guidelines. By confusing those concepts, the Commission* ***considerably broadens the scope of Article 2(3) of Regulation No 139/2004****, since any elimination of an important competitive force would amount to the elimination of an important competitive constraint which, in turn, would justify a finding of a significant impediment to effective competition.*"[15] (*emphasis added*)

Below we discuss in more detail various key aspects of the judgment, namely:

- the concept of an important competitive force ("ICF")
- closeness of competition
- economic analysis
- network sharing agreements
- wholesale market

Important competitive force

The Court is particularly critical of the Commission's classification of Three as an ICF or "*important competitive force*", arguably one of the central pillars of the Hutchison decision.

The Commission argued that it is sufficient for an ICF to "*contribute, substantially and consistently, to the competitive process (…) based on parameters such as price, quality, choice and innovation*" and that there is no need to be a maverick in the market.[16] The General Court disagrees: in the Court's view, such interpretation "*distorts*" the ICF concept and lowers the standard of proof for establishing an SIEC by introducing an alternative concept to the "*important competitive constraint*" concept set out in the EUMR.[17] Rather, the Court follows Hutchison in that an ICF "*must stand out from its competitors in terms of its impact on competition in that it plays a unique role (…) to exert disproportionately strong constraints on other players (…) indispensable for the preservation of effective competition.*"[18]

Closeness of competition

The Court also criticises the Commission for merely establishing that the four UK mobile network operators, and not only Three and O2, competed closely.[19]

According to the Court, it is not sufficient to establish an SIEC by showing that the merging parties were "*relatively close competitors*" in some of the segments of the market;[20] instead, the parties need to be "*particularly close competitors*" in order to eliminate important competitive constraints between them. In particular, the Court criticises the enforcer's survey work to establish diversion ratios because it was carried out on a sample of only approximately 100 users (compared with the 200,000 observations reported by Hutchison), which also turned out to be inconsistent with the results of the Commission's own quantitative analysis.[21]

Economic analysis

Throughout the judgment, the Court is harsh on the Commission's economic analysis: it concludes that the Commission's upward pricing pressure model ("UPP") which sought to simulate the impact of the merger on prices "*lack[ed] probative value, since the Commission has not demonstrated with a sufficient degree of probability that prices would increase 'significantly' following the elimination of the important competitive constraints which the parties to the concentration exerted upon each other.*"[22]

The Court also finds that mergers in concentrated markets almost automatically lead to short-term price increases due to a loss of competition between the merging parties. Similarly, mergers will lead to efficiencies, for instance the elimination of duplicative structures and integration of production and distribution processes. Such standard efficiencies should be taken into account by the Commission in its quantitative analysis (and it is not for the parties to prove the existence of this type of efficiencies). By failing to do so, the Commission "*confuse[d]*" two types of efficiencies, namely those efficiencies within the meaning of the Horizontal Merger Guidelines[23] and those specific to the concentration.

Network sharing agreements

The Court concludes that the Commission failed to show that the effects of the transaction on the two UK network sharing agreements (EE/Three and Vodafone/O2) and the UK mobile network infrastructure would negatively affect quality of service to consumers and constitute an SIEC.

The Commission had argued that with the merged entity being party to both network sharing agreements the alignment of interests with at least one of its network sharing partners would have been disrupted as the merged entity would not have had an interest to maintain two networks long term. A reduced commitment of the merged entity to invest would have probably increased costs for maintaining and improving the network, leading to fewer industry-wide investments in network infrastructure, a deterioration of quality of services offered and, if higher costs were passed on to consumers, a weakening of competitors.[24]

The Court however finds that the Commission did not meet the standard of proof to show that any merger related effects on the network sharing agreements would have led to an SIEC.[25] Instead the Commission made "*improbable assumptions concerning the absence of any reaction*" by competitors which would "*simply cease to invest*" in case of reduced network investments by the merged entity.[26] The Court finds the "*chain of cause and effect is especially weak*" in the Hutchison decision.[27] Also, a loosening of ties with in the network sharing agreements (or even a termination of those agreements by the merged entity) could, according to the Court, potentially encourage greater infrastructure competition in the UK mobile communications market.[28] Even if the Commission had shown harm to competitors, this would not constitute an SIEC.[29]

Wholesale market

With respect to the wholesale market, the Court finds that the Commission did not provide convincing evidence that Three was an ICF (in particular as it had not shown that Three "stood out" from other participants in the wholesale market and its market share was small with 0-5%).[30] Even if it had done so, this would not necessarily imply that the combination would eliminate important competitive constraints between Three and O2 leading to an SIEC.[31]

Implications for EU merger policy

The *CK Telecoms* judgment has been handed down at a time of increased protectionism around the globe, leading to heightened regulatory scrutiny of foreign investment. It also follows significant push back from several EU Member States (most notably France and Germany)[32] following the Commission's prohibition of *Siemens/Alstom*, which would have combined Europe's two main producers of high-speed trains, in 2019.[33] The Commission's prohibition decision also stands in contrast to the Department of Justice's and US courts' conditional blessing of "4-to-3" *T-Mobile/Sprint*.[34]

The judgment is significant as it provides guidance on the legal standards and concepts to be applied for establishing SIEC and limits the discretion of the Commission. The language used by the Court is at times remarkably harsh. Executive Vice President *Vestager* has announced that DG COMP is "*urgently analysing the judgment*" and is yet to decide whether to appeal the judgment as it raises "*a lot of new legal issues*". Although it seems likely that the Commission will appeal the ruling, the General Court's judgment will require the Commission to tread more carefully in its review of "4-to-3" mergers in the telecoms but also in other sectors. Given the strict legal standards established by the Court, the judgment will likely herald even closer scrutiny and longer review times for mergers in oligopolistic markets. This will be an additional burden for merging parties. However, the judgment will also require the Commission to think twice before blocking deals or making them conditional on far-reaching remedies undermining the merger's efficiencies. It should also facilitate further consolidation in the European telecommunications sector (and other concentrated industries) and ease the level of intervention for "5-to-4s" where competition effects should arguably be less pronounced than in "4-to-3" cases.

In these times of crisis, it can be expected that many businesses will look to consolidation and synergies as a survival mechanism. This judgment is timely for such businesses and their antitrust counsel as it may just facilitate the passage of some transactions which might otherwise have failed the Commission's merger review.

[1] *See* Case COMP/M.7612 – *Hutchison 3G UK/Telefonica UK*, https://ec.europa.eu/competition/mergers/cases/decisions/m7612_6555_3.pdf.

[2] *See*, e.g. Case COMP/M.6497, *Hutchison 3G Austria/Orange Austria*, https://ec.europa.eu/competition/mergers/cases/decisions/m6497_20121212_20600_3210969_EN.pdf); Case COMP/M.6992, *Hutchison 3G UK/Telefonica Ireland*, https://ec.europa.eu/competition/mergers/cases/decisions/m6992_20140528_20600_4004267_EN.pdf; Case COMP/M.7018, *Telefonica Deutschland/E-Plus*,

https://ec.europa.eu/competition/mergers/cases/decisions/m7018_6053_3.pdf); Case COMP/M.7758, *Hutchison 3G Italy/Wind/JV*, https://ec.europa.eu/competition/mergers/cases/decisions/m7758_2937_3.pdf. It is worth noting that the planned TeliaSonera/Telenor JV for Denmark was abandoned as the proposed remedies were seen as insufficient to address the Commission's concerns. Also, following the Hutchison prohibition decision, the Commission cleared the T-Mobile / Tele 2 merger unconditionally, s*ee* Case COMP/M.8792 – *T-Mobile NL/Tele2 NL*, https://ec.europa.eu/competition/mergers/cases/decisions/m8792_3403_11.pdf.).

[3] Case T?399/16, *CK Telecoms UK Investments Ltd v European Commission*, http://curia.europa.eu/juris/document/document.jsf?text=&docid=226867&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1811793.

[4] *See* Cases COMP/M.8677, *Siemens/Alstom*, https://ec.europa.eu/competition/mergers/cases/decisions/m8677_9376_3.pdf; COMP/M.8900, *Wieland/Aurubis Rolled Products/Schermetall* (Commission Press Release IP/19/883, 6 February 2019, https://ec.europa.eu/commission/presscorner/detail/en/IP_19_883; COMP/M.8713), *Tata Steel/ThyssenKrupp/JV* (Commission Press Release IP/19/2948, 11 June 2019, https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2948).

[5] Another more recent Commission merger prohibition (*UPS/TNT*) that was successfully appealed before the European Courts was annulled on procedural grounds (rights of defence violation). *See* Case C?265/17, *European Commission v United Parcel Service, Inc.*, http://curia.europa.eu/juris/document/document.jsf?text=&docid=209848&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=4556572.

[6] Case T-342/99, *Airtours plc v Commission*, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61999TJ0342&from=EN.

[7] *See* Case COMP/M.7612 – *Hutchison 3G UK/Telefonica UK*, https://ec.europa.eu/competition/mergers/cases/decisions/m7612_6555_3.pdf.

[8] This assumes that O2's share in the Tesco Mobile JV is counted in.

[9] *See id.*, recitals 2875, 3149-3152.

[10] *See* Case T?399/16, *CK Telecoms UK Investments Ltd v European Commission*, paras 109, 118.

[11] *Id.*, para. 118.

[12] *Id.*, para. 96.

[13] *Id.*, para. 90.

[14] *Id.*, para. 289.

[15] *Id.*, para. 173.

[16] *Id.*, para. 167.

[17] Id., para. 172.

[18] *Id.*, paras. 168 et seq., 174.

[19] *Id.*, para. 242.

[20] Id., para. 249.

[21] *See id.*, paras. 243-247.

[22] *Id.*, para. 282.

[23] Section VII, paras. 76 et seq.

[24] *Id.*, paras. 296, 367, 371.

[25] *Id.*, para. 345.

[26] *Id.*, para. 372.

[27] *Id.*, para. 376.

[28] *Id.*, para. 346.

[29] *Id.*, para. 344.

[30] *Id.*, para. 452.

[31] *Id.*, para. 453.

[32] *See* https://www.bmwi.de/Redaktion/EN/Pressemitteilungen/2019/20190219-altmaier-and-le-maire-adpot-joint-franco-german-manifesto-on-industrial-policy.html; *See* also the German-French-Polish manifesto: https://www.bmwi.de/Redaktion/DE/Downloads/M-O/modernising-eu-competition-policy.pdf?__blob=publicationFile&v=4.

[33] *See* European Commission, Mergers: Commission prohibits Siemens' proposed acquisition of Alstom, Commission Press Release IP/19/881, 6 February 2019, https://ec.europa.eu/commission/presscorner/detail/en/IP_19_881.

[34] *See, e.g.*, Department of Justice, Office of Public Affairs, Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish, Justice News, 26 July 2019, https://www.justice.gov/opa/pr/justice-department-settles-t-mobile-and-sprint-their-proposed-merger-requiring-package

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