

Kluwer Competition Law Blog

ECJ Advocate General Recommends Setting Aside the CK Telecoms Judgment and Endorsing the European Commission's Established Approach to Reviewing Mergers in Oligopolistic Markets

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Advocate General Kokott has found [1] that the General Court erred in law in requiring the European Commission to show anti-competitive effects of a merger with “*strong probability*” and that the scope of its judicial review was overly broad, notably in relation to economic evidence.

Key takeaways

- This case will give the Court of Justice (ECJ) an opportunity to rule, for the first time, on the concept of “significant impediment to effective competition” (SIEC), as that concept applies to non-coordinated horizontal effects in an oligopolistic market.
- The ECJ follows Advocate General (“AG”) Kokott’s opinions in 85 per cent of cases. So the ECJ is expected to confirm that the standard of proof that the Commission must meet to challenge a merger is a “balance of probabilities” test, as opposed to the General Court’s “strong probability” test. According to AG Kokott, the “strong probability” test set by the General Court in *CK Telecoms* is too strict. In the light of various “conceivable” market scenarios, the Commission may prohibit a merger if it is “more likely than not” anti-competitive. The same standard of proof should apply regardless of whether the merger results in the creation or strengthening of a dominant position, whether it is challenged based on unilateral effects in an oligopolistic market, or if the Commission advances a theory that is complex or uncertain.
- AG Kokott agreed with the Commission on all other key criticism of the General Court’s findings that led to the annulment of the Commission’s merger veto. AG Kokott criticises the General Court for setting too high a bar for the Commission to challenge a merger below the dominance threshold. The opinion suggests that the ECJ should endorse the Commission’s approach to reviewing mobile mergers (but also other mergers in oligopolistic markets). According to AG Kokott, contrary to the General Court’s findings, merging parties do not have to be “particularly close” competitors for the Commission to infer anti-competitive effects, even if all competitors in the market are relatively close. Similarly, while the term “important” competitive force implies that the company’s impact on competition should be substantial (beyond what is suggested by market shares or similar measures), contrary to the General Court’s

position, it should not apply only to companies “competing particularly aggressively in terms of prices” or “mavericks”. Even so, neither “closeness” nor being “an important competitive force” are sufficient in and of themselves to challenge a merger: the Commission must assess the impact of the merger based on all relevant factors and evidence.

- Overall, AG Kokott’s reasoning is an expression of strong judicial self-restraint: AG Kokott’s point of departure is that the EU Courts’ role is limited to verifying that the facts were accurately stated and that the Commission made no manifest error of assessment. A mere error of assessment is not enough to overturn the Commission. According to AG Kokott, the General Court cannot substitute its own assessment with that of the Commission, meaning that the Commission should have substantially more leeway than what the General Court proposed in *CK Telecom* in reviewing mergers in oligopolistic markets. That said, AG Kokott appears to acknowledge that the EU Courts must diligently review the evidence on which the Commission based its assessment and could require that novel or uncertain theories of harm are sufficiently backed up by evidence on the Commission’s file.

The merger prohibition

In 2016, the Commission prohibited the proposed acquisition by Hutchison 3G UK (“Three”) of Telefónica UK (“O2”). The transaction would have reduced the number of Mobile Network Operators (MNOs) on the UK market from four to three.

The merged entity would have become the new leader on the retail market (with a share of more than 40 per cent) and its various sub-segments, including, in particular, the key private post-paid segment. As in other four-to-three mergers, the main theory of harm was based on the non-coordinated effects in the mobile retail market. There was no finding of single firm dominance or of coordinated effects. Since mobile mergers will rarely lead to the creation of a dominant position, they are the archetypal “gap cases” that the SIEC test introduced in 2004 was supposed to catch. The Commission challenged the merger asserting that the parties were close (but not each other’s closest) competitors and that Three was an “important competitive force” and therefore, the merger eliminated the competitive constraints that the parties exercised on each other and the remaining market participants, which would lead to an SIEC in the UK mobile retail market.

The Commission also asserted that a situation where the merged entity would participate in two different network-sharing agreements could hurt its network-sharing partners — Vodafone and EE — and therefore impact competition on network quality and innovation. Finally, the Commission alleged that the transaction would lead to non-coordinated effects on the wholesale mobile market (i.e. the market relating to the provision of network access services to mobile virtual network operators (“MVNOs”). The Commission blocked the merger following failed remedies negotiations.

Hutchison appealed the Commission’s decision, which led to the *CK Telecoms* General Court (GC) judgment.

The CK Telecoms GC judgment

In a landmark judgment in 2020, the GC annulled the EC’s prohibition decision in its entirety.

The GC ruled that the Commission had essentially disregarded the standard of proof applicable to the review of transactions giving rise to non-coordinated effects on an oligopolistic market (so-called “gap cases”, which allow the Commission to prohibit mergers on account of non-coordinated or unilateral horizontal effects where the merged entity does not have a dominant position). The GC stated that in such cases, the Commission “is required to produce sufficient evidence to demonstrate with a **“strong probability”** the existence of significant impediments following the concentration”.

The GC also found that novel theories of harm (such as the theory of harm developed by the Commission in relation to the network sharing agreement) should be subject to a higher standard of proof. In that regard, the GC reasoned: “the more prospective the analysis is and the chains of cause and effect dimly discernible, uncertain and difficult to establish, the more demanding the EU judicature must be in terms of the specific examination of the evidence produced by the Commission”.

The General Court further criticised the Commission’s “toolbox” for assessing mergers in oligopolistic markets. The Court held that the Commission can classify a merging party as an “important competitive force” only if it “stands out” from its competitors in terms of impact on competition. It also said that in a market where all competitors are close, the Commission must show that the parties are “particularly close” if it wants to use that as evidence that the merger would result in a SIEC.

The Commission appealed the GC’s judgment before the ECJ.

AG Kokott’s opinion

AG Kokott recommended the GC’s judgment be set aside in its entirety and referred back to the GC for it to provide a “fresh ruling”.

Standard of proof

AG Kokott considered that the GC erred in law by requiring the production of sufficient evidence to show with a **“strong probability”** a SIEC. According to AG Kokott, it suffices that the Commission provides **“evidence of the ‘most likely’ outcome or ‘plausibility’ of its prospective analysis”**. This line of reasoning echoes the recent *ThyssenKrupp* judgment,[2] in which the General Court diverged from the *CK Telecoms* ruling, holding that it suffices that the Commission shows **“with a sufficient degree of probability, [...] that the transaction significantly impedes effective competition in the internal market.”** See our previous post on this judgment [here](#).

The Opinion makes the following observations on the concept of a SIEC and the standard of proof.

1. The requirement to show the ‘most likely’ outcome or plausibility of the Commission’s prospective economic analysis corresponds to the **‘balance of probabilities’ test**. [3] The envisaged market developments need not be **‘very probable’** or **‘particularly likely’** or established **‘beyond reasonable doubt’** (in accordance with the particularly high standard applicable in criminal or quasi-criminal matters), (para 56 of the Opinion).
2. There is no justification for requiring a higher standard of proof in the case of concentrations giving rise to non-coordinated effects in oligopolistic markets than in the case of concentrations

giving rise to ‘conglomerate’ or ‘collective’ type dominant positions (para 59). This is because of:

- The unitary nature of the concept of a SIEC irrespective of the type of concentration. The Commission must establish a SIEC, irrespective of whether or not that impediment results from the creation or strengthening of a dominant position (para 49).
- The symmetry of the standard of proof. The EU Merger Regulation does not impose different standards of proof with respect to decisions authorising a concentration and decisions prohibiting a concentration (para 55).

The same test applies also if the Commission advances a theory that is complex or uncertain or stems from a cause-and-effect relationship which is difficult to establish (para 60). Still, with respect to such theories, AG Kokott notes that EU Courts may assess the evidence brought before them to support the plausibility of the various consequences that such a concentration may have and to identify the outcome most likely to arise on that basis (para 61).

Accordingly, the Commission must adduce convincing and cogent evidence in support of such theories for the pertinent standard of proof to be met. Indeed, AG Kokott does not give the Commission *carte blanche* systematically to prohibit horizontal mergers in oligopolistic markets. The Commission is obliged to “investigate and assess a large number of factors and a great deal of evidence which may give rise to a finding of the existence” of a SIEC (para 64).

Judicial review

AG Kokott suggested that there should be limited scope for judicial review over the application of the concept of a SIEC in a gap case. She made the following points:

- The Commission has a margin of discretion over economic matters for the purposes of applying the EU Merger Regulation. Therefore, the review by the EU Courts of a Commission merger decision is confined to ascertaining that the facts have been accurately stated and that there has been no **manifest** error of assessment (para 51).
- The AG commented that the General Court in its judgment had departed in a number of places from the concept of ‘manifest error of assessment’ and held that mere ‘errors of assessment’ had been made. Yet the AG was constrained from examining this issue further, as the Commission did not directly challenge this approach in its appeal, and thus, it could not be further examined in this case.

Here again, the application of the manifest error standard echoes the judgments of the GC in *ThyssenKrupp* (see our previous entry on this judgment [here](#)).

Important competitive force

AG Kokott confirms that the General Court imposed excessive requirements for classifying a company as an ‘important competitive force’ (para 106). In that regard, the Opinion embraces the approach adopted by the Commission in the UK case in 2016 and in all other mobile mergers. While AG Kokott confirms that the General Court was competent to review the concept of an

“important competitive force”, it finds that the General Court’s interpretation of this concept is wrong in view of the following considerations:

- The Horizontal Guidelines do not presuppose that a company must stand out from its competitors in terms of its impact on competition or be ‘competing particularly aggressively in terms of prices’, forcing those competitors to align with its prices to be classified as an ‘important competitive force’. It suffices that such a company has more of an influence on the competitive process than its market share or similar measures would suggest (para 108).
- The fact that the Commission, in the past, considered that certain companies played a unique role as ‘mavericks in the market’ does not imply that the concept of ‘important competitive force’ is limited to those situations (para 109).
- Contrary to what the General Court ruled, there is no justification for interpreting the concept of ‘important competitive force’ restrictively. According to AG Kokott, such an interpretation could risk underestimating the competitive forces present within an already concentrated oligopolistic market from the outset. While the term ‘important’ implies that the company’s competitive behaviour on the market should be substantial (beyond what is suggested by market shares or similar measures), it does not require that company to be ‘competing particularly aggressively in terms of prices’ (para 110).

In line with the Commission’s position, however, the AG found that the loss of an important competitive force is in itself insufficient to establish a SIEC. It is only one of the multiple criteria considered (para 98).

Closeness of competition

AG Kokott considered that the General Court erred in law in holding that the Commission’s analysis of the closeness of competition was flawed (para 125). In particular, she **rejects the General Court’s finding that competitors must be “particularly close”** as unfounded for the following reasons:

- There can be “different degrees of closeness of competition” based on the Horizontal Guidelines, but *“it does not follow that [...] the relevant degree of proximity must [...] be that of “particularly close competitors”* (para 121). AG Kokott notes that the requirement of being “particularly close” neither follows from the Horizontal Guidelines (para 121), nor is it supported by EU Merger Regulation or the concept of a “significant impediment to effective competition” (para 123). Instead, AG Kokott argues that the General Court’s requirement of “particularly close” is “based on the excessive standard of proof” imposed on the Commission, i.e. a consequence of “the General Court’s failure to apply the standard of proof required” (para 123).
- The criterion of closeness of competition is just one of multiple factors which must be considered when assessing whether a transaction gives rise to a SIEC. It follows that lack of closeness or “particular closeness” is not a valid ground to conclude that there is no “*evidence of the existence of such an impediment [SIEC]*” (para 122).

AG Kokott, therefore, appears to take the view that, as long as the competitive relationship of the parties to a concentration can be characterised as somewhere on the sliding scale of “closeness” (regardless of just close or particularly close), closeness is relevant evidence in establishing the existence of a SIEC.

In that regard, AG Kokott’s Opinion echoes the Commission’s claim in *Wieland/Aurubis* (see our previous alert on this judgment [here](#)) where the Commission argued that it suffices to establish that the parties were ‘close competitors’ (rather than ‘closest’), and in which the General Court concluded that the Commission’s assessment establishing the parties were close competitors was “legally sufficient”. [4]

To be sure, however, the AG Kokott Opinion confirms that closeness alone is insufficient to find a SIEC (and, presumably, relative closeness should contribute less to the finding of a SIEC than a higher degree of closeness).

Economic models

AG Kokott considered that the General Court erred in law when requiring the Commission to include ‘standard efficiencies’ [5] in its UPP analysis (para 150-158), calling the General Court’s approach “*rather innovative*”, “*encroaching on its discretion in managing competition policy and merger control*” and lacking legal bases (paras 151 and 153). She observed the following:

- The General Court’s category of ‘standard efficiencies’ is not recognised by Regulation No. 139/2004, Regulation (EC) No. 802/2004 or Horizontal Guidelines. The General Court failed to indicate the legal bases for recognising the relevance of such ‘standard efficiencies’ and the Commission’s requirement to take them into consideration outside the applicable regulatory framework (para 153).
- There is no convincing reason to recognise a duty for the Commission to include the General Court’s ‘standard efficiencies’ in its assessment of the existence of a SIEC outside the regulatory framework applicable to merger control. At most, it is the Commission’s task when exercising its discretion in this area, to discover whether it is necessary to carry out such an analysis of its own initiative (para 155). In AG Kokott’s view, as “*EU law currently stands*”, such a duty can be neither found in EU Merger Regulation, Annex I to Regulation No. 802/2004 nor the Horizontal Guidelines (paras 155 and 156).

The AG appears to recognise, however, the potential shortcomings of the UPP model that always results in a price increase, noting that it should be in itself insufficient to show a SIEC, which has to be demonstrated on the basis of “*a body of evidence and factors, viewed as a whole*” (para 163).

Conclusions

In light of the broader policy trends and the recent judgments of the General Court in the *ThyssenKrupp* case mentioned above, AG Kokott’s suggestions on the standard of proof are not surprising.

AG Kokott suggests that the ECJ should effectively confirm the Commission’s standard toolbox for assessing mobile mergers, and more broadly, mergers in oligopolistic markets. This does not mean that the Commission would have a green light to challenge any four-to-three mobile merger. It only means that the Commission would continue to apply its current approach, which involves assessing each case on its merits based on its individual circumstances. As AG Kokott herself stresses, the Commission must substantiate its case with “*sufficiently significant and persuasive*

evidence” taking into account all relevant circumstances of the case (para 59). The Commission has repeatedly stated that there is “*no magic number*”. Indeed, after issuing a prohibition decision against the UK four-to-three merger subject to the appeal in *CK Telecoms* case, the Commission cleared unconditionally a four-to-three mobile merger in the Netherlands. [6]

The Opinion does little to address the criticism that the Commission’s analysis of mobile mergers lacks any limiting principles. In particular, as the issue was not before her, the AG did not address the point that the concepts of closeness and important competitive force were primarily introduced to address the effects of mergers in differentiated product markets (where market shares do not properly reflect the competitive dynamics, and the loss of rivalry between the merging parties) and may need to be applied differently in the context of homogeneous product markets. So whatever the ECJ finally decides, the debate on the precise contours of so-called “gap cases” that has been raging for 18 years since the introduction of the SIEC test has many more years yet to run.

[1] *European Commission v. CK Telecoms UK Investments Ltd*, Case C-376/20 P, Opinion of Advocate General Kokott, October 20, 2022.

[2] *Thyssenkrupp AG v Commission*, Case T-584/19, judgment of 22 June 2022.

[3] Described in AG Kokott’s opinion in *Bertelsmann and Sony Corporation of America v Impala*, judgment of 10 July 2008.

[4] *Wieland-Werke AG v Commission*, Case T-251/19, judgment of 18 May 2022, Para. 130

[5] These standard efficiencies correspond to the category of ‘default’ efficiencies that some economists recommend recognising in the model to counterbalance the fact that the UPP analysis assumes no efficiencies and always results in a price increase. Opinion, Para. 152.

[6] See Case M.8792 – T-Mobile NL/Tele2 NL (2018).

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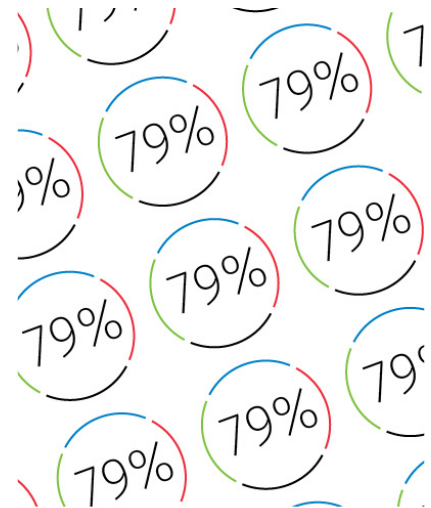
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