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THE EU COURT OF JUSTICE'S *CK TELECOMS* JUDGMENT: RESTORING THE COMMISSION'S WIDE DISCRETION TO PROHIBIT MERGERS IN CONCENTRATED MARKETS

The recent *CK Telecoms* ruling of the Court of Justice of the EU (**CJEU**) has overturned a previous judgment of the General Court (**GC**), which had sought to create stricter and more structured tests for the European Commission (**Commission**) to meet before prohibiting certain mergers in concentrated markets under the EU Merger Regulation (**EUMR**).

In particular, the CJEU held that the GC had applied a standard of proof for the Commission's decision that was too high, an overly restrictive interpretation of certain key concepts that formed the basis of the prohibition, and an approach that unlawfully required certain merger efficiencies to be assumed by the Commission. In doing so, the CJEU's judgment has largely restored the Commission's wide discretion in the assessment of mergers in concentrated markets (*e.g.,* 4-to-3 mergers) that do not create a dominant market player.

Key takeaways

- The ruling will make it easier for the Commission to prohibit mergers in concentrated markets that do not create a dominant position, or to require remedies as a condition of clearance.
- The Commission only has to show anticompetitive harm on balance of probabilities (not a strong probability) to prohibit a merger.
- The legal test for prohibiting mergers that do not create dominance is the same as for those that do. There are no additional criteria to be met.
- It is relevant that the merging parties are close competitors, even if not particularly close, and even if others are closer.
- A predicted price increase may be considered significant enough to take into account, even if it is less than in other recent cases in the sector.
- The Commission cannot presume that mergers give rise to certain 'standard' efficiencies in its quantitative analyses.

BACKGROUND

In 2016, the Commission prohibited the proposed merger between UK telecoms mobile network operators (**MNOs**), O2 – the second largest of the four MNOs in the UK – and Three, the smallest of the four. While the merger would have created a market leader with a share of more than 40%, the Commission's case was not that the merged entity would have a dominant position. Rather, it was that the elimination of an important competitor in a concentrated, oligopolistic market would result in a significant impediment to effective competition (**SIEC**) even in the absence of a dominant position.

CK Telecoms, the parent company of Three, appealed that decision to the GC, which in 2020 overturned the Commission's decision. The Commission, in turn, appealed that judgment to the CJEU. The GC's May 2020 ruling, and the grounds on which it was overturned by the CJEU's July 2023 judgment, are discussed below.

THE CJEU'S JUDGMENT

The Commission raised various grounds of appeal, the most important of which concerned the following issues.

What is the standard of proof in EU merger control?

The CJEU upheld the Commission's claim that, by requiring the Commission to demonstrate with a "*strong probability*" the existence of an SIEC following a merger, the GC had applied an unlawfully high standard of proof. The CJEU found that the Commission only needs to demonstrate a merger is "*more likely than not*" to result in a substantial impediment to effective competition based on a standard balance of probabilities.

In particular, the CJEU pointed out that the parallel obligations imposed on the Commission to declare mergers as either compatible or incompatible with the internal market are "*symmetrical*", such that the requisite standard of proof cannot vary according to the type of decision.

The CJEU also disagreed with the GC's conclusion that "*the more prospective the Commission's analysis… the more the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a* [prohibition] *decision… is important*". While EU case law has made clear that the complexity of a theory of harm put forward by the Commission must be taken into account when assessing the most likely outcomes of a merger, the CJEU stated that such complexity does not, of itself, alter the standard of proof that the Commission has to meet in its merger decisions. Similarly, while the forward-looking nature of the Commission's economic assessments means that the Commission must conduct those assessments "*with great care*", that does not impose a requirement for the Commission to meet a particularly high standard of proof. It is therefore sufficient for the Commission to identify the most likely outcome resulting from a merger based on a "*sufficiently cogent and consistent body of evidence*".

What is the test for prohibiting transactions that do not create or strengthen a dominant position?

As noted above, the case involved a merger in an oligopolistic market that would not have created or strengthened a dominant position but which, in the Commission's view, would nonetheless have resulted in an SIEC. The GC had held that, when assessing such a merger, the Commission could only find an SIEC if two cumulative conditions are fulfilled: firstly, that the merger would eliminate important competitive constraints that the merging parties had exerted upon each other and, secondly, that it would lead to a reduction of competitive pressure on the remaining competitors.

The CJEU agreed with the Commission that the GC's test would have the effect of preventing the Commission from prohibiting some mergers that would have resulted in an SIEC, such as those that lead to a reduction of the competitive pressure exerted by the remaining competitors on the merged entity (in the absence of a reduction on competitive pressure in the other direction). That, said the CJEU, would be incompatible with the objective of the EUMR, which is to ensure effective and undistorted competition in the internal market. The CJEU therefore overturned the GC's judgment on this point and held that it is enough for the Commission to show that the merger significantly reduces effective competition in the market.

When can the Commission find that a merging party is an "important competitive force" and that the parties are "close competitors"?

Two key factors in the Commission's prohibition decision were its findings that Three was an "important competitive force" in the UK mobile telecoms market that would have been eliminated by the merger and that Three and O2 were "close" competitors. The GC disagreed with these findings, but the CJEU held that, when doing so, the GC had interpreted those concepts too restrictively.

Important competitive force

Contrary to the GC's ruling, the CJEU found that a company does not need to "*compete particularly aggressively in terms of prices*", to still be able to alter the competitive dynamic to a significant and detrimental extent and be classified as an "important competitive force". The CJEU noted that price is not the only important parameter for assessing competitive dynamics generally, but also particularly in markets in which quality and innovation could play a key role. To classify an undertaking as an "important competitive force", the CJEU held that it is sufficient, as set out in the Commission's Horizontal Merger Guidelines, that the undertaking has more of an influence on the competitive process than its market share or similar measures would suggest.

Closeness of competition

The CJEU found that the GC has also erred in law by requiring the Commission to demonstrate that the parties to the merger are not just close competitors, but "*particularly*" close competitors. It rejected the implication that in a differentiated product market there must be a "*very high*" level of substitutability between the parties' products, because a merger could still create incentives to increase prices even if such substitutability is not particularly high, but is higher than that between the parties' products and those of third party competitors. It noted that (as stated in the Horizontal Merger Guidelines) high pre-merger margins may also make significant post-merger price increases more likely, despite also indicating that the parties to the relevant merger may be neither the closest competitors nor particularly close competitors.

Finally, the CJEU held that the GC had been wrong to find that the Commission's prohibition decision relied solely on the closeness of competition between Three and O2. On the contrary, the Commission had considered multiple factors, also listed in the Horizontal Merger Guidelines, to assess whether the merger gave rise to an SIEC.

When is a predicted price increase significant enough to justify prohibition?

The Commission had carried out quantitative economic analysis which predicted that the merger could result in a price increase, the magnitude of which is redacted in both the decision and the subsequent court judgments. The GC had held that the predicted price increase was insignificant on the basis that it was lower than the 6.6% and 9.5% price increases that were identified in two previous transactions that had been conditionally approved in the German and Irish telecoms markets. However, the CJEU made clear that the Commission's prior decisional practice is not a legal framework for merger control (even though it is indicative). In any event, the CJEU considered that those two decisions could be distinguished from the present case, as (unlike

the present case) the Commission had accepted commitments to remove its competitive concerns. It also held that the GC had committed a procedural error by failing to acknowledge that the Commission had asserted that its predicted price increase was in fact higher than that which formed the basis of the GC's assessment.

Unfortunately, the CJEU did not rule on whether any of the predicted price increases did actually pass the threshold for significance, or indeed where that threshold lies.

Should the Commission assume that mergers give rise to certain 'standard' efficiencies in its quantitative analyses?

The GC had ruled that, in its economic assessment of the proposed merger, the Commission ought to have included certain "*standard efficiencies*" in its quantitative analysis without the merging parties having to prove the existence and degree of such efficiencies. Such efficiencies stem from the "*rationalisation and integration of production and distribution processes by the merged entity*" and could, depending on the circumstances, lead the merged entity to lower its prices. The CJEU rejected this approach as an error of law, stating that it has no basis in the relevant legislation or guidelines and that there is no general presumption that mergers always give rise to such efficiencies. Consequently, it is for the merging parties to prove the existence and extent of all such efficiencies. As noted by Advocate General Kokott in her opinion in this case, this can be contrasted with the "*rule of reason*" recognised in US competition law, which (if applicable) would have required the Commission to weigh all the pro-competitive and anti-competitive effects resulting from a particular transaction of its own accord.

KEY TAKEAWAYS

CK Telecoms' main grievance was that the Commission's approach to assessing its merger relied on tests that would almost inevitably be met for any merger in a concentrated, oligopolistic market, even though it is recognised that such mergers do not necessarily harm competition. For instance, it will typically be the case that all competitors in an oligopolistic market are "close" competitors on the Commission's definition and it is not difficult for the Commission to find some metric by which to find that a party is a more "important competitive force" than its market share might indicate. This is combined with the use of quantitative "upward pricing pressure" analyses (which always identify at least some degree of predicted price increase from a merger), a murky test for determining whether such price increases are sufficiently significant and an approach that assesses a range of factors in the round without precisely identifying the relative importance of any of them. CK Hutchison's concern – which is shared by many commentators – is that this effectively gives the Commission an arbitrary "carte blanche" to prohibit any merger in an oligopolistic market, including those that are not likely to harm competition.

The GC had sought to address these concerns by developing more precise and structured tests for the assessment of such mergers; a framework that would have allowed for more effective judicial scrutiny of the Commission's decisions in this area. By reversing the GC's findings in relation to several core concepts, such as the requisite standard of proof, the existence of an "important competitive force" and "closeness of competition", and the extent of

the Commission's wide discretion in merger review cases, the CJEU has comprehensively demolished that framework.

The CJEU's judgment indicates that merger control review in oligopolistic markets need not differ from that in relation to mergers that create or strengthen a dominant position. However, assessing whether a merger gives rise to an SIEC remains a question of fact and degree. Consequently, it will remain open to well-advised parties to develop the arguments and evidence to secure clearance for such mergers, in appropriate cases. But it will also be harder, as a result of the CJEU's ruling, to hold the Commission to a rigorous standard for assessing those arguments and evidence, and to challenge any decision by the Commission to reject them.

The CJEU has remitted the case back to the GC, which has jurisdiction to (re)consider the facts of the case. It remains to be seen whether, in light of the CJEU's judgment, the GC's assessment of the facts and evidence will lead to a different conclusion. However, there is a good chance that it will, given how extensively the GC's earlier judgment was criticised by the CJEU.

The judgment is likely to have direct implications for merger review in the telecoms sector across the EU, since the Commission has sought to review telecoms mergers notwithstanding the national scope of these markets generally and despite requests for referral from national competition authorities. On the one hand, the Commission and national competition authorities will be pressed to ensure customers are protected in relation to key services on price and quality. However, the wave of consolidation in the telecommunications sector points to the need for further investment to sustain innovation and key technological changes, including 4G to 5G technology development, semiconductor advances, ORAN, and network optimisation, among others. A careful balancing act will therefore need to be carried out by competition authorities.

While the CJEU's judgment may have some influence, it will have no direct bearing on the UK telecoms market that was the subject of the decision at issue – and, in particular, on the anticipated merger of Vodafone/Three (Hutchison) in the UK – because that market no longer falls within the jurisdiction of the Commission following the UK's departure from the EU. Instead, that transaction will be reviewed by the UK's Competition and Markets Authority and will also be reviewed on national security grounds by the UK government under the National Security and Investment Act 2021.

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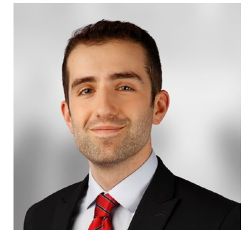

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