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European Court of Justice Strengthens the European Commission's Hand in Merger Control

Client Alert | August 2, 2023

In a recent landmark judgment, the EU's Court of Justice (the Court) has sided with the European Commission (the Commission) on how the EU merger control rules should be interpreted and applied.

In a 2020 judgment, the lower EU General Court (GC) had faulted the Commission for an incomplete analysis and annulled the 2016 prohibition of the combination of mobile network operators Three and O2.[1] *The 2020 GC judgment was widely seen as significantly raising the standard for when the Commission could challenge a merger.*

The Court's 2023 judgment now definitively establishes a number of key principles, and strengthens the Commission's hand in its assessment of mergers in the EU. It has legitimized the Commission's prior approach and underlined the margin of discretion afforded to the Commission in carrying out its assessment in certain respects. Continued vigorous merger control enforcement by the Commission can therefore be expected in the coming years.

I. Background

The revised EU Merger Regulation which entered into force in 2004 introduced an additional ground on which the Commission might take issue with mergers. As from 2004, the Commission was not only able to find that a merger created or strengthened a dominant position as had previously been the case, but could also (or alternatively) find that it would lead to a 'significant impediment of effective competition' (SIEC) in the EU internal market even without a finding of dominance. This additional ground was introduced to capture so-called "gap" cases.[2] The most prominent such "*gap*" cases in the years that followed related to the mobile telecommunications market. In a number of these cases, which generally involved the reduction of the number of mobile network operators in a given market from four to three, the Commission found that the proposed merger would lead to a SIEC through the removal of an important competitive constraint, without any finding of dominance.[3]

The Commission's prohibition of the proposed merger between Three and O2 in 2016 was one such case. In its prohibition decision, the Commission found that the combination of Three and O2 would have created a new market leader in the UK mobile market and that, through the removal of an important competitor and with only two remaining mobile network operators able to challenge the merged company, the merger would have significantly reduced competition in the UK market.

The GC annulled this decision in full in 2020 following an appeal by CK Telecoms, the parent company of Three. The GC held that the Commission had failed to prove all three of its theories of harm to the requisite legal standard of "*strong probability*". In particular, the GC held that: (1) the classification of a party as an "*important competitive force*" does not relieve the Commission from a full-fledged analysis of the elimination of important

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competitive constraints; (2) the merging parties were not "*particularly*" close competitors; and (3) "*standard*" efficiencies were not taken into account by the Commission in its quantitative price assessment. The judgment was widely viewed as significantly raising the requirements on the Commission to prove that a transaction should be prohibited.

II. The Court's Judgment

The *Three/O2* case was the first "gap" case since the entry into force of the revised Merger Regulation which had reached the Court. The judgment of the Court was therefore highly anticipated.

The Court,[4] annulled the judgment of the GC in full and referred the case back to it. In doing so, it established a number of important principles that the GC was required to apply in its review of the case, but which also apply more generally to the Commission's review of mergers.

The Standard of Review is "More Likely Than Not" for All Cases

While the GC effectively raised the standard of proof required for the Commission to show a SIEC to the existence of "*a strong probability*",[5] the Court made clear that the relevant standard of review is a "*balance of probabilities*" – irrespective of the type of merger or complexity of the theory of harm. Therefore, in order to prohibit a transaction, it is sufficient for the Commission to demonstrate, "*by means of a sufficiently cogent and consistent body of evidence that it is more likely than not*"**[6]** that the transaction leads to a SIEC. According to the Court, a higher burden of proof would be untenable given the forward-looking nature of the Commission's assessment in its *ex ante* control of concentrations.[7]

The Commission Has a Certain Margin of Discretion

The Court sided with the Commission in giving it a certain margin of discretion in its interpretation of the legal framework for its substantive SIEC analysis – in particular with regard to economic matters. The judgment went on to highlight the forward-looking nature of the Commission's assessment in *ex ante* merger control and implied that, as such, a very high burden of proof could reduce the effectiveness of the EU merger control regime. The Court nevertheless emphasized that the EU Courts should not refrain entirely from reviewing the Commission's interpretation of EU law concepts when it comes to matters of economic analysis – and as such the Commission's margin of discretion should not be unfettered.[8] While this does not mean that the EU Courts need to conduct their own economic analysis to verify the Commission's findings, they must ascertain "*whether the evidence relied on is factually accurate, reliable and consistent*", as well as whether this evidence contains all the necessary information and whether "*it is capable of substantiating the conclusions drawn from it*".[9] To this end, the Court recalled that in the past EU Courts have interpreted concepts such as 'dominant position' or 'relevant market', and the concepts of 'important competitive force' and 'close competitors' are in a similar category.[10]

No Special Test for SIEC in Oligopolistic Markets

As regards the assessment of a SIEC in oligopolistic markets, the Court rejected the GC's finding that the two conditions set out in recital 25 of the Merger Regulation must be fulfilled, namely: (1) the elimination of an important competitive constraint that the merging parties had exerted upon each other; and (2) a reduction of competitive pressure on remaining competitors. According to the Court, either prong is sufficient. A different interpretation would mean that the finding of a likely unilateral price increase following a merger would not in itself be sufficient to challenge a transaction.[11]

Specifically, the Commission had relied primarily on the concepts of "*important competitive force*" and "*close competitors*" to demonstrate a SIEC in the prohibition decision. For the GC, this was not enough. It found that in such a concentrated market, the Commission

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had to establish "*particularly*" close competition and find a stronger impact on pricing by Three rather than to call it an "*important competitive force*" based on what the GC considered to be a cursory reference to evidence and circumstances.[12]

The Court disagreed with the GC and emphasized that there are different ways the Commission could have demonstrated a SIEC in this case. As regards the definition of an 'important competitive force', the judgment made reference to the Commission's Horizontal Merger Guidelines and specified that on a given oligopolistic market, a number of companies could be classified as an important competitive force.[13] The Court also rejected the exclusively price-focused approach of the GC, noting that such an assessment would be incomplete, in particular in markets where quality and innovation play a role.[14] The judgment also disagreed that only a merger between "*particularly close competitors*" could lead to a SIEC in the case at hand – it outlined that even where substitutability between the merging parties' products is not particularly high, a lower level of substitutability between those parties' products and those of the non-merging parties may lead to higher incentives to increase prices, and also that high pre-merger margins may suggest possible price increases as a result of the merger.[15]

No Such Thing as "Standard" Efficiencies

One of the more controversial elements of the GC judgment was its finding that, given that most mergers lead to efficiencies, the Commission must take "*standard*" efficiencies into account in its quantitative assessments.[16] The Court disagreed in strong terms, noting that no EU Regulations or Guidelines refer to a category of "*standard*" efficiencies.[17] According to the Court, while it is true that certain mergers may give rise to efficiencies, it is for the merging parties to demonstrate them. Reversing the burden of proof with regard to efficiencies would reduce the effectiveness of merger control.[18]

III. Implications of the Judgment

The judgment has strengthened the Commission's hand in its assessment of mergers in a number of significant respects. First, it has clarified that all mergers, regardless of the pursued theory of harm or markets in which they occur, are subject to the "*more likely than not"* standard, which is more favorable to the Commission. Second, it has confirmed that the Commission enjoys a degree of flexibility in relation to the finding of a SIEC, and that the requirements to demonstrate a SIEC are not as high as the GC had previously identified. Finally, it has rowed back on the GC's finding that all mergers are presumed to generate some efficiencies and has put the onus back on the merging parties to demonstrate that there are any such efficiencies. As a result, we can expect the Commission to be emboldened and continue to vigorously enforce merger control in the coming years.

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[1] Case M.7612 — *Hutchison 3G UK/Telefónica UK* [2016].

[2] "Gap" cases are transactions in oligopolistic markets in which non-coordinated effects arise without the creation or strengthening of a dominant position.

[3] Between 2012 and 2014, under Commissioner Almunia, the Commission approved three four-to-three mergers subject to remedies, and hence where competition issues had been identified: Case M.6497, *H3G/Orange Austria* [2012], Case M.6992 *H3G/Telefonica Ireland* [2014], and Case M.7018 *Telefonica Deutschland/E-Plus* [2014]. Under Commissioner Vestager, the Commission blocked four-to-three mergers in Denmark and the UK (Case M.7419 *TeliaSonera/Telenor/JV* [2015] (withdrawn) and Case M.7612 *H3G UK/Telefónica UK* [2016]), and cleared a four-to-three merger in Italy, subject to divestment and entry of a new mobile operator on the market (Case M.7758 *H3G Italy/Wind/JV* [2016]). Currently pending: Case M.10896 *Orange/Masmovil/JV*.

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[4] The Court sat in its Grand Chamber, which occurs in particularly complex or important cases.

[5] Case T-399/16, *CK Telecoms UK v Commission*, ECLI:EU:T:2020:217, para. 118.

[6] Case C-376/20 P, *Commission v CK Telecoms UK*, ECLI:EU:C:2023:561, para. 87.

[7] *Ibid*., para. 86.

[8] *Ibid.*, para. 126.

[9] *Ibid.,* para. 125.

[10] *Ibid.*, para. 127.

[11] *Ibid*., para. 112.

[12] Case T-399/16, *CK Telecoms UK v Commission*, ECLI:EU:T:2020:217, para. 249 and 288.

[13] Case C-376/20 P, *Commission v CK Telecoms UK*, ECLI:EU:C:2023:561, para. 163.

[14] *Ibid*., para. 165.

[15] *Ibid*., para. 190.

[16] *Ibid*., para. 279.

[17] *Ibid.*, para. 241.

[18] *Ibid*., para. 244.

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