GIBSON DUNN

May 28, 2020

GENERAL COURT DISMANTLES EUROPEAN COMMISSION'S TOUGH APPROACH TO MOBILE MERGERS

General Court Judgment of 28 May 2020 - Case T-399/16, *Case CK Telecoms UK Investments Ltd. v. Commission*

To Our Clients and Friends:

The General Court earlier today called into serious question the tough approach taken by the European Commission (the 'Commission') in its review of mergers in the mobile communications sector. In doing so, the General Court has subjected the Commission's analysis to an unprecedented level of scrutiny on a range of important substantive issues, rather than seeking to catch out the Commission on more procedural technicalities.

As noted by the General Court itself, this was the first time it had been called upon to rule on the conditions for the application of the EU Merger Regulation to a merger in an oligopolistic market which did not involve the creation or strengthening of an individual or collective dominant position, but giving rise to so-called "non-coordinated effects".[1] Since its initial 2006 Decision in *T-Mobile Austria/Tele-ring*,[2] the Commission has focused on a series of "gap" cases[3] in mobile communications markets, rather than on traditional theories of harm based on unilateral effects.

The overturning of a Commission merger veto Decision is rare,[4] and it is even more rare for a General Court Ruling to annul a Commission Decision in such a comprehensive manner.

The Decision

The appeal arose in relation to the Commission's 2016 Decision[5] to block the proposed acquisition by UK mobile network operator ('MNO') *Three* of *O2*, thereby limiting the number of MNOs on the UK market from 4 to 3. The acquisition would have created the UK's largest MNO, with a market share of 40%. In the eyes of the Commission, the loss of a fourth MNO in the circumstances was incompatible with the Common Market. It was generally understood at the time that the Commission's Decision was fully endorsed by the UK authorities, which had earlier requested that the merger be reviewed by them under the 'referral' powers available under the *EU Merger Regulation*.[6]

The key findings of the Commission's Decision were that the proposed transaction would result in the following:

1. A lessening of competition due to the removal of an important competitor, leaving only two other MNOs (namely, Vodafone and Everything Everywhere, or 'EE') to compete against the merged

entity. This would have lowered existing incentives on the merged entity to compete, in turn leading to higher prices and reduced quality and choice for consumers.

2. The hampering of mobile network infrastructure investment in the UK, primarily because the merged entity would have been participating with two other sets of infrastructure sharing agreements with the other MNOs on the market. The level of market transparency gained by participation in such agreements was likely to lead to less competition in the roll-out of next generation (5G) technology.

3. A reduction in the number of MNOs that would be willing to host mobile virtual network operators ("MVNOs") through wholesale access relationships, thereby weakening the negotiating position of MVNOs to obtain favourable access terms from MNOs.

With a view to overcoming the Commission's competition concerns reflected in its three theories of harm, the notifying parties submitted a series of proposed behavioural commitments to the Commission concerning the grant of MVNO access and access to its network sharing relationships. These commitments were rejected by the Commission because they were too complex to implement and to monitor effectively, and because they would have been commercially unattractive to MVNOs.

Grounds of the Appeal

The appeal before the General Court was based on a number of grounds, including the Commission's alleged errors of assessment when concluding that the merging parties were "close competitors" and when concluding that *Three* was an "important competitive force" in the mobile wholesale access market. In addition, it was argued that the Commission had misunderstood important aspects of *Three's* network capacity capabilities relative to its competitors.

It was also argued that the Commission had misunderstood the workings of the UK mobile market when concluding that the MNOs were likely to align their market behaviour post-merger. Finally, it was alleged that the Commission had erred in concluding that the commitments offered by the notifying parties were not capable of sustaining effective competitors in the marketplace.

The Judgment

In what might be seen to be a landmark Judgment, the General Court annulled the Commission's Decision in its entirety, concluding that the Commission had failed to substantiate its three separate theories of harm laid out in its Decision. According to the General Court, the Commission had failed to satisfy the requisite legal standard regarding the negative effects of the proposed merger on prices and quality, the competitive impediments raised by the network sharing agreements, and the concerns about wholesale access bargaining.

More specifically, the Court subjected each of the Commission's theories of harm to forensic analysis. Thus, in connection with the first theory of harm, the Court was not convinced that a relatively low degree of product differentiation was likely to eliminate competitive constraints being exercised in the mobile retail market. Moreover, the Commission's quantitative analysis had little probative value, as it

fell far short of proving how "significant" the upward pressure on retail prices would be. To add insult to injury, the Court felt that the Commission had wrongly conflated the ideas of "significant impediment to effective competition", "elimination of an important competitive constraint" and "elimination of an important competitive force". In doing so, it rendered its decision-making on the first theory of harm fatally flawed.

As regards the second theory of harm, the Court expressed its surprise at the "novelty" of that theory, insofar as the Court found it difficult to comprehend how the Commission could draw a causal link between potential increases in fixed and incremental costs with a tendency of MNOs to engage in fewer network investments, deteriorate quality or lower competitive pressure. Moreover, in asserting that new levels of transparency between operators would induce aligned behaviour, the Commission had failed to conduct a sufficiently dynamic analysis of current and emerging competitive conditions. Most importantly, the Commission had failed to give due weight to the fact that, at some time post-merger, the merging parties would be operating only one network, which would by definition weaken any tendency towards greater transparency in the market.

Finally, the Court also dismissed the Commission's third theory of harm. According to the Court, the Commission had over-emphasised the extent to which the competitive dynamic might change as a result of 4 access options being diminished to 3. Moreover, the Commission had over-estimated the relative importance of *Three* in the wholesale market, where it accounted for only a relatively small market share. As such, its disappearance as a wholesale access option was unlikely to change the competing environment in any significant way post-merger.

The views of the General Court will no doubt make unpleasant reading for the Commission, yet it is difficult to find fault with the approach adopted by the Court. Given the number of methodological errors made by the Commission, it would be wrong to conclude that the General Court has gone beyond its review mandate and superimposed its views for those of the Commission on matters of complex economic assessment. There now seems to be a clear current of thinking in the General Court that the Commission is under a significant responsibility to explain it's sometimes complex economic analyses. This is most obvious when it comes to likely competitive effects, but has also recently been seen in relation to other issues like fine calculations.

Likely Aftermath

It is undeniable that the Commission has suffered a significant blow to its tough policy on "gap" mergers in the mobile communications sector. The mobile industry will no doubt be heartened that the General Court has dealt a blow to that policy, as the industry continues to explore the possibilities of consolidation in the face of tough margins and competition from "over the top" providers of communications services. The mobile industry will be particularly pleased by the fact that the General Court has, on a number of occasions in its Judgment, pointed out that there is no competitive magic associated with the existence of 4 mobile operators in any given national market. Despite numerous denials to the contrary by Commission spokespeople,[7] the overwhelming feeling has been for some time that the Commission has operated under the mantra that the existence of 4 mobile operators in each Member State is the preferred market structure that will deliver optimal competitive outcomes. The industry will also be well

disposed to the views expressed by the Court about the motivations on the industry to invest as an outcome of consolidation, rather than using consolidation to engage in less ambitious expansion plans. In this sense, it must also provide a spur to the industry that its members now have the prospect of achieving scale at a pan-European level on the cusp of next generation 5G investments being made that will provide the bedrock for Europe's digital transformation in the age of the "Internet of Things".[8]

Having said all that, a 4-to-3 mobile deal will still pose great challenges for the notifying parties. With one notable exception,[9] the Court has focused fundamentally on the faulty methodology relied upon by the Commission, rather than on the analytical basis of the theories of harm adopted by it.[10] Moreover, the Court has not needed to take a view on the Commission's tough line on remedies, as this question was rendered moot in the circumstances. Armed with the ability to extract comprehensive commitments from the notifying parties to a merger, it is arguable that the Ruling of the Court has merely clipped the Commission's wings, rather than having dealt it a bodyblow. The next merger in the mobile sector may therefore be a tough test case in the wake of the Court's Ruling, as the Commission re-assesses its position and the depths of its fact-finding.

Finally, the net beneficiaries of this Judgment are likely to be the parties negotiating the proposed *Virgin Media/O2* deal, which will be facing merger review bodies across the Channel bearing deep scar tissue from their recent mauling before the General Court in the *Three/O2* Case.[11]

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[1] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, pp. 5-18, paragraphs 24-38.

[2] Case No. COMP/M.3916.

[3] In complex oligopoly situations, theories of harm are developed to address theories of harm in the analytical "gap" that exists between unilateral effects and coordinated effects theories.

[4] Since the adoption of the EU Merger Regulation in January 2004, the Commission has blocked only twelve mergers following a "Phase II" investigation on the basis of Article 8(3) of the Regulation. Among these, eight appeals were brought before the General Court, and three are still pending.

[5] Case No. COMP/M.7612.

[6] Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentration between undertakings, OJ L 24, 29.1.2004, pp. 1-22, Article 9(2)(a).

[7] *See,* for example, most recently, Olivier Guersent's statement according to which Telecoms mergers that leave just three players do not face a pre-cooked veto from Brussels (April 2020), available at: https://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1182698&siteid=190&rdir=1.

[8] The Internet of things ("IoT") is a system of interrelated computing devices that are provided with unique identifiers and the ability to transfer data over a network without requiring human-to-human or human-to-computer interaction.

[9] Namely, the Commission's conclusion that low levels of investments would be the necessary by-product of network sharing agreements.

[10] Even as regards the application of the third theory of harm, there is nothing to suggest that the Commission's views about the likely negative impact on bargaining power for mobile network access agreements would not have been upheld had *Three* enjoyed a more significant wholesale market share.

[11] https://www.theguardian.com/business/2020/may/07/virgin-media-and-o2-owners-confirm-31bn-mega-merger-in-uk.

Gibson Dunn's lawyers are available to assist with any questions you may have regarding these developments. For additional information, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Antitrust and Competition Practice Group, or the following authors in Brussels:

Peter Alexiadis (+32 2 554 7200, palexiadis@gibsondunn.com)
David Wood (+32 2 554 7210, dwood@gibsondunn.com)
Iseult Derème (+32 2 554 72 29, idereme@gibsondunn.com)