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CK Telecoms - ECJ restores status quo for standard of proof in EU merger control cases

On 13 July 2023, the European Court of Justice ("**ECJ**") handed down its judgment in Case C-376/20 P *Commission v CK Telecoms UK Investments* regarding the legal standard and burden of proof in so-called "gap cases". These are cases in which a transaction – typically involving smaller players in a concentrated market – does not result in the merged entity holding a dominant position, but where the Commission nevertheless concludes that the transaction would result in a significant impediment to effective competition ("**SIEC**"). Until the *CK Telecoms* case, it was unclear what legal test the Commission should apply to assess cases that produced such "unilateral effects" but did not result in dominance.

In the *CK Telecoms* ruling, the ECJ reversed the stricter legal tests articulated by the General Court and laid out a blueprint for the assessment of gap cases going forward. Specifically, the ECJ held that:

- the Commission need only demonstrate by a simple balance of probabilities that a transaction will "*more likely than not*" result in a SIEC (rather than show a "*strong probability*" that the transaction would lead to a SIEC);
- the Commission need only demonstrate that the transaction will eliminate an important competitive constraint on the parties or that it will reduce competitive pressure on the remaining competitors to show a SIEC in gap cases (i.e., it does not need to show both);
- the concept of an "*important competitive force*" should be defined according to the Horizontal Merger Guidelines as firms having "*more of an influence on the competitive process than their market shares or similar measures would suggest*" (rather than the stricter two-pronged definition imposed by the General Court);
- in an oligopolistic market, it is sufficient that the Commission show that the transaction parties are "*close*" (and not "*particularly close*") competitors to support a finding that the transaction could result in non-coordinated anticompetitive effects; and
- the Commission is not required to take so-called "standard efficiencies" into account in its analysis.

BACKGROUND

On 28 May 2020, the General Court annulled the Commission's 11 May 2016 decision prohibiting the acquisition by Hutchinson 3G UK (now CK Telecoms UK Investments Ltd) of Telefónica UK. The proposed deal would have constituted a "4-to-3" merger in the mobile telephony retail market. It would have resulted in the merged entity holding roughly between 30 and 40% of the retail market, allowing it to become the main player on that market, ahead of its two remaining competitors. In blocking the deal, the Commission concluded that, although the deal would neither strengthen nor reinforce a dominant position, it would nevertheless give rise to a SIEC. Specifically, it would produce "non-coordinated effects" (i.e., where the merged entity is able to unilaterally exercise market power) by reducing competitive pressure in an already concentrated market.

On appeal, the General Court annulled the Commission's decision in its entirety. It concluded that the Commission had incorrectly determined the burden of proof that must be met to demonstrate a SIEC and misinterpreted how the SIEC test should be applied to the analysis of

non-coordinated effects in an oligopolistic market. It then rejected the Commission's three theories of harm, finding that the Commission had not correctly applied the SIEC test nor met its evidentiary burden in each instance. For further detail on the General Court judgment, including background on the SIEC test, please see VBB on Competition Law, Volume 2020, No. 6 at pages 4-7.

The Commission appealed the judgment to the ECJ, which has now set aside the General Court's ruling. The ECJ concluded that the General Court had erred as a matter of law both in its application of the SIEC test, as well as in its conclusions regarding the requisite burden of proof. Consequently, the case has been remanded to the lower court to reevaluate the Commission's theories of harm in light of the correct legal standard. The takeaways from this reversal, outlined below, have far-reaching implications for the future assessment of concentrations in general.

COURT OF JUSTICE'S JUDGMENT

A SIEC can be established by a balance of probabilities.

The General Court required the Commission to demonstrate a "*strong probability*" of the existence of a SIEC. This standard of proof was higher than "*more likely than not*" but less than "*beyond a reasonable doubt.*" The Commission argued this standard was too high, extending well beyond the standard of proof required by previous ECJ case law.

The ECJ considered the provisions of the EUMR applicable to the approval or prohibition of a notified concentration and concluded that: (i) there is nothing to suggest that different standards of proof need to be applied for prohibition as opposed to approval decisions; and (ii) there is no general presumption as to whether a concentration is compatible with the internal market or not. Consequently, the Commission cannot be held to a higher standard of proof when issuing a prohibition decision than a clearance.

The ECJ likewise found that prior case law did not support the General Court's use of a higher burden of proof. Specifically, it noted that: (i) requirements relating to the quality of the evidence that must be produced in certain types of cases (e.g., the quality of the evidence produced is particularly important for conglomerate-type concentrations) do not affect the standard of proof required; and (ii) while the complexity of a theory of harm must be taken into account in assessing the plausibility of the various consequences a concentration may have, this also does not in itself impact the standard of proof required. Consequently, the standard of proof does not vary depending on the type of concentration being examined or the complexity of the theory of harm posited.

Hence, the ECJ concluded that to either prohibit or clear 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 that the concentration concerned would or would not significantly impede effective competition in the internal market or in a substantial part of it*" (emphasis added). The General Court was held to have made an error in law by applying a higher standard.

The Commission does not need to meet stricter standards to find non-coordinated effects in gap cases than in concentrations resulting in dominance

The General Court sought to lay out a set of strict standards that the Commission must meet to establish that non-coordinated effects result in a SIEC in gap cases (i.e., absent the creation or reinforcement of a dominant position). The ECJ, however, disagreed with the lower court's interpretation of the legal test and key concepts involved, rejecting the higher standards the General Court sought to impose.

First, the General Court had ruled that, in gap cases, in order for non-coordinated effects of a concentration to give rise to a SIEC under Article 2(3) EUMR, two *cumulative* conditions must be fulfilled: (i) the elimination of important competitive constraints that the merging parties previously exerted upon each other, and (ii) a reduction of competitive pressure on the remaining competitors. To reach this conclusion, the General Court had read Article 2(3) EUMR in light of Recital 25 EUMR (which observes that a SIEC may arise under these two circumstances in oligopolistic markets).

The ECJ held that the wording of Recital 25 cannot be understood to impose such limits on the determination of a SIEC. The intent of the Recital was to indicate that the finding of a SIEC could extend beyond situations of dominance, not to impose a two-pronged test that must always be met in such situations. The ECJ underscored that the EUMR "*seeks to establish effective control of all concentrations which would significantly impede effective competition.*" Effective control would not be possible if the finding of a SIEC as a result of non-coordinated effects was limited to the satisfaction of both conditions. In any event, the ECJ noted that recitals have no binding legal force and cannot be relied on to derogate from Article 2(3) or interpret it in a manner that is clearly contrary to its wording and objective.

Second, the General Court defined the concept of an "*important competitive force*" as follows: the undertaking in question must: (i) stand out from its competitors in terms of the impact of its pricing policy on competitive dynamics on the market concerned; and (ii) compete particularly aggressively in terms of price and force the other players on the market to align with its prices. The Commission argued that these requirements were excessive.

The ECJ held that the requirements for classifying an undertaking as an important competitive force cannot be so demanding as to preclude the Commission from finding that concentrations that bring about a SIEC are incompatible with the common market. A number of undertakings in an oligopolistic market can be important competitive forces without being particularly aggressive in terms of price. Indeed, concentrations involving parties which are not particularly aggressive in terms of price can also bring about a SIEC, not least because price is not the only important parameter for assessing competitive dynamics – so too are quality, innovation, etc. Consequently, the ECJ set aside the General Court's definition of an important competitive force, and instead held that the definition in the Commission's Horizontal Merger Guidelines is appropriate: that is, undertakings which "*have more of an influence on the competitive process than their market shares or similar measures would suggest.*"

Finally, in its prohibition decision, the Commission relied – among other things – on the closeness of competition between the parties to the concentration to conclude that the concentration was likely to give rise to non-coordinated anticompetitive effects. The General Court held, however, that in an oligopolistic market where all firms are by definition close competitors to some extent, the Commission is required to show that the undertakings are "*particularly close*" competitors. Otherwise, the General Court reasoned, any merger in an oligopolistic market would necessarily eliminate a close competitor.

The ECJ disagreed, finding that it is not necessary for the merging parties' products to have the high level of substitutability – corresponding to "*particularly close*" competition – in a differentiated market, in order to incentivise the merging parties to increase prices. It suffices that there is a higher level of substitutability between the merging parties' products as compared to the level of substitutability between the merging parties' and third parties' products. Consequently, the Commission is only required to demonstrate "*close*" and not "*particularly close*" competition as between the parties to the concentration.

The Commission does not need to take "standard efficiencies" into account in its analysis

The General Court required the Commission to take into account "*standard*" efficiencies in its quantitative analysis – that is, efficiencies which are specific to each concentration, and which are a component of a quantitative model designed to establish whether a concentration is capable of producing restrictive effects.

The ECJ disagreed, holding that neither the EUMR nor the Horizontal Merger Guidelines refer to such a category of standard efficiencies, nor do they establish a presumption that all concentrations give rise to such efficiencies. Were the Commission required to take such efficiencies into account systematically, this would reverse the burden of proof with regard to that category of efficiencies, whereas the burden of raising and demonstrating any efficiencies should rest with the transaction parties.

OBSERVATIONS

The General Court's ruling was especially harsh on the Commission in that it rejected each of the Commission's theories of harm on substantive grounds. It raised the level of scrutiny of Commission prohibition decisions based on non-coordinated effects, thus ignoring that the very purpose of the introduction of the SIEC test was to broaden the scope of EU merger control beyond single-dominance situations.

The ECJ's reversal, though comprehensive, is not particularly revolutionary. Indeed, it extends the previously accepted legal landscape to gap cases, using the well-established balance of probabilities standard of proof, and rejecting the General Court's addition of new requirements to the definition of economic concepts. Whilst the General Court judgment had the potential to render enforcement by the Commission in the absence of single firm dominance significantly more demanding, the ECJ judgment reinstates the Commission's margin for manoeuvre. A distinct chastisement of the General Court appears to permeate the judgment – as the ECJ notes multiple instances in which the lower court distorted or otherwise mischaracterised the Commission's arguments and findings.

Despite disagreeing with the General Court's legal analysis at seemingly every turn, the ECJ does leave the General Court's review powers largely intact. Indeed, the ECJ flatly rejected the Commission's argument that the General Court had erred by departing from the definitions of certain economic concepts outlined in the Horizontal Guidelines, when it had neither the jurisdiction nor expertise to do so. The ECJ acknowledged that the Commission enjoys a margin of discretion with regard to economic matters for the purpose of applying the substantive rules of the EUMR (and that in such matters, judicial review is confined to ascertaining that the Commission has accurately stated the facts and committed no manifest errors of assessment). Nevertheless, the ECJ concluded that this does not preclude EU courts from "*reviewing the Commission's interpretation of information of an economic nature*" nor from "*reviewing the Commission's interpretation of concepts of EU law requiring an economic analysis when they are implemented.*" The ECJ's broader defence of the judiciary's traditional review powers was a notable standout in a judgment that otherwise read squarely in the Commission's favour.

In sum, the ECJ's ruling proves a return to traditional merger review on all fronts. The Commission now has a clear legal roadmap to assess gap cases that does not raise significant additional evidentiary or legal hurdles from the assessment of traditional dominance-based cases. The General Court's unduly restrictive legal analysis has been dismissed by the ECJ, and it will be interesting to see how it will reassess CK Telecoms' initial appeal in light of the ECJ judgment.

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