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Highest EU Court Reinforces Merger Control in Telco Sector and Beyond

Long-awaited decision upholds European Commission's appeal, dashing hopes of a more lenient approach to telco mergers

July 13, 2023

Introduction and Overview

On 13 July, the highest EU court—the European Court of Justice (**ECJ**)—handed down its much anticipated judgment in the *Three UK/O2* mobile telco case, setting the direction of travel for merger control policy within the sector and beyond for years to come.[1] The European Commission (**EC**) succeeded on all six grounds of its appeal (partly or in full), with the ECJ setting aside the General Court (**GC**)'s previous judgment in its entirety due to the "breadth, nature and scope of the errors made."[2]

Notably, the ECJ confirmed that "more likely than not" is the appropriate standard of proof for determining whether a merger would significantly impede effective competition, rejecting the GC's use of "strong probability" as incompatible with the EU Merger Regulation.[3] The ECJ went on to clarify the concept of "important competitive force," explaining that it is not limited only to firms that "compete particularly aggressively" on price, but rather captures any firm with an outsized influence on the competitive process relative to its market shares or similar measures.[4]

Similarly, the ECJ stated that the GC erred by insisting the EC should have demonstrated the merging parties were "particularly" close competitors, and endorsed the EC's approach—consistent with its Horizontal Merger Guidelines—of considering closeness of competition as merely one of multiple factors which are relevant to determining whether a merger may result in non-coordinated effects.[5] The ECJ also quashed any notion of a presumption that all mergers give rise to "standard" efficiencies, holding that this would effectively reverse the

[1] Case C-376/20 P, *European Commission v. CK Telecoms UK Investments Ltd* [2023] EU:C:2023:561.

[2] *Ibid*., para 337.

[3] Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (EC Merger Regulation) [2004] OJ L24/1.

[4] *CK Telecoms UK Investments* (n 1), paras 166 and 167.

[5] *Ibid*., para 187.

burden of proof in way that could reduce the effectiveness of merger control, and that instead the parties must demonstrate any merger-specific efficiencies (a notoriously difficult task with the EC).[6]

The EC must undoubtedly be relieved by the ECJ's findings, which effectively restore the status quo that prevailed prior to the GC's 2020 judgment on this case. Conversely, deal-makers and telco sector players who had been hoping a loss by the EC would unlock future European consolidations will be disappointed.

Context

The case relates to a failed merger between UK mobile operators Hutchison 3G UK (Three UK) and Telefónica UK (O2), which was blocked by the EC in May 2016, pre-Brexit.[7] The EC rarely blocks mergers outright. Indeed, in the last 5 years it has only referred 2.4% of all cases to an in-depth Phase 2 investigation. In relation to mobile consolidations, however, the EC has been known for taking a firm stance. This case marked the high point of that policy and, since then, European 4-to-3 mobile telco mergers have only been approved subject to comprehensive remedies (*Hutchison 3G Italy/Wind/JV*),[8] or in an exceptional case from the Netherlands where one of the merging parties was not a sufficiently strong player and there were limited concerns about its ongoing role as an important competitive force (*T-Mobile NL/Tele 2 NL*).[9]

More generally, merger control policy has become stricter in recent years both in Europe and across the Atlantic. In the EU, a general hardening of merger control has led to an increased proportion of total in-depth Phase 2 investigation decisions, and a striking increase in the proportion of Phase 2 cases frustrated (*i.e.* blocked or abandoned) in 2022. The picture is even starker in the UK where, since Brexit, the UK Competition and Markets Authority (**CMA**) has become more interventionist. The proportion of total Phase 2 decisions more than doubled in 2022 (compared to 2021), with a further rise in H1 2023, and with two prohibitions and one abandonment so far in 2023.[10] The CMA's prohibition decision in *Microsoft/Activision* (which was conditionally cleared in Brussels) is the most prominent example.[11]

The U.S. authorities are arguably the flag-bearers of this interventionist trend, as the DOJ/FTC continue to challenge mergers in high numbers, now coupled with a decreased willingness to settle and an appetite for pursuing novel theories of harm.[12] The FTC has also proposed extensive changes to the Hart-Scott-Rodino Act's

[6] *Ibid*., paras 233-247.

[7] Case COMP/M.7612 *Hutchison 3G UK/Telefónica UK* (11 May 2016).

[8] Case COMP/M.7758 *Hutchison 3G Italy/Wind/JV* (1 September 2016).

[9] Case COMP/M.8792 *T-Mobile NL/Tele 2 NL* (27 November 2018).

[10] See Theme 3 in our Global Merger Regulation Key Themes and Predictions For 2022/2023.

[11] *Microsoft/Activision Blizzard*, CMA Phase 2 Final Report of 26 April 2023.

[12] See Theme 1 in our Global Merger Regulation Key Themes and Predictions For 2022/2023.

notification process that will drastically expand the scope and substance of the notification form.[13] The U.S. agencies, though, experience difficulties in court, reflected by the fact that their success rate in 2022 merger trials was far lower than in prior years (prevailing in only one out of six merger cases decided in 2022, with one win, one loss and a denial of their request for a preliminary injunction in the *Microsoft/Activision* case in the first half of 2023). Indeed, earlier this week, the FTC suffered a major defeat in its attempt to challenge Microsoft's acquisition of Activision.[14]

Notwithstanding this wider merger control trend, we are witnessing a resurging desire to consolidate the telco sector, as a result of difficulties being experienced by some players who need to continue investing in new technologies. In Europe, consolidations have recently taken place in Spain, where Orange and MasMovil have announced their planned joint-venture (currently subject to Phase 2 investigation by the EC),[15] and in Belgium, where Orange has recently acquired the cable operator VOO (subject to commitments extracted by the EC).[16] In the UK, Vodafone and CK Hutchison recently agreed to a tie-up that will form the UK's largest mobile operator, which will be closely scrutinised by the CMA.

The ECJ Judgment

THE STANDARD OF PROOF

The aspect likely to have the most profound impact on ongoing cases relates to the standard of proof. The GC had stated that the EC must produce sufficient evidence to demonstrate "with a strong probability" the existence of a significant impediment to effective competition. This was more onerous than the "balance of probabilities" standard (*i.e.* "more likely than not") that the EC had applied in its original decision and as standard practice across all of its cases.

According to the ECJ, however, the "strong probability" standard endorsed by the GC is not consistent with the EU Merger Regulation—and is incompatible with the prospective nature of merger control analysis.[17]

Had the EC lost on this point, it would have faced a materially higher bar to intervening in future cases across every sector. Instead, the ECJ's judgment means the EC can continue applying its standard framework for assessing mergers in concentrated sectors. Of course, the more complex or uncertain the EC's theory of harm, the greater the need for compelling evidence to substantiate it.

[13] See our client memo: FTC Proposes Major Overhaul to HSR Merger Notification Process New Rules Would Substantially Expand Scope and Extend Preparation Time for HSR Filings.

[14] See Theme 2 in our Global Merger Regulation Key Themes and Predictions For 2022/2023.

[15] Case COMP/M.10896 *Orange / Masmovil / JV*.

[16] Case COMP/M.10663 *ORANGE / VOO / Brutele* (20 March 2023).

[17] *CK Telecoms UK Investments* (n 1), paras 82-84 and 87.

THE SUBSTANTIVE TEST

At the heart of this case was the interpretation of the substantive legal test to be applied in EU merger control. Since a major reform in 2004, the EC has been able to block mergers that give rise to a "significant impediment to effect competition" ("SIEC"), even in the absence of the creation or strengthening of a dominant player (these are known as "gap cases"). Such cases include those where the theory of harm relies on the elimination of an "important competitive force" (*i.e.*, a disruptor in the market or a particularly aggressive competitor) or the combination of close competitors.

The GC's decision threatened the viability of such "gap cases" in two notable ways. First, it created a higher threshold for establishing that a firm is an "important competitive force," by insisting that this required a given firm to be competing particularly aggressively on price and forcing other players to align with its pricing. Second, the GC held that the EC should have demonstrated that the merger parties were not merely close competitors, but rather "particularly" close competitors. Both findings, had they been upheld, would have permanently altered the application of the SIEC test and made it considerably harder for the EC to successfully challenge future "gap cases".

Instead, the ECJ sided with the EC on both points. The ECJ held that the concept of an "important competitive force" is not limited only to firms that "compete particularly aggressively" on price, but rather captures any firm with an outsized influence on the competitive process relative to its market shares or similar measures.[18] In the same vein, the ECJ found that the GC had erred by concluding that only a merger between "particularly" close competitors could result in a SIEC in the relevant market. It also endorsed the EC's approach—consistent with its Horizontal Merger Guidelines—of considering closeness of competition as merely one of multiple factors which are relevant to determining whether a merger may result in non-coordinated effects.[19]

Given its comprehensive victory, the EC remains free to challenge "gap cases" and may feel emboldened to pursue an increasingly interventionist stance. The implication for telecoms and other concentrated sectors is clear: any future consolidation faces considerable risk, as almost any (if not every) player in such a sector might reasonably be found to constitute an "important competitive force" that competes closely with any and all rivals.

THE ROLE OF EFFICIENCIES

An acutely controversial aspect of the GC's judgment was its approach to efficiencies, particularly the finding that "*any concentration will lead to efficiencies, the extent of which will also depend on external competitive pressure*".[20] This was read by many as effectively introducing an "efficiency presumption"; that is, making it incumbent upon the EC to rebut the existence of "standard" efficiencies flowing from each and every merger. The

[18] *Ibid.,* paras 166 and 167.

[19] *Ibid.*, para 187.

[20] Case T-399/16, *CK Telecoms UK Investments Ltd v European Commission* [2020] EU:T:2020:217, para. 277.

approach sat uncomfortably with the prevailing sentiment amongst competition authorities in Europe and the U.S.

Those same authorities will now be sitting far more comfortably, however, because the ECJ has exhaustively demolished any notion of a presumption that all mergers give rise to "standard" efficiencies. Holding that the GC had erred at law in this regard, the ECJ stated that any such presumption would effectively reverse the burden of proof in way that could reduce the effectiveness of merger control. Rather, the ECJ emphasised that whilst certain mergers may give rise to efficiencies that are specific to them, it is not necessarily the case that all mergers will result in such efficiencies. In any event, the ECJ has concluded, it is for the parties to demonstrate those merger-specific efficiencies.[21]

The ECJ's judgment restores the prevailing practice before the GC's 2020 decision, when parties found it notoriously difficult to persuade the EC that they should receive any credit for efficiencies.

Conclusion

All-in-all, the ECJ judgment will lead to more vigorous merger control enforcement in the telco sector and to a further hardening of European merger control across the board.

This judgment will likely set the direction of travel for merger control policy within the EU for many years to come. We expect the EC will continue to take a firm stance towards consolidation and—absent exceptional circumstances—will only approve mergers in highly concentrated markets subject to comprehensive remedies.

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[21] *CK Telecoms UK Investments* (n 1), paras 233-247.