

## Insights

# ANOTHER SIEC IN THE WALL - THE ECJ'S JUDGMENT IN CK TELECOMS

Aug 03, 2023

## EXECUTIVE SUMMARY

Save for the Commission's decision in M.8792 (*Tele2 NL/T-Mobile NL*) which cleared the acquisition of Tele2 NL by T-Mobile NL without remedies, the Commission has historically blocked or accepted divestment/behavioural remedies for pure telecom to telecom mergers within Europe, primarily due to the oligopolistic nature of the national market. The scrutiny continues, with the Commission recently issuing its Statement of Objections over the anticipated *Masmovil/Orange* tie up, and with the anticipation that the *Vodafone/Three* merger will be reviewed in detail by the UK's CMA.

Arguably the most significant historic decision from the Commission in this area was to block the merger between O2 and Hutchison ("**Three**") within the UK. The General Court on appeal took the unexpected step to *annul* the Commission's decision (Case T-399/16 *CK Telecoms v Commission*). We previously considered the [General Court's judgment in the context of the standard for judicial review in the EU](#).

In this article we assess the ECJ's recent judgment in Case-376/20 P, *Commission v CK Telecoms* which set aside (and referred back) the General Court's judgment. We consider five key findings from the ECJ's judgment, as follows:

- i. The standard of proof for proving a significant impediment on effective competition ("**SIEC**");
- ii. The General Court's test for establishing an SIEC;
- iii. The meaning of "important competitive force";
- iv. The assessment of "close" and "particularly close" competitors; and
- v. The framework for assessing efficiencies under the Merger Regulation.

In summary, the judgment restores the Commission's wide discretion and power in evaluating mergers (especially in concentrated markets) after the General Court's decision to raise the bar for the Commission in finding an SIEC. This judgment therefore reinforces the approach of the

Commission as it looks to utilise merger control as one of its key instruments to affect the shape and future structure of the economy across Europe. The judgment is also a reminder that it is not the case that the ECJ and the General Court think alike; with the ECJ exercising its review of the judgment of the General Court and coming to a different interpretation of a key and fundamental provision of the European Union Merger Regulation ("**Merger Regulation**").

## THE STANDARD OF PROOF FOR AN SIEC

Article 2(3) of the Merger Regulation states that a merger "*which would significantly impede effective competition in the common market or in a substantial part of it (SIEC), in particular as a result of the creation or strengthening of a dominant position*" shall be declared (by the Commission) as being incompatible with the common market. The General Court notably held that, in blocking the merger between O2 and Three the Commission had not proven to the requisite legal standard that the merger would lead to an SIEC. The General Court held that the Commission were required to prove to a "*strong probability*", rather than on the "*balance of probabilities*" (i.e. a "more likely than not" standard) that the merger would lead to an SIEC.

The General Court's judgment was significant: a requirement to evidence an SIEC on the basis of a "*strong probability*" would substantively raise the evidential bar for the Commission in relation to its ability to find an SIEC, and ultimately to block anticipated mergers (thereby making it easier for a proposed merger to be cleared). In this context it is perhaps unsurprising that the ECJ set aside the General Court's decision, finding that it was sufficient for the Commission to find an SIEC on the "*balance of probabilities*".

The ECJ advanced multiple arguments as to this conclusion:

- i. The ECJ grounded its decision in **symmetry**, finding that the Merger Regulation does not distinguish the burdens for finding a merger compatible or incompatible with the common market. On that basis, the ECJ found that the taking of evidence, including the applicable standard of proof, should not vary in relation to clearing or blocking a merger.
- ii. Whilst the evidence utilised by the Commission must be "*sufficiently cogent and consistent*", and in the case of conglomerate mergers (due to such mergers occurring across separate markets) the quality of the evidence is particularly important (as in Case C-12/03 P - *Tetra-Laval*), the quality of the evidence required is not *determinative* of the legal standard of proof, nor does the standard of proof differ in relation to the complexity or nature of the theory of harm advanced by the Commission.
- iii. In addition, the *ex-ante* nature of merger review (rather than an *ex-post* review as applicable to the assessment of anti-competitive agreements or abuse of a dominant position) falls within the Commission's margin of discretion as to economic matters; such that the forward looking nature

of the Commission's economic analysis precludes a particularly high standard of proof to demonstrate an SIEC.

Taking these matters into account, the ECJ's concluded that the Commission must prove by a sufficiently cogent and consistent body of evidence that **it is more likely than not** (i.e. on the balance of probabilities) that a merger would (or would not) constitute an SIEC.

The ECJ did not follow the opinion of AG Kokott, who had proposed that the applicable standard of judicial review for merger decisions should be confined to manifest error and factual accuracy. The standard of judicial review with respect to mergers established in *Tetra-Laval* is therefore maintained; the ECJ reserves itself full review for factual and legal matters, save for economic matters/assessment with which the Commission has a margin of discretion. The ECJ therefore has retained its existing standard of review for mergers, rather than adopt a narrow standard of review like the UK courts.

## THE GENERAL COURT'S TEST FOR ESTABLISHING AN SIEC

The General Court outlined in its judgment that two cumulative conditions must be met to establish whether non-coordinated effects,(where a merged entity can build or strengthen its market power without coordinated behaviour) can lead to an SIEC:

1. An elimination of important competitive constraints that the merging parties had exerted upon each other; and
2. The reduction of competitive pressure on the remaining competitors.

The General Court reached this position through interpreting Article 2(3) in light of Recital 25 of the Merger Regulation, which states (non-exhaustively) "*concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in*" an SIEC. The Commission submitted before the ECJ that the General Court's test would have the effect of hindering the Commission from developing theories of harm which did not meet these cumulative conditions.

The ECJ agreed, holding that recitals, whilst indicative of the drafting intention, do not have binding legal force and cannot be relied upon to derogate from the legally binding articles, or interpret the articles contrary to their clear wording.

Furthermore, the ECJ stated that Recitals 5 and 6 clearly set out the purpose of the Merger Regulation, to govern and permit effective control of those mergers "*which may significantly impede effective competition in the common market or in a substantial part of it*". On this basis, the ECJ outlined that the "*effective control*" established in the Merger Regulation extends to all mergers

that would lead to an SIEC so that the Commission can prevent lasting damage to competition within the internal market; the application of the Merger Regulation is not only limited to those cases in which **both** of the circumstances in Recital 25 are met. The ECJ noted that if this were to be the case then mergers missing one of the two conditions would never in themselves be sufficient to demonstrate an SIEC; for example mergers which eliminate competitive constraints and lead to unilateral price rises. The ECJ concluded that such a situation would be incompatible with the objective of the Merger Regulation.

## THE MEANING OF “IMPORTANT COMPETITIVE FORCE”

In its judgment the General Court adopted a definition of the concept of “important competitive force”. This concept is particularly important to the Commission’s assessment on whether a merger will lead to the elimination of important competitive constraints between the merger parties, and therefore whether a merger will lead to an SIEC; the General Court in its judgment did not consider that Three fell within this definition.

The Commission argued that the General Court imposed a narrow definition, requiring the Commission to show that a competitor is an important competitive force when it stands out from other competitors in terms of the impact of its pricing policy on the competitive dynamics of the markets concerned and, in particular, where it competes particularly aggressively in terms of price and forces the other players on the market to align with its prices. The ECJ agreed, noting that, in order to classify a competitor as an important competitive force, it is sufficient that this competitor has *“more of an influence on the competitive process than its market share (or similar measures) would suggest”*. The ECJ’s reasoning for this was manifold, mainly:

- i. Even where a party does not stand out from its competitors as being ‘particularly aggressive’ in terms of its pricing, this does not mean that a merger involving this party could not alter the competitive dynamic of the market;
- ii. The Commission is not bound by its previous decisions classifying particular competitors as important competitive forces where they were unique in their ‘**aggression**’. The Commission’s previous decisions serve as an indication, not a legal framework and so cannot rule out that other situations are capable meeting this classification; and
- iii. Price is not the only important parameter for competitive dynamics; e.g. quality and innovation are also important. A price-focused approach would be incomplete.

## PARTICULARLY CLOSE COMPETITORS

The General Court held that Three and O2 were only relatively close competitors in some segments of the market (comprising four mobile network operators) and that this factor alone was not sufficient to prove the elimination of important competitive constraints between the two to prove an

SIEC; insofar that the Commission were required to demonstrate that the merging parties are 'particularly close competitors' rather than 'close competitors' in an oligopolistic market. The Commission submitted that the General Court imposed an excessive requirement in relation to the closeness of competition between the parties.

The ECJ upheld the Commission's appeal, holding that the Commission was correct to state that products may be differentiated within a relevant market by substitutability. The ECJ agreed that where there is a higher degree of substitutability between the merging firms' products, it is more likely the merging firm will raise prices significantly post-merger (creating non-coordinated effects and therefore lead to an SIEC). The ECJ held that requiring 'particularly close' competition implies a high level of substitutability between the merging parties' products; however, this level is **not necessarily required** to prove an SIEC where there are comparatively lower levels of substitutability between the merging parties' products and other competitors' products within the relevant market. The ECJ's approach is therefore *evidence based* insofar that it accounts for comparative substitutability within markets, rather than solely competitive relationships between the merging parties.

## STANDARD EFFICIENCIES

The Commission submitted that the General Court erred in holding that the Commission ought to have assessed the "*standard efficiencies*" which are "*specific to each concentration*" (merger) in its quantitative analysis. The ECJ outlined that the General Court drew a distinction between (i) efficiencies which the notifying parties must advance in the overall competitive assessment of the merger to **counteract** the merger's restrictive effects and (ii) efficiencies specific to each merger which are a component of a quantitative model to assess whether the merger is **capable of producing** restrictive effects (the "*standard efficiencies*"). The General Court held that "*any concentration*" (merger) will lead to these standard efficiencies, with the extent of them depending on external competitive pressure (therefore making the efficiencies merger specific). The General Court held that the Commission is required, as part of its analysis, to take into account these standard efficiencies in finding an SIEC.

The ECJ disagreed, holding that whilst certain mergers may give rise to efficiencies, this in no way implies that all mergers give rise to certain efficiencies; the Merger Regulation and other relevant legislation do not imply this, and do not even refer to a distinct category of 'standard efficiencies'. The ECJ held that it is for the notifying parties to demonstrate efficiencies so that the Commission can account for them, and that any acknowledgement of the existence of these 'standard' efficiencies would create a presumption and reverse the burden of proof for a category of these efficiencies – when the burden of making out efficiencies is borne by the parties to the merger.

The ECJ held that this reversal is capable of reducing the effectiveness of merger control as it would interrupt the balance between the established burden of proof of the EU legislature, and therefore the ECJ set aside the General Court's finding.

## CONCLUSION

The General Court's judgment in *Commission v CK Telecoms* was one of the most significant in the European competition case law. *CK Telecoms v Commission* as the top-down ECJ judgment looks to be equally significant. In it the ECJ clarified several points of law as to the standard of proof for an SIEC, and the underlying analysis required in reaching this assessment.

Ultimately as to *CK Telecoms v Commission*, the ECJ was not in the position to make a final judgment on all of the pleas in law put forward at first instance, and in doing so referred the case back to the General Court to reach a decision compliant with its judgment.

It may then be the case that another significant General Court judgment will arise, however the ECJ has settled much of the legal questions which the original General Court judgment threw into doubt. Whilst the Commission's legal burden in finding an SIEC has been clarified, it is worth reiterating that the ECJ's judgment has reversed the higher burden found by the General Court; therefore increasing the ability of the Commission to block mergers. This conclusion is unlikely to be welcome for businesses, and indeed the reduced burden of proof may provide more uncertainty to businesses on whether the Commission will find their anticipated mergers to be incompatible with the common market.

If you are working on deals and want to know more about this decision; including how it may impact your deals directly or indirectly, please speak to **Andrew Hockley, David Anderson, Graeme Thomas, George Christodoulides**, or your usual BCLP contact.

## RELATED CAPABILITIES

- Antitrust

## MEET THE TEAM



### **Graeme Thomas**

London

[graeme.thomas@bclplaw.com](mailto:graeme.thomas@bclplaw.com)

[+44 \(0\) 20 3400 4918](tel:+442034004918)



### **George Christodoulides**

London

[george.christodoulides@bclplaw.c  
om](mailto:george.christodoulides@bclplaw.com)

[+44 \(0\) 20 3400 4745](tel:+442034004745)

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