The General Court raises the bar for the European Commission to block mergers in oligopolistic markets

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The General Court's judgment in *CK Telecoms UK Investments Ltd v Commission*[1] is likely to have a substantial impact on the ability of the European Commission (the "**EC**") to find a "*significant impediment to effective competition*" ("**SIEC**") in mergers involving allegedly oligopolistic markets. This was one of the key aspects of the EC's decision to prohibit the proposed "4:3" merger between UK mobile network operators Telefonica Europe Plc (known as O2) and Hutchison 3G UK (known as Three) in May 2016.[2]

The judgment contains a number of findings which have potentially wide ramifications for future merger cases. This briefing discusses these ramifications below in terms of: (i) the meaning of SIEC; (ii) the EC's legal standard of proof; and (iii) the quality of evidence the EC must provide to justify its findings.

Meaning of SIEC

Under Article 2(3) EUMR, the EC shall declare a transaction incompatible with the common market if it would significantly impede effective competition in the common market or in a substantial part of it "*in particular as a result of the creation or strengthening of a dominant position*".[3]

Uncertainty has arisen in relation to the criteria for establishing an SIEC in oligopolistic markets where there is no individual or collective dominant position (so called "gap" cases).[4] The General Court has now clarified that such combinations should be prohibited if they "*are liable to affect the competitive conditions on the market to an extent equivalent to that attributable to such positions, by conferring on the merged entity the power to enable it to determine, by itself, the parameters of competition and, in particular, to become a price maker instead of remaining a price taker*".[5]

This appears to set a high threshold for intervention which closely resembles one of the key indicators of a dominant position – the European Court of Justice (ECJ) has established that dominance enables a company to prevent effective competition by affording it the power "*to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers*".[6]

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[1] Case T-399/16 CK *Telecoms UK Investments Ltd v Commission*, judgment of 28 May 2020.

[2] Case COMP/M.7612 — *Hutchison 3G UK/Telefónica UK*, Commission decision of 11 May 2016.

[3] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1) (the "**EUMR**").

[4] Under a previous version of Article 2(3) in Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1), now replaced by the EUMR, the creation or strengthening of a dominant position was required.

[5] CK *Telecoms UK Investments Ltd v Commission, para. 90.*

[6] Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission* [1978] ECR 207, para. 65.

Standard of proof

The General Court also found that the EC is required to produce sufficient evidence to demonstrate with a "*strong probability*" the existence of an SIEC. Contrary to what the EC had argued, the Court held that the legal test is higher than whether an SIEC is "*more likely than not*" or on the "*balance of probabilities*", although it is less strict than "*being beyond all reasonable doubt*".[7]

This too has potentially wide ramifications for merger cases and will put pressure on the EC to ensure it has enough evidence to meet this standard in order to mitigate the risk of future appeals.

Quality of evidence required to prove an SIEC

The General Court was also critical of how the EC applied the SIEC test and in particular of its treatment of the evidence used to justify its findings. The following findings may be of particular interest in future merger cases:

a) The EC's use of concept of an "important competitive force" was wrong

The General Court found that the EC was wrong to find that an "*important competitive force*" does not need to stand out from its competitors in terms of impact on competition. Otherwise, as Hutchison noted, the EC would effectively be able to find any undertaking in an oligopolistic market an important competitive force.

b) Three's pricing policy did not make it an "important competitive force"

Despite the EC advancing examples of Three having cheaper prices on the market, the General Court found that this was not sufficient to demonstrate that Three was an "*important competitive force*". The EC should have instead proven that Three was "*competing particularly aggressively in terms of prices and that it forced the other players on the market to align with its prices or that its pricing policy was capable of significantly altering the competitive dynamics on the market*".[8]

c) The EC's quantitative pricing analysis was insufficient

The General Court found that the quantitative pricing analysis used by the EC lacked probative value, and that the EC did not demonstrate with a "*sufficient degree of probability*" that prices would increase "*significantly*" following the merger.[9]

In reaching its conclusion, the General Court made a number of interesting findings regarding the EC's use of quantitative pricing analyses which may be of general application in future merger cases:

- When considering predicted percentage price increases, there is no need for the EC to identify a "*de minimis*" or "*safe harbour*" threshold. However, when the EC uses quantitative pricing analyses it "*must take into account all the relevant factors which may affect the price level*" and establish the predicted price increase "*with a sufficiently high degree of probability*".[10]
- The EC was wrong not to take efficiencies into account in its quantitative pricing model and when assessing whether the transaction would result in restrictive effects on competition.

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[7] *CK Telecoms UK Investments Ltd v Commission, para. 118.*

[8] *CK Telecoms UK Investments Ltd v Commission, para. 216.*

[9] *CK Telecoms UK Investments Ltd v Commission, para. 282.*

[10] *CK Telecoms UK Investments Ltd v Commission, para. 275.*

d) The EC did not establish sufficient closeness of competition

The General Court was critical of the probative value of the evidence the EC used to establish that O2 and Three were close competitors, which included using diversion ratios derived from a survey based on only approximately 100 users.[11]

The Court also observed how most of the examples used by the EC showed that Three and O2 were "*close competitors*" rather than "*particularly close competitors*".[12]

The General Court ultimately found that the fact that Three and O2 were relatively close competitors in some segments was not sufficient to establish an SIEC. The General Court noted that, otherwise, any concentration in an oligopolistic market resulting in a 4:3 merger would as a matter of principle be prohibited.

e) Prospective and complex theories of harm require higher quality evidence

The EC examined a number of different hypothetical scenarios as to how the UK's existing mobile network sharing arrangements might be impacted by the merger.

When dismissing this theory of harm, the General Court observed that "*the more prospective the analysis is and the chains of cause and effect dimly discernible, uncertain and difficult to establish, the more demanding the EU judicature must be in terms of the specific examination of the evidence produced by the Commission*".[13] In doing so, the General Court drew on an equivalent statement in *Commission v Tetra Laval* where the ECJ found, in the context of analysing conglomerate effects, that the theory of harm involved a "*prospective analysis in which…the chains of cause and effect are dimly discernible, uncertain and difficult to establish. That being so, the quality of the evidence produced by the Commission…is particularly important…*".[14]

This could have particular ramifications for prospective and complex theories of harm, which are increasingly being advanced by the EC and other regulators when analysing dynamic markets.

Conclusion

The General Court's judgment will make it more challenging for the EC to find an SIEC in allegedly oligopolistic markets which do not involve individual or collective dominance.

The General Court's judgment may also expose the EC to a potential damages action by the parties under Article 340 of the TFEU, which provides that the EU shall make good any damage caused by its institutions in the exercise of their duties. The EC is already facing similar claims by UPS and ASL following the General Court's decision (subsequently upheld by the ECJ) to annul the EC's 2013 prohibition of UPS's proposed acquisition of TNT Express.[15]

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[11] *CK Telecoms UK Investments Ltd v Commission, para. 243.*

[12] *CK Telecoms UK Investments Ltd v Commission, para. 242*

[13] *CK Telecoms UK Investments Ltd v Commission, para. 332.*

[14] Case C-12/03 *P Commission v Tetra Laval, 15 February 2005, para. 44.*

[15] Case T-834/17 *United Parcel Services v Commission* and Case T-540/18 *ASL Aviation Holdings DAC and ASL Airlines (Ireland) Ltd v Commission.*

It will be interesting to see if the General Court's judgment will encourage more appeals by merging parties against EC decisions.

Margrethe Vestager, the EU's Competition Commissioner, has said: "*We are urgently analysing the judgment. There are a lot of new legal issues being raised in the judgment, and on the basis of that, of course, we will decide whether to appeal or not.*" Given the ramifications discussed above, it is perhaps likely that the EC will decide to appeal to the ECJ. If so, it could be another 1-2 years before we receive the ECJ's final verdict on these important issues for EU merger control.

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