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QUICK LINKS

Advocate General Kokott issues opinions on Towercast and on Telefónica/Hutchison 3G

In recent weeks, Advocate General (AG) Juliane Kokott has issued two opinions that could have a significant impact on future merger control cases should the European Court of Justice (CJ) agree with the AG's conclusions.

First, in considering *Towercast*, AG Kokott proposed that national competition authorities should have the power to apply the abuse of dominance regime (Article 102 TFEU) to transactions that are not reportable under relevant turnover-related thresholds of an EU merger control regime. On the other hand, a competition authority should not be able to apply the abuse of dominance regime to completed transactions that are already approved as part of a merger control regime.

Second, in relation to *Commission v CK Telecoms UK Investments* (CK Telecoms), AG Kokott opined that the European General Court (GC) erred in raising the standard of proof for the prohibition of mergers on the basis of non-coordinated effects, when it annulled the European Commission's decision to prohibit the acquisition of Telefónica UK (known as O2) by Hutchison 3G UK (Hutchison) (known as Three).

TOWERCAST

BACKGROUND

In June 2016, French television broadcaster TDF Infrastructure Holding acquired control of Itas SAS. As a result of the acquisition, the market was left with only two service providers, namely TDF (which was already the largest market player prior to its acquisition of Itas) and Towercast. The acquisition did not exceed merger control thresholds at the EU or French level and so was not reviewed by either the Commission or the French competition authority.

Towercast submitted a complaint to the French competition authority that the acquisition of Itas by TDF constituted an abuse of dominant position. According to Towercast, the acquisition hinders competition by significantly strengthening TDF's already dominant position in the upstream and downstream wholesale markets for digital transmission of terrestrial television services.

After the French competition authority dismissed its complaint, Towercast appealed to the Paris Court of Appeal. Subsequently, the Paris Court of Appeal asked the CJ to consider whether a concentration that does not meet the merger control thresholds of an EU merger control regime (whether at European Commission level or Member State level), and therefore has not been subjected to any *ex ante* assessment under the merger control

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regime, is reviewable under Article 102 TFEU, the prohibition of abuse of a dominant position.

OPINION OF AG KOKOTT

According to AG Kokott's opinion, which was delivered on 13 October 2022, a concentration between undertakings that has not been the subject of an *ex ante* assessment under merger control law, may be assessed *ex post* on the basis of the prohibition of abuse of dominance.

In AG Kokott's view, Article 102 has a wide field of application and the abusive exclusion of a competitor from the market can take a variety of forms, including the acquisition of another competitor by a dominant company. AG Kokott also opines that a dominant company has a "*special responsibility*" not to allow its behaviour to impair genuine, undistorted competition in the internal market.

AG Kokott contends that a supplementary application of Article 102 would, similar to that of Article 22, address a "*gap in protection*" by capturing so-called killer acquisitions in which dominant players acquire innovative start-ups (for example in the fields of digital or pharmaceutical markets) that do not have sufficient turnover to trigger merger control thresholds. She further noted that it should be possible for national competition authorities to apply Article 102 to such deals, even if it is the "*weaker*" instrument of punitive *ex post* control (compared to merger control).

However, AG Kokott also found that a transaction which had been approved under the more specific merger control rules cannot subsequently be viewed under Article 102, unless the company concerned has engaged in additional conduct beyond the acquisition that could be found to constitute an abuse.

TELEFÓNICA/HUTCHISON 3G

BACKGROUND

In May 2016, the Commission prohibited the proposed acquisition of Telefónica UK by Hutchison, finding that the transaction would have reduced the number of mobile network operators in the UK from four to three.

In May 2020, the GC, before which Hutchison had appealed the Commission's decision, set aside the Commission's ruling in its entirety. In its judgment, the GC found, among other things, that the Commission had essentially disregarded the standard of proof applicable to the control of concentrations giving rise to non-coordinated effects on an oligopolistic market (that is to say a transaction that has non-coordinated or unilateral effects but where the merged entity does not have a dominant position).

In the GC's view, the standard of proof in such cases is that there is a "*strong probability*" of a significant impediment to effective competition following the concentration. (For further details, see a previous edition of our newsletter.)

The Commission contested the findings of the GC and has filed an appeal before the CJ.

OPINION OF AG KOKOTT

AG Kokott proposes that the GC's judgment be set aside and that the case be referred back to the GC to provide a fresh ruling on the dispute.

The opinion concludes that the GC erred in law in applying a stricter standard of proof than that recognised in the case-law of the CJ in the area of merger control by requiring the Commission to demonstrate with a "*strong probability*" the existence of a significant impediment to effective competition. Rather, in AG Kokott's view, the Commission must apply the "*balance of probabilities*" test and can challenge a merger if it is "*more likely than not*" anti-competitive. Kokott further noted there to be no justification for requiring a higher standard of proof in the case of concentrations giving rise to non-coordinated effects on oligopolistic markets than in the case of concentrations giving rise to 'conglomerate' or 'collective' type dominant positions. Furthermore, a higher

standard of proof should not be required when the theory of harm is complex or uncertain, or stems from a cause-and-effect relationship which is difficult to establish.

In addition, AG Kokott observed that the Commission has a margin of discretion with regard to economic matters for the purposes of applying the rules of the Merger Regulation, and the review by the EU courts cannot go beyond ascertaining that the Commission accurately stated the facts and made no manifest error of assessment.

CONCLUSION

It is important to note that the AG's opinions are not binding on the CJ. Although the CJ has followed AG's Kokott's opinions in the majority of cases, it remains to be seen what the outcome will be in these two cases. If the CJ does agree with the AG on these occasions, the impacts on future merger control cases are likely to be significant.

OTHER DEVELOPMENTS

MERGER CONTROL

CMA ISSUES REMITTAL FINAL DECISION IN FACEBOOK/GIPHY MERGER INVESTIGATION

On 18 October 2022, the Competition and Markets Authority (CMA) announced the conclusion of its Remittal Inquiry into the acquisition by Facebook (now Meta Platforms) of Giphy. The Remittal Inquiry was prompted by Facebook's appeal against the CMA's original Phase 2 decision in November 2021, which had found that the merger had resulted or may be expected to result in a substantial lessening of competition. The Competition Appeal Tribunal (CAT) upheld Facebook's appeal on a procedural ground relating to the sharing of third-party confidential information. The CAT quashed the CMA's Phase 2 Final Report and remitted the case back to the CMA.

The Remittal Inquiry addressed the CAT's procedural concern by disclosing the third party material within a confidentiality ring. The CMA also considered new evidence and submissions from the parties. Nevertheless, the CMA came to the same conclusion: that the merger has resulted or may be expected to result in a substantial lessening of competition in the supply of display advertising in the UK, and the supply of social media services worldwide. The CMA asserted that Giphy had been offering a Gif-based advertising service in the US prior to the merger and that it had hoped to expand its offering internationally. As these services had the potential to compete with Meta's own advertising services, the CMA considered that the merger had led to a loss of dynamic competition in the display advertising market. The CMA also asserted that the merged entity would have the ability and incentive to prevent rival social media companies from using Giphy's products, or to worsen the terms on which they used those products. Consequently, the CMA has ordered Facebook to divest Giphy to a suitable purchaser within 12 weeks of the publication of the Remittal Final Report.

ANTITRUST

EUROPEAN COMMISSION PUBLISHES GUIDANCE ON LENIENCY POLICY AND APPLICATIONS

On 22 October 2022, the European Commission published guidance intended to provide greater "*transparency, predictability and accessibility to potential leniency applicants*". The Commission's leniency programme provides whistleblowers the opportunity to disclose their participation in a cartel and cooperate with the Commission with a view to receiving a reduction in the fines that may be imposed. The latest guidance has been issued in the form of an FAQ document and seeks to clarify concepts and current practices relating to the Commission's application of the 2006 Leniency Notice.

The guidance refers to new practical arrangements, including the creation of Leniency Officers to provide further guidance on leniency arrangements, how they are likely to apply in particular cases and how to make leniency applications. The guidance also explains the Commission's willingness to discuss potential leniency applications on a "*no-names*" basis, without the need to disclose the sector, the parties involved or any other details identifying the potential cartel. This is intended to allow potential applicants to ascertain whether the conduct is likely to benefit from the programme. This may be particularly useful where the conduct is novel or if it is unclear whether it falls within the scope of the Leniency Notice.

The guidance also provides further details on the threshold of "*significant added value*" to qualify for leniency and the relative weights afforded to different types of evidence. Specifically, the evidence provided must "*strengthen…the Commission's ability to prove the alleged cartel*". While contemporaneous and direct forms of evidence are judged to be the most useful, the utility of any evidence will depend on the evidence already in the Commission's possession at the time of the leniency application.

The guidance also delves into the additional protections and benefits enjoyed by leniency applicants, beyond those described in the 2006 Leniency Notice, including under the Damages Directive.

HONG KONG COMPETITION COMMISSION IMPOSES RECORD-BREAKING FINE FOR PRICE FIXING AND MARKET SHARING

The Hong Kong Competition Commission (HKCC) announced on 4 November 2022 that it would impose a penalty of HK$150 million (approximately £17 million) on air-conditioning works provider ATAL Building Services Engineering Limited (ABS) for contravention of the First Conduct Rule. The penalty is the highest ever imposed in Hong Kong by some margin, with the previous record being a HK$4 million (approximately £444,000) fine imposed on Gray Line for its involvement in fixing prices of tourist attractions and transportation tickets (as reported in a previous edition of this newsletter). It covers ABS's involvement in proceedings currently before the Competition Tribunal, as well as (somewhat unusually) a future, second set of proceedings, details of which will be announced in due course.

The HKCC commenced proceedings in June 2022, alleging that between 2015 and 2019, ABS and its parent company Analogue Holdings Limited (AHL) frequently colluded with a competitor, Shun Hing Engineering Contracting Company Limited, when responding to requests for tenders and quotations. This included agreeing to provide cover bids and sharing commercially sensitive information on elements of the bid such as price and the number of days that would be needed to complete the works.

While Shun Hing is still contesting liability, ABS and two of its employees agreed to admit liability and enter into separate cooperation agreements with the HKCC. In addition to the fine, this means they will need to enhance their competition compliance, pay the HKCC's costs and provide full assistance to the HKCC in relation to this and the future, second set of proceedings.

Proceedings against ABS will continue (albeit with an agreed recommended fine and with ABS admitting liability) but the HKCC decided to adjourn proceedings against AHL, which the HKCC had initially sought to involve as ABS's parent company, taking into account the fact that AHL and ABS actively approached the HKCC with a view to resolving the case and committed to fulfilling all obligations agreed with the HKCC.

The large fine represents a big win for the HKCC, which says the case demonstrates the potential benefits of its leniency and cooperation policies for companies involved in cartels if they approach, and cooperate with, the HKCC.

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