



Press and Information

General Court of the European Union

PRESS RELEASE No 65/20

Luxembourg, 28 May 2020

Judgment in Case T-399/16

CK Telecoms UK Investments v Commission

The General Court annuls the Commission's decision to block the proposed acquisition of Telefónica UK by Hutchison 3G UK in the sector of the mobile telephony market

On 11 May 2016,¹ the Commission adopted a decision in which it blocked, under the Merger Regulation,² the proposed acquisition of Telefónica UK ('O2') by Hutchison 3G UK³ ('Three').

According to the Commission, that acquisition would have removed an important competitor on the United Kingdom mobile telephony market and the merged entity would have faced competition only from two mobile network operators, Everything Everywhere (EE), belonging to British Telecom, and Vodafone. The Commission considered that the reduction from four to three competitors would probably have led to an increase in prices for mobile telephony services in the UK and a restriction of choice for consumers. The acquisition would also have been likely to have a negative influence on the quality of services for consumers, hindering the development of mobile network infrastructure in the UK. Lastly, it would have reduced the number of mobile network operators wishing to host other mobile operators on their networks.

Three brought an action before the General Court seeking annulment of the Commission's Decision.

By today's judgment, **the General Court upholds the action and annuls the Commission's Decision.**

I – The effects of the operation on prices and on the quality of services for consumers have not been proved to the requisite legal standard

The Commission's assessment was based on the consideration that the acquisition would have eliminated competition between two powerful players on the UK mobile telephony market, one of which, Three, is allegedly an important competitive force on the UK mobile telephony market and the other of which, O2, allegedly holds a strong position: together, the two would have been the market leader, with a share of approximately 40%. In particular, it seemed likely to the Commission that the merged entity would have been a less aggressive competitor, that it would have increased prices and that, moreover, the concentration would have been likely to have a negative impact on the ability of the other operators to compete on price and by means of other parameters (innovation, network quality).

After clarifying the scope of the change made by the Merger Regulation, as well as the burden of proof and the standard of proof in relation to concentrations, **the General Court finds that the Commission's application of the assessment criteria of the so-called 'unilateral' (or 'non-**

¹ Commission Decision C(2016) 2796 of 11 May 2016 declaring the operation incompatible with the internal market (Case COMP/M.7612 — Hutchison 3G UK/Telefónica UK).

² Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1), as implemented by Commission Regulation (EC) No 802/2004 of 7 April 2004 (OJ 2004 L 133, p. 1).

³ Hutchison 3G UK Investments Ltd, an indirect subsidiary of CK Hutchison Holdings Ltd, became the applicant, CK Telecoms UK Investments Ltd.

coordinated') effects – namely, the concept of 'important competitive force', the closeness of competition between Three and O2 and the quantitative analysis of the effects of the concentration on prices – is vitiated by several errors of law and of assessment.

The Court acknowledges that the Merger Regulation allows the Commission to prohibit, in certain circumstances, on oligopolistic markets concentrations which, although not giving rise to the creation or strengthening of an individual or collective dominant position, 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. However, **the mere effect of reducing competitive pressure on the remaining competitors is not, in principle, sufficient in itself to demonstrate a significant impediment to effective competition in the context of a theory of harm based on non-coordinated effects.**

As regards the classification of Three as an 'important competitive force', the Court finds that the Commission erred in considering that an 'important competitive force' need not necessarily stand out from its competitors in terms of its impact on competition. If that were the case, that position would allow it to treat as an 'important competitive force' any undertaking in an oligopolistic market exerting competitive pressure.

In addition, as regards the assessment of the closeness of competition, the Court finds that, although the Commission established that Three and O2 are relatively close competitors in some of the segments of a market, that factor alone is not sufficient to prove the elimination of the important competitive constraints which the parties to the concentration exerted upon each other and therefore to establish a significant impediment to effective competition.

The Court also finds that the Commission's quantitative analysis of the effects of the concentration on prices does not establish, with a **sufficiently high** degree of probability, **that prices would increase significantly.**

II – The Commission failed to show that the effects of the concentration on the network-sharing agreements and on the mobile network infrastructure in the UK would constitute a significant impediment to effective competition

The current four mobile network operators in the UK are parties to two network-sharing agreements: on the one hand, EE and Three have brought together their networks under the 'Mobile Broadband Network Limited' – MBNL joint venture; on the other hand, Vodafone and O2 have brought together their networks to create 'Beacon'. That enables them to share the costs of rolling out their networks while continuing to compete at the retail level.

According to the Commission, the future development of the mobile network infrastructure in the UK would have been hindered to the extent that the merged entity would have been party to both network-sharing agreements, MBNL and Beacon. That entity would have been afforded an overview of the network plans of the two remaining competitors, Vodafone and EE, and the possibility of weakening them, thereby hindering the future development of the mobile network infrastructure in the country. In particular, according to the Commission, one of the ways of weakening the competitive position of one or other of the partners in the network-sharing agreements would be to degrade the network quality of that agreement. For the Commission, that seems particularly relevant for the partner in the network-sharing agreement that would not become the basis of the merged entity's consolidated network.

The Court finds that a possible misalignment of the interests of the partners in a network-sharing agreement, a disruption of the pre-existing network-sharing agreements, or even the termination of those agreements do not constitute, as such, a significant impediment to effective competition in the context of a theory of harm based on non-coordinated effects.

In that regard, the Court notes, first, that the effects of the concentration in relation to a possible exercise of market power, in the form of a degradation of the services offered by the merged entity

or of the quality of its own network, were not analysed in the contested decision, even though the assessment of a possible elimination of important competitive constraints between the parties to the concentration and a possible reduction of competitive pressure on the remaining competitors should lie at the heart of the assessment of the non-coordinated effects arising from a concentration.

The Court notes, second, that, even if the merged entity had favoured one of the two network-sharing agreements and was induced in particular to reduce the costs associated with the other network, that could not have a disproportionate effect on the position of the other partner in the network-sharing agreement or constitute a significant impediment to effective competition, since the Commission has failed to make the case that the other party would have neither the ability nor the incentive to react following an increase in its costs and would simply cease to invest in the network.

III – The effects of the concentration on the wholesale market were not found to be sufficient to establish the existence of a significant impediment to effective competition

In addition to the four mobile network operators, there are also several ‘virtual’ operators on the UK mobile telephony retail market, such as Virgin Media, Talk Talk and Dixons Carphone which use the infrastructure of the ‘host’ mobile network operators to provide their services to consumers in the UK.

According to the Commission, the loss of Three as an ‘important competitive force’ and the ensuing reduction in the number of host mobile networks would have placed the virtual operators in a weaker negotiating position to obtain favourable wholesale access conditions.

The Court finds that neither Three’s wholesale market shares nor their recent increase justify its classification as an ‘important competitive force’. The mere fact that Three had more of an influence on competition than its market share would suggest is not sufficient to establish the existence of a significant impediment to effective competition, particularly as it was not disputed that Three’s market share was small.

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months and ten days of notification of the decision.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

Unofficial document for media use, not binding on the General Court.

The [full text](#) of the judgment is published on the CURIA website on the day of delivery

Press contact: Jacques René Zammit 📞 (+352) 4303 3355