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Advocate General's Opinion in Commission v CK Telecoms

A lower bar for the European Commission to block mergers?

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On 20 October 2022, an adviser (Advocate General) to the European Court of Justice (ECJ) recommended that the ECJ uphold the European Commission (EC)'s appeal of a 2020 judgment by the lower-tier General Court, which set aside the EC's decision to prohibit the proposed merger between mobile network operators (MNOs) Three and O2 in the United Kingdom.

The General Court's judgment had been widely seen as favouring parties wishing to pursue consolidation, both in the telecoms sector and more broadly, by setting a higher bar for the EC to prohibit transactions in markets characterised by a few major players. While no longer relevant to the prospect of consolidation among UK MNOs following Brexit, if the ECJ follows this recommendation in its final judgment, this will give the EC greater confidence to block mergers falling within its jurisdiction, both among MNOs and in other industries with few players.

Background: the General Court sets a higher standard for intervention

The Advocate General's recommendation (**Opinion**) is the latest development in long-running proceedings, which we previously covered in detail in our **alert** on the General Court's judgment. The litigation began with the EC's decision in 2016 to prohibit CK Hutchison, owner of UK MNO Three, from acquiring Telefónica's O2, one of the three other UK MNOs, despite remedies offered by the parties. The decision confirmed a hardening of the EC's approach to consolidation between MNOs.

CK Hutchison appealed and in May 2020, the EU General Court annulled the EC's decision in its entirety. The reasons for this related largely to the legal test and standard of proof to be applied by the EC in assessing mergers, in particular those transactions that do not create or strengthen a single dominant player or a position of "collective dominance", but instead bring together competitors in markets characterised by a few major players, resulting in "non-coordinated" (or "unilateral") effects. As this is a common fact-pattern for mergers that attract substantive scrutiny, the General Court's decision to reject the EC's approach was of significant wider importance.

Helpfully for merging parties, the General Court not only materially tightened the conditions that must be met to find a "significant impediment to effective competition" (an SIEC) based on unilateral effects, but also required that the EC demonstrate this "with a strong probability" (not merely on a "balance of probabilities" standard). Fundamentally, the judgment revealed a disconnect between the General Court and established EC practice in evaluating mergers, with the General Court appearing to be sceptical of theories of harm based on unilateral effects.

Further, the General Court's judgment appeared to require the EC to consider, on its own initiative and as part of its analysis of a merger's effects on price, certain "standard" efficiencies (beneficial effects on efficiency from the rationalisation and integration of the parties' production and distribution processes, which the General Court held would result from any merger to a greater or lesser extent and might lead the merged entity to lower its prices). This implied a greater role for efficiencies in helping to clear mergers. Previously, the generally understood position was that the EC was only required to consider efficiencies put forward and proven by the parties (which is usually challenging in practice).

The Advocate General disagrees

In her Opinion, Advocate General Kokott substantially agrees with the EC's grounds of appeal, finding that the General Court was wrong in its interpretation of the legal test and standard of proof, distorted various aspects of the EC's decision and defence at first instance, and misconstrued the scope of the review it should have carried out. The Opinion recommends that the General Court's judgment be set aside in its entirety and the case remitted to the General Court for a fresh ruling.

Notably, the Opinion rejects the General Court's holdings regarding the conditions for finding an SIEC in cases involving unilateral effects, concludes that the same "balance of probabilities" standard of proof applies in all cases, rather than a higher "strong probability" standard applying in certain cases, and faults the General Court's "rather innovative approach" to efficiencies.

If the ECJ follows the Advocate General's recommendations, the effect would therefore be to reverse all of the General Court's merging-party-friendly holdings.

What next?

Advocate Generals' opinions are highly influential but not legally binding. The ECJ will now deliberate on the case before giving judgment (which will take some months).

During the course of these proceedings, much has changed in the UK, so that a fresh consideration of the merger would be academic. The UK has left the EU, and rather than being acquired by Three, O2 merged with Liberty Global's Virgin Media in 2021 – an example of fixed-mobile rather than MNO consolidation. While MNO consolidation is back in the news with reports of a possible tie-up between Three UK and Vodafone UK (following earlier speculation around whether UK communications regulator Ofcom has become more open to supporting consolidation to drive network investment), any such transaction would now be ruled on by the UK Competition and Markets Authority (CMA), not the EC.

The CMA applies its own legal test when assessing the impact of mergers and any remedies offered and has shown itself willing to take a different approach to the EC (even on transactions that are reviewed in parallel by both authorities). In May 2022, for example, the CMA blocked a merger between Cargotec and Konecranes, just weeks after the EC cleared the deal with remedies – see our ***Antitrust in focus* article** for more detail on the divergence in approach. That said, theories of harm based on unilateral effects are now a standard part of the CMA's toolkit for assessing mergers.

However, the final judgment in the case will be highly significant for parties wishing to pursue mergers within EU markets, both in telecoms (where Orange and MasMovil are currently seeking to combine their Spanish operations, and a number of other markets still have more than three MNOs) and in other concentrated sectors. If the ECJ substantially follows the Opinion, this will largely restore the previous EC approach to assessing mergers giving rise to unilateral effects, potentially making it more challenging to secure clearance for deals in concentrated markets.

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