SLAUGHTER AND MAY/

NEWSLETTER

12 - 25 JULY 2023

ISSUE 14

COMPETITION & REGULATORY NEWSLETTER

QUICK LINKS

Main Article
Other Developments
Antitrust
Subsidy control
General competition

Court of Justice rules in favour of Commission decision prohibiting Hutchison 3G (Three) / Telefónica (O2) merger

Introduction

On 13 July 2023, the European Court of Justice (CJ) handed down its judgment in *Commission v CK Telecoms UK Investments Ltd*, finding that the General Court (GC) had erred in its ruling annulling the European Commission's prohibition of the proposed acquisition of Telefónica UK by CK Hutchison. The landmark judgment contains several findings which have potentially wide ramifications for future merger cases, in particular regarding the standard of proof applicable to merger prohibition decisions and the interpretation of the 'significant impediment to effective competition' test. The CJ has referred the case back to the GC for a fresh ruling.

Background

In May 2016, the Commission prohibited the proposed 'four to three' merger between UK mobile network operators Telefónica Europe Plc (known as O2) and Hutchison 3G UK (known as Three).

In May 2020, the GC set aside the Commission's ruling in its entirety. In its judgment, the GC found, among other things, that the Commission had essentially fallen short of the standard of proof applicable to the control of concentrations giving rise to non-coordinated effects in an oligopolistic market (that is to say a transaction that gives rise to unilateral effects but where the merged entity does not have a dominant position). The GC held that the standard of proof in such cases was that there was a "*strong probability*" of a significant impediment to effective competition following the concentration.

The GC also criticised the Commission's approach to assessing the likely elimination of competitive constraints arising from a transaction. In the GC's view, to classify a merging party as an 'important competitive force' the Commission was required to demonstrate that it competed particularly aggressively in terms of price and "*stands ou*t" from other competitors in the market. The GC also held that, in justifying a merger prohibition decision, the Commission must establish that parties are "*particularly close*" (rather than merely "*close*") competitors.

Overall, the GC judgment significantly raised the bar for the Commission to block mergers in oligopolistic markets (as explained in more detail in a previous briefing). The Commission contested the findings of the GC and filed an appeal before the CJ.

For further information on any EU or UK Competition related matter, please contact the Competition Group or your usual Slaughter and May contact.

Square de Meeûs 40
1000 Brussels
Belgium
T: +32 (0)2 737 94 00

One Bunhill Row
London EC1Y 8YY
United Kingdom
T: +44 (0)20 7600 1200

Main Article
Other Developments
Antitrust
Subsidy control
General competition

Key findings of the CJ

Standard of proof

The CJ has found that the GC erred by requiring the Commission to demonstrate with a "*strong probability*" the existence of a significant impediment to effective competition. In the CJ's view, it is sufficient for the Commission to establish that this outcome is "*more likely than not*" in declaring a concentration incompatible with the internal market. The CJ held that the higher standard required by the GC did not follow from the EU Merger Regulation (EUMR), as interpreted by the CJ. The CJ's judgment therefore aligns with Advocate General (AG) Juliane Kokott's October 2022 opinion which also found that the GC had erred in raising the standard of proof for the prohibition of mergers on the basis of non-coordinated effects in oligopolistic markets. The AG's opinion was covered in more detail in a previous edition of this newsletter.

According to the CJ, the prospective nature of the analysis required of the Commission in assessing the likelihood of certain developments on the relevant market precludes a requirement for the Commission to meet a particularly high standard of proof in order to demonstrate that a concentration would or would not significantly impede effective competition.

Closeness of competition

The CJ has also been critical of the GC's approach to applying the 'significant impediment to effective competition' test, and in particular to assessing the likely elimination of competitive constraints arising from a transaction.

In that regard, the CJ found that the fact that a party to a transaction on an oligopolistic market does not stand out from its competitors by being "*particularly aggressive*" in terms of price does not mean that a concentration to which that undertaking is a party could not alter the competitive dynamic on a market to a significant and detrimental degree. In the CJ's view, although the Commission had in previous decisions classified as an important competitive force certain undertakings which were unique in their "*aggression*" on the market concerned and had grown their presence on that market faster than any other competitors, this did not mean that those are the only situations capable of giving rise to such a classification. As AG Kokott opined, there was no justification for interpreting the concept of an 'important competitive force' restrictively so that it was only applicable to "*mavericks in the market*". The CJ also considered that price is often not the only important parameter for assessing competitive dynamics, in particular in differentiated product markets in which quality and innovation could play a key role in the positioning of the products concerned.

The CJ also found that that the GC was wrong to conclude that only a concentration between "*particularly close*" competitors could significantly impede competition on the relevant market. The GC's judgment follows AG Kokott's view that the GC's assessment does not follow either from the Commission's Horizontal Merger Guidelines or the EUMR. Although a higher degree of closeness of competition between merging parties may constitute evidence that it is more likely than not that the transaction will significantly impede effective competition, even a lower degree of substitutability between merging parties' products is capable of leading to higher prices. Consequently, by requiring the Commission to demonstrate that the merging parties are "*particularly close*" competitors, the GC erred in law.

Efficiencies

The CJ also rejected the GC's finding that the Commission should have included the "*standard*" efficiencies which, according to the GC, accompany all concentrations, in its quantitative analysis. The CJ has clarified that it is for the notifying parties to demonstrate the existence of any efficiencies so that the Commission can take them into account in its review, noting that "*while certain concentrations may give rise to efficiencies which are specific to them, that possibility in no way implies that all concentrations give rise to such efficiencies*".

Main Article
Other Developments
Antitrust
Subsidy control
General competition

Conclusion and implications

The judgment confirms that the standard of proof applicable to the Commission's merger reviews is a 'balance of probabilities' test, for both clearance and prohibition decisions. It clarifies the bar for the Commission to prohibit mergers in so-called 'gap' cases in oligopolistic markets which do not involve individual or collective dominance. It remains to be seen how the Commission will make use of the CJ's judgment, in ongoing and future merger reviews.

While the judgment represents a victory for the Commission, the CJ nevertheless rejected the Commission's plea that the GC had exceeded the limits of its judicial review powers in interpreting economic concepts. The CJ clearly re-affirms that the EU Courts "*must not only establish, among other things, whether the evidence relied on by the Commission is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it*". This means that the Commission's margin of discretion will continue to be subject to meaningful substantive review and scrutiny on appeal to the GC.

The case is now sent back to the GC for a fresh ruling.

OTHER DEVELOPMENTS

ANTITRUST

CMA fines Leicester City FC for anti-competitive arrangements with JD Sports

On 5 July 2023, the UK Competition and Markets Authority (CMA) announced that it had reached a settlement with Leicester City FC (Leicester), under which Leicester has agreed to pay a fine of up to a maximum of £880,000 for colluding to share out markets and fix prices. This follows admissions by Leicester and JD Sports (JD) that they broke competition law by entering into an arrangement which restricted competition in the sale of Leicester City-branded clothing, including replica kit, in the UK.

In particular, the arrangement between Leicester and JD consisted of the following elements:

- an agreement, in August 2018, that JD would stop selling Leicester City-branded clothing online for the 2018/19 season;
- an agreement, in January 2019, that JD would not undercut Leicester's online sales for the 2019/20 season by applying a delivery charge to all orders of Leicester City-branded clothing, in turn disapplying its company-wide promotional offer of free online delivery on orders over £70; and
- an agreement, between July 2020 and January 2021, that JD would continue to apply delivery charges to online orders of Leicester City-branded clothing for the 2020/21 season.

JD reported the illegal conduct to the CMA and admitted that it had participated in the conduct by way of a leniency application. As such, JD will not receive a fine in connection with the arrangement, on condition that it continues to comply with the CMA's conditions for leniency. Leicester, meanwhile, did benefit from a settlement discount on the fine, as a result of admitting to acting illegally.

Main Article
Other Developments
Antitrust
Subsidy control
General competition

SUBSIDY CONTROL

European Commission publishes Foreign Subsidies Implementing Regulation

On 10 July 2023, the Commission adopted the final text of the Regulation implementing the Foreign Subsidies Regulation (the IR). The Foreign Subsidies Regulation (FSR), which came into force on 12 January 2023, is intended to address distortions in the EU internal market caused by foreign subsidies, in respect of both concentrations and public procurement procedures. For more information on the FSR, see our previous briefing and newsletter.

The IR sets out the procedures for FSR notifications and investigations, including the relevant notification forms for notifying concentrations (Annex I: Form FS-CO) and public procurement procedures (Annex II: Form FS-PP). Businesses must use these forms from 12 October 2023, when the obligation for parties to notify qualifying concentrations and public procurement procedures will start to apply.

The final text of the IR is the product of a very active consultation, held in February, on the draft Implementing Regulation, during which stakeholders urged the Commission to ease the administrative burden on businesses related to information disclosures. Overall, the IR has introduced some moderate amendments to the information disclosures envisaged by the draft Implementing Regulation. Nonetheless, in practice, businesses will still need to engage in close monitoring of all the relevant financial contributions that they receive, to ensure compliance with the FSR.

Most notably, the IR, as adopted, only requires parties to notify foreign financial contributions from the previous three years which (i) are "most likely to distort" competition within the EU (as set out in the FSR), provided that the relevant contribution is worth €1 million or more (the *de minimis* threshold) or which (ii) meet the *de minimis* threshold and are received from a third country for which the aggregate amount of contributions received in the preceding three years is equal to or exceeds €45 million (M&A deals) or €4 million (public tenders).

For further information on the requirements of the IR in respect of foreign financial contributions, see our detailed briefing here.

GENERAL COMPETITION

UK Government publishes National Security and Investment Act annual report 2022-2023

On 11 July 2023, the UK Government's Cabinet Office published the second Annual Report (the Report) on the National Security and Investment Act 2021 (NSI Act). The Report is the first to cover a full year (from 1 April 2022 to 31 March 2023), as last year's Annual Report only covered the first three months of the regime, which was introduced in January 2022.

Of note are the headline figures which the Report provides on the operation of the NSI Act. In the last financial year, the Cabinet Office received 866 notifications. Of all notifications, it called in 65 acquisitions (7.5%) for further assessment, of which 37 were made following a mandatory notification and 17 following a voluntary notification; 11 call-in notices were issued for acquisitions that were notified retrospectively or that had not been notified. Of the call-ins that were closed during this reporting period, the Secretary of State made 57 final notifications and 15 final orders; and one final order was revoked.

In addition, the Cabinet Office states that all cases were decided within the relevant statutory timelines. On average, the Investment Screening Unit (ISU) - the body responsible for overseeing the NSI Act regime - accepted both mandatory and voluntary notifications within 4 working days. The ISU then took an average of 28 working days to review the mandatory notifications which it accepted (and 27 working days for voluntary notifications),

falling short of the maximum 30 working day assessment period set out in the NSI Act. In more complex cases involving remedies, however, the ISU then required an average of 77 further working days to issue a final order.

Defence-related acquisitions were the most prominent transactions to be called in and subject to final orders: 47% of mandatory notifications related to the defence sectors, whilst in terms of call-ins 37% related to the Military and Dual Use sector, and 29% related to Defence. The other sectors subject to the most final orders were communications, energy, advanced materials, and computing hardware. Whilst 42% of call-ins related to transactions involving acquirers associated with China, the figure dropped to 32% and 20% for acquisitions involving acquirers associated with the UK and the USA, respectively.

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650

Published to provide general information and not as legal advice. © Slaughter and May, 2023.
For further information, please speak to your usual Slaughter and May contact.

www.slaughterandmay.com