Case Notes

The Case Notes section will identify and analyse important judgments that shape the interpretation and application of the EU law in the field of competition and regulation. If you are interested in contributing, please contact the Case Notes Editors Dimitris Vallindas at <dvallindas@shepparnd-mullin.com> or Silvia Pronk at <silviapronk@gmail.com>.

CK Telecosms and the Assessment of Horizontal Mergers in Oligopolistic Markets: Does the More Economic Approach Entail Stricter Judicial Review?

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Case T-399/16 CK Telecoms UK Investments Ltd v European Commission, Judgment of the General Court (First Chamber, Extended Composition) of 28 May 2020

The General Court annulled the European Commission’s decision prohibiting the acquisition of Telefónica Europe plc, operating on the UK retail telecommunications market under the brand name ‘02’, by CK Hutchison Holdings Ltd, operating on the same market under the brand name ‘Three’. In the first judgment on the application of the Significant Impediment to Effective Competition (SIEC) test to horizontal concentrations on oligopolistic markets, the General Court held that the Commission had failed to demonstrate that the concentration would significantly impede effective competition.

I. Facts and Background of the Case

On 28 May 2020, the General Court of the European Union (‘General Court’ or ‘GC’) annulled the European Commission’s decision prohibiting the acquisition of Telefónica Europe plc by CK Hutchison Holdings Ltd and its indirect subsidiary Hutchison 3G UK Investments Ltd (which was renamed to CK Telecoms UK Investments Ltd).1 In the first judgment on the application of the Significant Impediment to Effective Competition (SIEC) test introduced by Regulation 139/20042 to horizontal concentrations on oligopolistic markets, the GC held that the Commission had failed to demonstrate that this 4-to-3 horizontal concentration would lead to significant non-coordinated effects on the relevant markets.

At the time of the Commission’s decision, there were four mobile network operators active on the UK retail market for telecommunication services:

- EE plc, a subsidiary of BT Group plc (‘BT/EE’), with approximately 30 to 40% market share;
- Telefónica Europe plc (operating under the brand name ‘02’), with approximately 20 to 30% market share;
- Vodafone, with approximately 10 to 20% market share;
- Hutchison 3G UK Investments Ltd, now known as CK Telecoms UK Investments Ltd (operating under the brand name ‘Three’), with approximately 10 to 20% market share.

The proposed concentration, which was notified to the Commission on 11 September 2015, involved the acquisition of Telefónica Europe by CK Hutchison Holdings via the latter’s subsidiary Hutchison 3G UK. As a result of this concentration, the merged entity of O2 and Three would become the largest player on the UK retail telecommunications market, and the number of players would decrease from four to three.

The UK retail telecommunications market was also characterised by two network sharing agreements between BT/EE and Three, on the one hand, and O2 and Vodafone, on the other hand. These agreements allowed the operators to share their network costs while competing for retail customers.\(^3\)

All four operators were also active on the market for wholesale access to mobile networks. On this wholesale market, operators of a mobile network sell part of their network capacity to virtual network operators such as Tesco Mobile and Virgin Mobile.\(^4\)

In the course of the administrative proceedings, the Commission had rejected two sets of commitments, and on 11 May 2016 it adopted a decision declaring the concentration incompatible with the internal market.\(^5\)

The Commission advanced three theories of harm. First, it claimed that the concentration would result in non-coordinated anti-competitive effects on the retail market.\(^6\) Second, the merged entity would be part of both network sharing agreements to which O2 and Three were members. As a result, it would no longer have an incentive to fully commit to either network sharing agreement, in turn likely reducing industry-wide incentives for investment and innovation.\(^7\) Third, the concentration would lead to non-coordinated anti-competitive effects on the wholesale market.\(^8\)

The General Court not only rejected all three theories of harm which the Commission had relied upon, it also laid down a number of important and controversial principles for applying the SIEC test to concentrations not creating or strengthening a dominant position, the required standard of proof and the intensity of judicial review.

II. The Judgment of the General Court

1. Principles of Merger Control and Judicial Review

The GC commenced its analysis by emphasising that the purpose of creating the GC was to ‘improve judicial protection of individual interests, in particular in proceedings necessitating close examination of complex facts’ and to ‘maintain the quality and effectiveness of judicial review’.\(^9\) Accordingly, the GC ought to review the factual accuracy, reliability and consistency of the Commission’s evidence and whether the Commission’s complex economic assessment ‘is capable of supporting the conclusions drawn from it’.\(^10\) Throughout the judgment, there is no mentioning of a ‘margin of appreciation’ for the Commission in complex economic assessments.\(^11\)

As regards the application of the SIEC test to non-coordinated effects of oligopolistic concentrations, the GC inferred a twofold test from Article 2(3) and recital 25 of Regulation 139/2004: the concentration must involve (i) ‘the elimination of important competitive constraints that the merging parties had exerted upon each other’ and (ii) ‘a reduction of competitive pressure on the remaining competitors’.\(^12\)

In this regard, the GC observed that Article 2(3) of Regulation 139/2004 allows the Commission to prohibit mergers not creating or strengthening a dominant position 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’.\(^13\) This is a crucial part of the judgment: it suggests that the Commission can only prohibit a merger if the power of the merged entity is equivalent to that of a dominant position, an interpretation substantially narrowing the scope of Article 2(3). We will return to this point below.

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3  **CK Telecoms** (in 1) para 4.
4  ibid para 3.
6  **CK Telecoms** (in 1) paras 20, 128–136.
7  ibid paras 21, 292–322.
8  ibid paras 22, 419–423.
9  ibid para 72.
10 ibid para 76.
12 **CK Telecoms** (in 1) para 96.
13 ibid para 90 (emphasis added).
In terms of the standard of proof, the Court held that ‘the Commission is required to produce sufficient evidence to demonstrate with a strong probability the existence of significant impediments following the concentration’. Accordingly, the standard of proof is higher than the balance of probabilities (‘more likely than not’) but lower than ‘beyond all reasonable doubt’.14

Based on these clear statements of principle, the GC moved on to assess the three theories of harm presented by the Commission. We will discuss them in turn, focusing on the first theory of harm.

2. The First Theory of Harm: Non-Coordinated Effects on the Retail Market

According to the Commission’s first theory of harm, the concentration would remove ‘an important competitive force’ – namely Three – from the market.15 The term ‘important competitive force’ is used in the Horizontal Merger Guidelines.16 The GC pointed out that the Guidelines cannot bind the EU Courts, although the latter are free to adopt their legal and economic assessments.17 The Commission had reasoned that ‘an undertaking having more of an influence on competition than its market share would suggest’ suffices for that undertaking to be an ‘important competitive force’ and that ‘the mere decline in the competitive pressure which would result, in particular, from the loss of [an important competitive force] is sufficient, in itself, to prove a significant impediment to effective competition’.18 According to the GC, the Commission had mistakenly conflated the concepts of ‘important competitive force’ (from the Horizontal Merger Guidelines), ‘important competitive constraint’ (from recital 25 Regulation 139/2004) and ‘significant impediment to effective competition’ (from Article 2(3) Regulation 139/2004).19 This had the effect of elevating the concept of ‘important competitive force’ to an autonomous legal criterion additional and alternative to the criteria used in Regulation 139/2004.20 In turn, it would allow the Commission to block any concentration in oligopolistic markets and thereby infringe the principle of legal certainty.21 The GC subsequently concluded that the Commission had failed to show that Three was an ‘important competitive constraint’ in the sense of Article 2(3) and recital 25.22

Secondly, the GC scrutinised the Commission’s analysis regarding the ‘closeness of competition’ between Three and O2.23 The Court observed that the concept of a ‘close competitor’ appears merely in the Horizontal Merger Guidelines, but that it may be an important part of the analysis of non-coordinated effects.24 However, the GC concluded that the Commission had not demonstrated that Three and O2 were ‘particularly close’ competitors instead of being ‘relatively close competitors’.25 Since all competitors in oligopolistic markets are relatively close competitors, this would mean that ‘any concentration resulting in a reduction from four to three operators would as a matter of principle be prohibited’.26

Thirdly, the GC also rejected the Commission’s quantitative analysis of upward pricing pressure (UPP) on the retail telecommunications market. The Commission had claimed that, following its prediction of price increases, the notifying parties should demonstrate efficiencies which could outweigh anti-competitive effects.27 The GC concluded, however, that the Commission had confused two types of efficiencies: efficiencies that are likely to counteract the restrictive effects of the concentration, and so-called ‘standard efficiencies’ that are a component of the capability of the concentration to restrict competition.28 The latter type of efficiencies is an inherent part of the Commission’s burden to prove non-coordinated effects in the form of price increases.29 Furthermore, the Commission had also failed to
show, with a sufficient degree of probability, that the predicted price increase was 'significant'.

3. The Second and Third Theories of Harm: Disruption of the Network-Sharing Agreements and Non-Coordinated Effects on the Wholesale Market

The GC likewise rejected the second and third theory of harm. The GC’s reasoning is similar to the one regarding the first theory of harm and focuses on the plausibility and probability of the Commission’s predictions in light of the general principles regarding the meaning of the SIEC test, the standard of proof and the intensity of judicial review in paragraphs 72 to 119.

With respect to disruption of network-sharing agreements, the GC noted that this is a ‘novel’ and ‘innovative’ theory of harm in light of the Commission’s previous decision-making practice. In that regard, the GC concluded 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’. It also held that the Commission’s prediction of harm to the other parties to the network-sharing agreements – BT/EE and Vodafone respectively – by reduced or delayed network investments relied on a weak chain of cause and effect, and was not sufficiently realistic and plausible.

With regard to the non-coordinated effects of the merger on the wholesale market, the Commission had concluded that ‘[Three’s] presence had a competitive impact in wholesale negotiations even in cases where it was not successful’ and ‘that it was considered to be an important competitor’, whose removal from the market would weaken the bargaining position of virtual mobile network operators seeking wholesale access.

However, Three’s market share was only between 0 and 5% on this wholesale market. The GC held that the Commission had failed to demonstrate that, notwithstanding its small market share, Three was an ‘important competitive force’ in the sense of paragraphs 37 and 38 of the Commission’s own Merger Guidelines. The fact that Three is considered to be a credible threat on the market and participated in a significant number of calls for tenders did not prove that Three stands out from other market participants and is to be considered an ‘important competitive force’. In any case, the Commission also failed to demonstrate that Three and O2 formed ‘important competitive constraints’ in the sense of recital 25 of Regulation 139/2004. Consequently, also the third theory of harm was rejected.

III. Comment

1. The Interpretation and Application of the SIEC Test

The GC’s interpretation and application of the SIEC test is complex and will undoubtedly continue to be discussed in the upcoming years. One of the key questions in this regard is how the SIEC test ought to be applied to concentrations not creating or strengthening a dominant position.

According to the GC, oligopolistic concentrations not creating or strengthening a dominant position can only be prohibited if they ‘are liable to affect the competitive conditions on the market to an extent equivalent to that attributable to such positions’ and the merged entity is able ‘to determine, by itself, the parameters of competition and, in particular, to become a price maker instead of remaining a price taker’. This interpretation cannot be traced back easily to the text of Regulation 139/2004 and arguably eliminates considerably the added value of the SIEC test compared to the pre-2004 dominance test. Recital 25 of Regulation 139/2004 states that ‘[t]he notion of “significant impediment to effective com-
petition” in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned” (emphasis added). Accordingly, Regulation 139/2004 does not appear to require the non-coordinated effects to be equivalent to the effects of creating or strengthening of a dominant position.

Furthermore, in its application of the SIEC test to the present case, the GC heavily emphasises the adjective ‘significant’ in the SIEC test. This can be seen for instance in the Court’s conclusion that the Commission’s interpretation of the SIEC test would allow it to block any horizontal concentration in oligopolistic markets. It is also apparent from the Court’s observation that the Commission had predicted a price increase on the retail telecommunications market that was comparable to predicted price increases in two earlier concentrations which the Commission had authorised, thus casting doubt on its significance.

The General Court’s application of the SIEC test illustrates the thin line between in-depth legality review and substituting the Court’s view for that of the Commission. In theory, this distinction is clear enough: the GCought to assess whether the Commission accurately established the facts and whether it applied the law correctly. But in applying the SIEC test, it is unclear where the law ends and discretion starts. For example, in our view, the GC rightly concluded that ‘the mere effect of reducing competitive pressure on the remaining competitors’ is insufficient to find a SIEC. However, does it follow from the SIEC test that a 4 to 3 merger only impedes effective competition significantly if it removes a competitor which ‘stands out from its competitors in terms of impact on competition’? In our view, it does not, and the GC’s conclusion on this point comes very close to a substitution of the Commission’s analysis.

The semantic discussion between ‘important competitive force’ and ‘important competitive constraint’ is perhaps not as central as the judgment suggests. The key question is whether the removal of a competitor having ‘more of an influence on competition than its market share would suggest’, i.e. an ‘important competitive force’, but which does not stand out from its competitors in terms of impact on competition, may count as the elimination of an ‘important competitive constraint’ in the sense of recital 25 of Regulation 139/2004. According to the GC it does not because that would allow the Commission to consider the removal of any undertaking in an oligopolistic market exerting competitive pressure as an important competitive force and a SIEC. It is not apparent to us, however, why that would be an illegal interpretation of Article 2(3) of Regulation 139/2004. It appears that the GC assumes, on the basis of recital 25, that the SIEC test cannot be interpreted as prohibiting all horizontal mergers in oligopolistic markets. However, this conclusion ignores the importance of efficiencies that affect the merger’s capability to entail anti-competitive effects or outweigh them. The fundamental question is whether – absent such efficiencies – horizontal oligopolistic concentrations removing an ‘important competitive force’ from the market presumably entail a SIEC.

In our view, the only substantive argument the GC provides to answer that question in the negative is the principle of legal certainty. That argument, however, is unconvincing. Even if the Commission would be allowed to presume that all horizontal concentrations in oligopolistic markets eliminate important competitive constraints, the near certainty that such concentrations would be prohibited – at least absent demonstrable efficiencies – would enhance rather than diminish legal certainty.

\[\text{CoRe 427} \]
2. The Burden and Standard of Proof in Oligopolistic Merger Cases

The burden of proof to demonstrate that the concentration significantly impedes effective competition is borne by the Commission, as the GC confirms. In this respect, the GC’s assessment of the Commission’s quantitative analysis of UPP deserves particular attention. The GC’s conclusion that the Commission should consider ‘standard efficiencies’ in order to demonstrate a likely price increase will be a heavy burden for the Commission in future merger cases. This allocation of the burden of proof is further complicated by the fact that the Commission largely depends on the information supplied by the notifying parties, including information about efficiencies that involve cost savings. The burden of proof in relation to efficiencies will therefore likely be an important aspect of the Commission’s appeal.

In relation to the standard of proof, two aspects of the judgment are particularly noteworthy: the relevance of the margin of appreciation doctrine and the GC’s conclusion that the standard of proof is higher than the balance of probabilities.

The GC did not refer to the doctrine of a ‘margin of appreciation’ for the Commission in complex economic assessments. In a number of the judgments, the EU Courts held that such a margin of appreciation is ‘implicit in the provisions of an economic nature which form part of the rules on concentrations’. This margin of appreciation has been associated with two formulas. First, judicial review is limited and confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment of misuse of powers. Second, judicial review focuses on whether ‘the evidence relied on 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’.

CK Telecoms excludes the first formula and mentions the second one as a self-standing criterion. Together with the margin of appreciation, this second formula reads as a deferential form of judicial review. By itself, however, as in CK Telecoms, the formula rather emphasises the full nature of judicial review.

It may be that the margin of appreciation is smaller in merger control than it is in antitrust. The case law, however, remains unclear at this point, with Impala espousing a somewhat more deferential approach than Tetra Laval.

The first formula more strongly suggests deference in judicial review. A possible explanation for its omission: according to Marc van der Woude, President of the GC and one of the judges in this case, the first formula simply aims to reflect that ‘the Union courts are not allowed to substitute their own economic assessment to that of the Commission’. In our view, this interpretation significantly alters the meaning of the margin of appreciation doctrine, and it will be a pivotal aspect of the proceedings before the Court of Justice following the Commission’s appeal. It is also noteworthy in this regard that while the applicants consistently referred to the allegedly ‘manifest error of assessment’ of the Commission, the GC at crucial points qualified the Commission’s decision as an ‘error of assessment’.

In addition, while observing that the standard of proof in merger cases is between a ‘balance of probabilities’ and a ‘beyond reasonable doubt’, the GC re-

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52 ibid para 107.
53 Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2013) OJ L 336/1, s 9: ‘Should you wish the Commission specifically to consider from the outset whether efficiency gains generated by the concentration are likely to enhance the ability and incentive of the new entity to act pro-competitively for the benefit of consumers, provide a description of, and supporting documents relating to, each efficiency (including cost savings, [...]) [...]’ (emphasis added).
54 Case C-12/03 P Commission of the European Communities v Tetra Laval BV [2005] ECLI:EU:C:2005:87, para 38.
55 eg Case 42/84 Romia BV and Others v Commission of the European Communities [1985] ECLI:EU:C1985:327; para 34; Clave-SmithKline Services (n 45) para 163; and similarly Impala (n 45) para 144.
56 Commission v Tetra Laval (n 54) para 39.
57 ibid para 38 refers to ‘a certain discretion [for the Commission], especially with respect to assessments of an economic nature’. Impala in para 144 refers to this paragraph from Tetra Laval to support the conclusion that judicial review is limited to ‘ascertaining that the facts have been accurately stated and that there has been no manifest error of assessment’ (emphasis added).
59 Case C-376/20 P European Commission v CK Telecoms UK Investments (pending).
60 CK Telecoms (n 1) paras 174, 189-190, 197-198, 216.
ferred to the Opinion of AG Tizzano in *Tetra Laval*\(^6^1\) and the Opinion of AG Jääskinen in *France v Commission* (a case dealing with state aid).\(^6^2\) It did not refer, however, to the Court of Justice’s judgment in *Impala*, in which the Court held that it cannot therefore be inferred from the Regulation that there is a general presumption that a notified concentration is compatible with, or incompatible with, the common market;\(^6^3\) and that ‘it cannot be deduced from that that the Commission must, particularly where it pursues a theory of collective dominance, comply with a higher standard of proof in relation to decisions prohibiting concentrations than in relation to decisions approving them.’\(^6^4\) AG Tizzano’s preference to err on the side of approving the concentration\(^6^5\) is difficult to reconcile with these observations from the more recent *Impala* judgment. If the standard of proof in relation to decisions prohibiting concentrations must be equal to the one related to decisions approving them, it appears that the standard of proof cannot be higher than the balance of probabilities.\(^6^6\) After all, as noted by Vande Walle, if the Commission is unable to demonstrate ‘with a strong probability’ that the concentration significantly impedes effective competition, but neither ‘with a strong probability’ that it does not, it would technically be unable to reach any decision.\(^6^7\)


We submit that the fundamental question posed by *CK Telecoms* is the following: how far does legality review enter the assessment of the economic circumstances of an individual case? This question further subdivides into a number of pressing issues that will have to be addressed by the Court of Justice on appeal. Among them, first of all, is the relationship between full judicial review, the margin of appreciation in complex economic assessments, and the substitution of the Court’s view for that of the Commission. If the law is unclear and the Commission’s economic assessments are disputed, it remains to be seen how much legality review and substitution of the Commission’s view can really be separated.

Secondly, the relationship between legality review and economic assessments has become more complex as a result of what is often called the ‘more economic’ approach to EU competition law.\(^6^8\) A case-by-case analysis of (predicted) economic effects grants considerable discretion to administrative decisionmakers. One of the pressing questions of the more economic approach is how such a case by case analysis relates to judicial review. In our opinion, *CK Telecoms* shows that the discretion generated by fewer ‘form-based’ rules is being counteracted by a higher intensity of judicial review in regard to evidential standards.

Thirdly, and most generally, *CK Telecoms* re-raises the question of the desirability of specialist courts. While the GC does not operate as a specialist court, the extended composition of the First Chamber to which *CK Telecoms* was assigned included several high level competition law experts, including the President of the GC. Expertise can be virtue and vice at the same time: how would a judicial chamber com-

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61 Case C-12/03 P Commission of the European Communities v Tetra Laval BV [2004] ECLI:EU:C:2004:318, Opinion of AG Tizzano, paras 76–77, arguing that if the notified transaction does not ‘very probably’ create or strengthen a dominant position and ‘it is impossible to arrive at a clear distinct conviction that the likelihood that a dominant position will be created or strengthened is significantly greater or less than the likelihood that such a position will not be created or strengthened’, the concentration should be approved.

62 Case C-559/12 P French Republic v European Commission [2013] ECLI:EU:2013:766, Opinion of AG Jääskinen, para 35: ‘the standard of proof must be based on serious probability and sufficiency of evidence. The requisite standard is thus more than mere probability, whilst falling short of a requirement of being beyond all reasonable doubt’.

63 Impala in 45) para 48.

64 ibid para 51.

65 See n 60.

66 See also Case C-413/06 P Impala [2007] ECLI:EU:2007:790, Opinion of AG Kokott, para 209: ‘Thus, if it is more likely than not that a dominant position will be created or strengthened, the concentration is to be prohibited: on the other hand, if it is less likely than not that a dominant position will be created or strengthened, the concentration should be cleared’. Alongside its references to the Opinions of AG Tizzano and AG Jääskinen, the General Court referred to this Opinion as an argument ‘a contrario’ (*CK Telecoms* in 1) para 118), while ignoring that the Court of Justice followed AG Kokott’s ‘symmetrical’ approach.


posed of competition law experts distinguish between ‘legality review’ and ‘sound economic assessment’, especially if vague legal tests refer to economic concepts? How can such a chamber avoid substituting de facto its view for the Commission’s? Would generalist and specialist courts assess the demarcation between ‘manifest error of assessment’ and ‘error of assessment’ differently? Against the background of these broader questions about the relationship between institutional design and judicial review, the GC’s review of the Commission’s economic assessment is certainly in-depth, but also audacious and close to the point of testing it against its own economic assessment.