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Europe's Highest Court Provides Clarity on Key Concepts in EU Merger Control

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The latest development in the Three / O2 saga will perhaps not come as a surprise to everyone, but it will certainly get people talking. The Court of Justice of the European Union ("CJEU") has ruled that the lower EU court, the General Court, must consider again whether the European Commission ("EC") was right in 2016 to block Three's $14.5 billion bid for O2.[1]

Four years ago, the General Court overturned the EC's prohibition decision. In a highly critical judgment, the General Court held that the EC erred in its legal analysis, fell short in respect of its economic analysis and overall failed to justify the decision to prohibit the transaction on competition grounds.

However, the CJEU has now comprehensively overturned the General Court judgment, on the basis that it applied the wrong legal analysis to the EC's decision and distorted aspects of the decision.

Although the saga is not over yet, the CJEU's judgment is likely to be considered a seminal ruling for telecoms mergers and EU merger control in general, as it provides clear guidance on key legal concepts under the EU Merger Regulation ("EUMR").

Background

Prior to the proposed Three / O2 transaction, the EC had cleared a number of "4-to-3" telecoms mergers across Europe, subject to increasingly far-reaching remedies. However, in its decision on Three / O2, the EC dismissed the substantive arguments and merger-related efficiencies presented by the parties and found that, while the transaction would not create a dominant position, it would result in a significant impediment to competition ("SIEC"). The EC rejected the parties' proposed remedies to

open up the combined network infrastructure to new rivals, divest part of O2's stake in a mobile virtual network operator, freeze prices in the wholesale market, and invest heavily in the combined network.

The prohibition stopped the deal from proceeding, but Three appealed the EC's decision. In 2020, the General Court also annulled the decision, holding that it failed to produce sufficient evidence to demonstrate with "strong probability" the existence of an SIEC.

Given the ramifications for the EC's merger control decision-making, the EC appealed the General Court's judgment to the CJEU. In October 2022, the EC's arguments were strongly supported in the Opinion of Advocate General Kokott. The CJEU's judgment is closely aligned with AG Kokott's Opinion and will be seen as a significant win for the EC.

The CJEU's main findings

The CJEU's judgment is highly critical of the General Court's ruling and largely overturns the General Court's criticisms of the EC's decision. Key findings include:

- **The General Court erred in law on the standard of proof required to establish an SIEC.** The General Court found that the relevant standard of proof here was the "strong probability" of the existence of an SIEC. However, the CJEU held that the standard of proof is the same for all types of merger assessments and importantly — in line with previous EU case law — only requires that the EC finds it is "more likely than not" that a transaction will give rise to an SIEC. The CJEU also highlighted the EC's margin of discretion in complex economic matters requiring a forward-looking analysis. For this type of analysis, the EU courts' review is limited to ensuring that facts have been accurately stated and that there has not been a manifest error in the EC's assessment.
- **The General Court erred in law on the conditions required to establish an SIEC in the absence of a dominant position following a transaction on an oligopolistic market.** The General Court concluded that in the absence of a dominant position following a transaction on an oligopolistic market, the EC is required to prove: (a) the transaction would eliminate significant competitive constraints exerted by the merging parties on each other; and (b) the transaction would result in the reduction of competitive pressure on the remaining competitors. The CJEU rejected this interpretation and held that these are not cumulative conditions, but separate reasons why a transaction in an oligopolistic market may give rise to an SIEC.

- **The General Court erred in law on the role of efficiencies in the EC's quantitative analysis.** The General Court was critical of the EC for not fully taking into account efficiencies generated by the transaction, including "standard" efficiencies that can be expected to arise in M&A transactions. By contrast, the CJEU emphasized that not all transactions give rise to efficiencies and, in any event, it is the notifying parties' — rather than the EC's — responsibility to demonstrate the existence of such efficiencies.
- **The General Court erred in law on the conditions required to qualify as an "important competitive force".** The General Court held that the EC failed to prove that Three implemented a particularly aggressive pricing policy that either forced its competitors to follow its prices or could change the competitive dynamics on the market. However, according to the CJEU, the concept of an "important competitive force" does not only apply to these specific situations. It is sufficient to show that the undertaking has more of an influence on the competitive process than its market share or similar measures would imply.
- **The General Court erred in law on the closeness of competition test.** The General Court held that the EC was required to establish that Three and O2 are "particularly close" competitors. To the contrary, the CJEU found that demonstrating that the parties are "particularly close" competitors is not required.

As would be expected, the CJEU has referred the case back to the General Court, which will have to consider the above clarifications and reach a fresh judgment on the EC's prohibition decision. In light of the CJEU's ruling, it seems hard to imagine the General Court will reach any conclusion other than to uphold the prohibition.

Key takeaways and implications of the judgment on EU merger control

In summary, the CJEU's judgment clarifies several important concepts under the EUMR:

- The EC does not need to find that a transaction will give rise to the "strong probability" of an SIEC. Instead, it is sufficient to demonstrate it is "more likely than not" that a transaction would result in an SIEC and the legal standard of proof is the same for all types of merger assessments.
- There is no requirement for the EC to demonstrate that the merging parties are "particularly close" competitors. If they are "close" competitors, it may be that they exert sufficient competitive constraints to give rise to an SIEC.

- The elimination of important competitive constraints that the merging parties exert upon each other pre-transaction (which would be expected to continue to apply if the transaction did not go ahead) could be sufficient by itself to establish an SIEC, even if the transaction would not result in the reduction of competitive pressure on the remaining competitors.
- The burden of establishing efficiencies lies firmly with the merging parties.

The General Court's decision had raised the bar for the EC to find an SIEC, but the CJEU has firmly lowered it again, with its ruling based largely on existing EU case law and established EC practices. Going forward, where parties are considering a merger in a market that is already concentrated (such as a 4-to-3), be it in telecommunications or other markets, the CJEU's decision will give the EC greater confidence to intervene and the merging parties greater cause for concern.

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1. The bid concerned the proposed acquisition by Three (aka CK Telecoms UK Investments Ltd, previously known as Hutchison 3G UK Investments Ltd) of O2 (aka Telefónica Europe). ↩

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