

## Court Strikes Blow to European Commission in Mobile Telecoms Merger

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In May 2016, the European Commission (“Commission”) blocked CK Hutchison’s (“Hutchison”) £10.25 billion acquisition of Telefónica UK (“O2”). The Commission had previously cleared a series of “4-to-3” telecoms mergers across Europe, subject to increasingly far-reaching remedies. Specific features of the UK mobile telecoms market led the Commission to reject the remedies offered by Hutchison and issue its prohibition decision. The transaction collapsed but Hutchison appealed the decision.

On 28 May 2020 (four years after the prohibition – merger appeals do not progress quickly in the EU), the General Court (the lower of the two European appeal courts) comprehensively overturned the Commission’s decision. The ruling represents a highly significant loss for the Commission led by Executive Vice President Margrethe Vestager, who has taken a tough stance on companies in a number of competition cases (e.g., by fining Google more than €8 billion in three cases). In the area of merger control, the Commission has adopted on average one prohibition decision per year in the last six years, with a peak of three in 2019, but has increasingly come under political pressure from major Member States to relax its approach.

Unless overturned by Europe’s highest court, the judgment is set to become a seminal case in European merger control. For the first time since the EU Merger Regulation’s revision in 2004, the Court has interpreted the substantive criteria for establishing a “significant impediment to effective competition” (“SIEC”) in cases that do not lead to single firm dominance, or to coordinated effects in oligopolistic markets.

## The Commission's 2016 prohibition

The acquisition by Hutchison would have created a new market leader in the UK, combining mobile network operators Three and O2, ahead of the two other mobile network operators (Vodafone and EE). The Commission found that the merger would give rise to an SIEC on the retail and wholesale markets for mobile telecoms services.

Dismissing substantive arguments and merger-related efficiencies presented by the parties, the Commission found that, while the merger would not create a dominant player (the combined market share would be between 30 and 40%), it would result in an SIEC. The Commission rejected Hutchison's proposed largely behavioral remedies including opening up the combined network infrastructure to new rivals, divesting part of O2's stake in Tesco Mobile, freezing prices in the wholesale market, and investing heavily in the combined network.

## The General Court's main findings

The General Court's ruling addresses the standard of proof for establishing an SIEC, mandating that the Commission has to produce sufficient evidence to demonstrate with "strong probability" the existence of an SIEC.

To prohibit a merger in an oligopolistic market, the Court found that the mere effect of reducing competitive pressure as a result of the merger is not sufficient to assume an SIEC.

The Court issued some harsh criticism of the decision, finding that the Commission:

- "*confused*" three different concepts (the SIEC standard, the "*elimination of an important competitive constraint*" and the "*elimination of an important competitive force*") and in relying on the less demanding concept of elimination of an important competitive force, set too low a standard for intervention. Instead, it needed to show that the transaction eliminated an important competitive constraint between the merging parties in the market;
- merely established that Three and O2 were "*relatively close competitors*" rather than "*particularly close competitors*";
- fell short with regard to its economic analysis, including its survey work to establish diversion ratios, its upward pricing pressure analysis and inadequately disregarding certain standard efficiencies in its quantitative analysis;
- failed to show that the effects of the transaction on the two UK network sharing agreements and the UK mobile network infrastructure would negatively affect quality of service to consumers and constitute an SIEC; and

- did not demonstrate that Three was an important competitive force in the wholesale market (in particular as its market share was small with 0-5%).

The Court in particular showed no mercy when it labelled the Commission decision of nearly a thousand pages as *“limited to a cursory reference to the body of evidence and circumstances concerning, in particular, the elimination of an important competitive force by the concentration, the closeness of competition and the large market share of the merged entity”*.

## Implications for EU merger policy

The *CK Telecoms* judgment has been handed down at a time of increased protectionism around the globe, leading to heightened regulatory scrutiny of foreign investment. It also follows significant push back from several EU Member States (most notably France and Germany) following the Commission’s prohibition of *Siemens/Alstom* in 2019. The Commission’s prohibition decision also stands in contrast to the US Department of Justice’s and US courts’ blessing of “4-to-3” *T-Mobile/Sprint*.

Although it seems likely that the Commission will appeal the ruling, the General Court’s judgment will require the Commission to tread more carefully in its review of “4-to-3” mergers in the telecoms but also in other sectors. Given the strict legal standards established by the Court, the judgment will likely herald even closer scrutiny and longer review times for mergers in oligopolistic markets. This will be an additional burden for merging parties. However, the judgment will also require the Commission to think twice before blocking deals or making them conditional on far-reaching remedies undermining the merger’s efficiencies. It should also ease the level of intervention for “5-to-4s” where competition effects should arguably be less pronounced than in “4-to-3” cases. In these times of crisis, it can be expected that many businesses will look to consolidation and synergies as a survival mechanism. This judgment is timely as it may just facilitate the passage of some transactions which might otherwise have failed the Commission’s merger review.

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## Suggested Reading

- [28 May 2020 In the News Law360's Weekly Verdict: Legal Lions & Lambs](#)
- [11 May 2020 Award GCR 40 Under 40 2020](#)
- [04 May 2020 Press Release Kirkland Advises National Fuel Gas and Seneca Resources on Purchase of Shell's Interests in Appalachia Upstream and Midstream Properties](#)

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