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Advocate General's Opinion C-376/20 P | Commission v CK Telecoms UK Investments

Merger control: Advocate General Kokott clarifies the standards of proof of the existence of non-coordinated effects satisfying the concept of 'significant impediment to effective competition' on an oligopolistic market where the merged entity does not have a dominant position

The scope of the judicial review, as well as the requirements for taking evidence and the standard of proof, must be the same, irrespective of the type of concentration which may give rise to such an impediment

On 11 May 2016, the European Commission adopted a decision¹ finding that the proposed acquisition of Telefónica UK (known as 'O2') by Hutchison 3G UK² (known as 'Three'), two British mobile telephony operators, was incompatible with the merger regulation. The relevant market is oligopolistic and the transaction results, in the view of the Commission, in a significant impediment to effective competition on account of 'non-coordinated' or 'unilateral' horizontal effects, that is to say where the merged entity does not have a dominant position.

The General Court of the European Union, before which one of the undertakings brought an action, set aside that decision by a judgment of 28 May 2020³, ruling that the Commission, in essence, disregarded the standard of proof applicable to the control of concentrations giving rise to non-coordinated effects on an oligopolistic market.

In the appeal which it brought before the Court of Justice, the Commission disputes, in essence, both that standard of proof applied by the General Court and the scope of the review which it carried out in that regard.

In her Opinion presented today, **Advocate General Juliane Kokott proposes that the General Court's judgment be set aside** and that the case be referred back to the General Court **for it to provide a fresh ruling on the dispute**.

Advocate General Kokott first points out that **this is the first case in which the Court has been given the opportunity to provide a ruling on the concept of 'significant impediment to effective competition', in so far as it is based on non-coordinated effects**, and to provide clarification both concerning the standard of proof which the Commission is required to meet for the purposes of applying that concept and concerning the scope of the review of legality which the EU Courts are called upon to carry out.

In the first place, Advocate General Kokott states that **the scope of judicial review as regards application of the concept of 'significant impediment to effective competition' must be the same, irrespective of the type of**

¹ Commission Decision C (2016) 2796 of 11 May 2016, declaring a concentration to be incompatible with the internal market (Case COMP/M.7612 – Hutchison 3G UK/Telefónica UK).

² Hutchison 3G UK Investments Ltd, an indirect subsidiary of CK Hutchison Holdings Ltd became the applicant, CK Telecoms UK Investments Ltd.

³ Judgment of 28 May 2020 CK Telecoms UK Investments v Commission, [T-399/16](#) (see [CP 65/20](#)).

concentration concerned which may give rise to such an impediment. In that regard, the Commission has a margin of discretion with regard to economic matters for the purposes of applying the substantive rules of the merger regulation. It follows that **the review by the EU Courts of a Commission decision is confined to ascertaining that the facts have been accurately stated and that there has been no manifest error of assessment.**

In the second place, the Advocate General **examines the criteria governing the burden of proof, the taking of evidence and the standard of proof which the EU Courts must require the Commission to apply** when it prohibits a concentration on the ground of a significant impediment to effective competition resulting from non-coordinated effects on an oligopolistic market.

On the one hand, the merger regulation does not impose different standards of proof with respect to decisions authorising a concentration and decisions prohibiting a concentration, since those standards of proof are perfectly symmetrical.

On the other hand, **the relevant test for the standard of proof required on the part of the Commission in its (prospective) economic analysis is the 'balance of probabilities' or 'plausibility'**. The latter consists of an examination of how, in the light of the various conceivable chains of cause and effect, the merger concerned could give rise to a significant impediment to effective competition. In that situation, **the scope of the judicial review is, in essence, limited to ascertaining whether there have been manifest errors of assessment.** According to the Advocate General, that conclusion is all the more compelling, since it is not possible to provide 'objective' proof of a forecast or for it to be free of uncertainties and doubts. Accordingly, on a general or abstract level, any prospective analysis relating to the future developments of a relevant market and the future behaviour of operators who are or will be active on it can be based only on the determination of a more or less strong probability.

Finally, Advocate General Kokott considers that, in view of the unitary nature of the concept of 'significant impediment to effective competition', irrespective of the type of concentration concerned and the symmetry of the standard of proof, **there is no justification for requiring a higher standard of proof in the case of concentrations giving rise to non-coordinated effects on oligopolistic markets than in the case of concentrations giving rise to 'conglomerate' (groups of undertakings active in different areas) or 'collective' (a number of undertakings which are legally independent of one another but which act, from an economic point of view, as a collective entity on the relevant market) type dominant positions.**

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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