



## PRESS RELEASE No 120/23

Luxembourg, 13 July 2023

Judgment of the Court in Case C-376/20 P | Commission v CK Telecoms UK Investments

### The General Court must rule once more on the lawfulness of the Commission's prohibition of the acquisition of Telefónica Europe ('O2') by Hutchison 3G UK ('Three')

On 11 May 2016, the Commission adopted a decision <sup>1</sup> in which it blocked, under the Merger Regulation, <sup>2</sup> the proposed acquisition of Telefónica Europe ('O2') by Hutchison 3G UK Investments ('Three'), which is now CK Telecoms UK Investments Ltd <sup>3</sup> ('CK Telecoms'). CK Telecoms brought an action before the General Court of the European Union seeking to have that decision set aside. By judgment of 28 May 2020, <sup>4</sup> the General Court upheld that action and set aside the Commission decision. The Commission challenged that judgment before the Court of Justice.

**By today's judgment, the Court of Justice annuls the judgment of the General Court and refers the case back to it.**

First, by holding that the Commission is required to demonstrate with a 'strong probability the existence of significant impediments' to effective competition following the concentration and that 'the standard of proof applicable in the present case is therefore stricter than that under which a significant impediment to effective competition is "more likely than not"', **the General Court applied a standard of proof which does not follow from the Merger Regulation**, as interpreted by the Court of Justice, and thus made an error in law. According to the Court of Justice, the prospective nature of the economic analysis which the Commission must carry out under the Merger Regulation precludes a requirement for that institution to meet a particularly high standard of proof in order to demonstrate that a concentration would or would not significantly impede effective competition.

Second, **the General Court erred in law in holding that** the Merger Regulation must be interpreted as meaning that, in the absence of the creation or strengthening of a dominant position following a concentration on an oligopolistic market, **a significant impediment to effective competition can be established only if** the Commission demonstrates **that two cumulative conditions are satisfied**, namely, first, **the elimination of important competitive constraints that the merging parties had exerted upon each other** and, second, **the reduction of competitive pressure on the remaining competitors**. Such a restrictive interpretation is

<sup>1</sup> Commission Decision C(2016) 2796 final of 11 May 2016 declaring a concentration incompatible with the internal market (Case COMP/M.7612 – Hutchison 3G UK/Telefónica UK) ('the decision at issue').

<sup>2</sup> Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1), as implemented by Commission Regulation (EC) No 802/2004 of 7 April 2004 (OJ 2004 L 133, p. 1).

<sup>3</sup> Hutchison 3G UK Investments Ltd, an indirect subsidiary of CK Hutchison Holdings Ltd, became CK Telecoms UK Investments Ltd.

<sup>4</sup> Judgment of the General Court of 28 May 2020, CK Telecoms UK Investments v Commission, [T-399/16](#) (see also [Press release No 65/20](#)), ('the judgment under appeal').

incompatible with the objective of that regulation, namely to establish effective control of all concentrations which would significantly impede effective competition, in the internal market or in a substantial part of it, including those giving rise to non-coordinated effects.

Third, the General Court **did not exceed the limits of judicial review** in interpreting the concepts of 'important competitive force' and 'close competitors'. Even though those concepts require an economic analysis when they are implemented, the EU Courts have jurisdiction to interpret them when reviewing Commission merger control decisions. **However**, the Court of Justice holds that **the General Court distorted the decision at issue in finding that it was apparent from that decision that the Commission was of the view that the elimination of an 'important competitive force' or the closeness of competition between Three and O2 would be sufficient, in themselves, to prove a significant impediment to effective competition.** In addition, in finding that, in order to classify Three as an 'important competitive force', the Commission was required to demonstrate that Three competed particularly aggressively in terms of price and that it forced the other players on the market to align with its prices or that its pricing policy was likely to alter significantly the competitive dynamics on the market, the General Court **erred in law**. In order to classify an undertaking as an 'important competitive force', it is sufficient that it has more of an influence on the competitive process than its market share or similar measures would suggest. Lastly, by requiring the Commission to demonstrate that the merging parties are not close competitors, but rather 'particularly close' competitors, the General Court **erred in law**.

Fourth, as regards the quantitative analysis of the effects of the proposed concentration on prices, **the General Court distorted the Commission's written pleadings** at first instance as regards the exact value of the price increase to which the proposed concentration could give rise. In addition, the General Court **erred in law** when it found that the Commission ought to have included the 'standard' efficiencies which, according to that court, accompany all concentrations, in its quantitative analysis. 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. In any event, it is for the notifying parties to demonstrate those efficiencies so that the Commission can take them into account in its review.

Fifth, by failing to carry out, following its examination of the substance of the factors and findings contested by CK Telecoms at first instance and in the light of the result of that examination, an overall assessment of the relevant factors and findings in order to ascertain whether the Commission had demonstrated the existence of a significant impediment to effective competition, the General Court **erred in law**.

Sixth, the Court of Justice states, moreover, that it is apparent from the decision at issue that the Commission did in fact assess the possible degradation of the quality of the network of the entity resulting from the proposed concentration. By observing that the Commission had not made such an assessment, the General Court **distorted that decision**.

**Having regard to the breadth, nature and scope of the errors made by the General Court, which affect the General Court's reasoning as a whole, the Court of Justice sets aside the judgment under appeal.** Since it does not have the necessary information in order to give final judgment on all the pleas in law put forward at first instance, the Court of Justice **refers the case back to the General Court**. It is for the General Court to now rule on the dispute in its entirety once more, taking account of all the clarifications provided by the Court of Justice in the context of the appeal.

**NOTE:** An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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The [full text of the judgment and the abstract](#) are published on the CURIA website on the day of delivery.

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