

CLIENT ALERT

Annulment of EC Prohibition of Telecoms Merger Creates Uncertainty for Mergers in Tight Markets

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On August 7, 2020, the European Commission filed an appeal against the judgment of the EU General Court, in which the Court annulled the Commission’s 2016 decision blocking the merger between the U.K. telecommunications operators O2 and Three. The merger would have reduced from four to three the number of mobile network operators in the U.K. The General Court dismissed the possibility of a general presumption against four to three mergers, criticised the Commission’s use of a GUPPI analysis, and set a raised standard of proof for merger prohibitions.

On May 11, 2016, the European Commission prohibited the proposed acquisition of Telefónica UK (O2) by Hutchison 3G UK (Three). The transaction would have been a 4:3 merger involving the number 2 and number 4 U.K. mobile network operators. The merged entity would have had a non-dominant share of around 40% and network sharing arrangements with both its remaining competitors (BT/EE and Vodafone). The Commission’s decision was based, in particular, on the elimination of Three as “an important competitive force” that offered the most competitive prices in certain market segments and 4G at no extra cost. The Commission made no finding of coordinated effects.

On May 28, 2020, the General Court found that the Commission had failed to show a “strong probability” that the merger would result in a “significant impediment to effective competition” (SIEC). According to the Court, there was little evidence that Three was a maverick with an outsized influence on competition. It was not a particularly low price competitor if all market segments were taken into account, and its subscriber growth was weak. O2 and Three were not each other’s closest competitors. Nor could the Commission rely on its GUPPI analysis. Such economic analyses inevitably predict some price increases unless efficiencies are taken into account. The Commission had not identified a level above which the predicted increase should be considered significant. Here, the Commission had wrongly refused to take account of any potential efficiencies and the predicted price increase was less than 6.6%.

The Court’s overarching concern seemed to be that the Commission had relied on arguments that would apply to any 4:3 merger, effectively creating a structural presumption without identifying any case-specific plus factors.

The judgment is important and has attracted substantial attention for the following reasons.

- First, the Commission was widely perceived to have adopted a de facto presumption against 4:3 mergers in telecoms markets, making this a test case.
- Second, the Commission had been thought to face a symmetrical, balance of probabilities standard of proof in either permitting or prohibiting mergers. The General Court judgment makes it clear the standard is higher (although not as high as beyond reasonable doubt) in prohibition cases, making the Commission’s job harder.
- Third, following high profile court losses in coordinated effects cases in the early 2000s, the Commission has relied almost exclusively on non-coordinated effects theories in merger interventions, even in tight oligopoly markets. This

judgment makes it harder for the Commission to rely on such theories absent the creation of a dominant firm, potentially calling the strategy into question.

However, the impact on EU merger control probably should not be exaggerated. The General Court's judgment suggests that the Commission's interventions in previous 4:3 telecoms mergers would potentially have survived scrutiny. The evidence that Three was a significant maverick seems to have been particularly weak. Moreover, the Commission filed an appeal before the EU Court of Justice, whose previous case law appears to support a balance of probabilities standard of proof.

The full decision is available [here](#).

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