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11.11.2020

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CK TELECOMS V HUTCHINSON JUDGMENT OF THE GENERAL COURT CONSEQUENCES FOR 4 TO 3 MERGERS AND THE SIEC TEST

The decision of the Court will most likely improve the chances for a merger control clearance in concentrated markets. The requirements for a prohibition where a dominant market position does not exist are increasing. In the future, the European Commission will have to meet higher demonstration and proof requirements than it has in its practice up to now. This will presumably increase the procedural expense for the parties to the concentration and the Commission.

General Court, judgment of 28 May 2020, Case T-399/16, CK Telecoms UK Investments Ltd, ECLI:EU:T:2020:217

Up to now, the chances of a clearance of 4 to 3 mergers had generally been poor

In view of the decision-making practice to date and the Commission's guidelines for the assessment of concentrations, the chances of a clearance of 4 to 3 mergers, i.e. in tight oligopolistic markets, were poor from the outset. These chances were only somewhat better if it was objectively possible and the parties to the concentration were willing to accept very extensive remedies. In individual sectors such as telecommunications or classical industrial production, this tendency to prohibit or impose stringent remedies was particularly marked. The Commission often deemed it to be sufficient for a prohibition if

- the concentration eliminated an important competitive force,
- the elimination of which would reduce the competitive pressure between the remaining three market participants

The Court has rejected these prerequisites without additional proof of specific competition concerns as being inadequate. Such a standard would mean that every concentration in a highly concentrated market could simply be prohibited by that fact alone.

Higher obstacles to prohibition

With its decision, the Court has deliberately set limits for the SIEC test in tight oligopolistic markets which fall beneath the statutory standard example of a dominant position in the market. First of all, it found that a significant impediment to effective competition must have significant impact on competition, similar to the impact that would occur if a dominant position were to arise. Therefore, a prohibition due to a significant impediment to effective competition is only possible if the concentration would result in the elimination of a company which significantly restricts the scope of action of the other participants in the market. This feature must derive from the specific features of the company that is to be "eliminated". Its competitive importance in the sense of an important competitive force must cause it to stand out from the other market participants such that its elimination would remove significant competitive pressure. This could in particular arise from the case fact that

- the target undertaking, with a market share increment well beyond its former market share, represents an important competitive alternative (paragraphs 179 to 190 of the Judgment);
- the target undertaking, which already has a relatively strong market position, is growing continuously and much more strongly than its competitors. Such an undertaking could likewise prove to be an important

- competitive alternative (paragraph 191 to 198).
- the target undertaking is pursuing a sustained aggressive pricing policy and is significantly and permanently altering the competitive dynamics on the market (paragraphs 209 to 224).
- a particular closeness of competitive relations between the merging undertakings exists because their products are in particularly intense competition with each other, their features are similar to a particular extent, and they are therefore the most important substitutes for the purchasers. In such a case, a concentration leads to the elimination of particularly important constraints which the parties to the concentration have exerted on each other, i.e. the most typical and direct unilateral effects. However, this must apply for the entire market, not just for individual market segments. It is also not sufficient if the two companies are only relatively close competitors, i.e. are somewhat closer competitors to each other than to other market participants (paragraphs 234 to 250).
- as a consequence of the concentration, it is sufficiently likely that the prices on the affected market will rise to a significant extent. This requires a reliable, fact-based analysis of a price increase which incorporates the reactions of competitors and potential competitors to price increases and takes gains in efficiencies into account. These efficiencies include in particular increased investments in improving the products and services involved (paragraphs 276 to 282).

The Commission must ascertain and prove the facts that make a company's competitive importance stand out from the other market participants in a reliable and substantiated manner. The standard of proof for forecast elements is a high degree of probability – the same standard of proof as applies for a collective market dominance test. Additionally, the Commission must demonstrate why a concentration will lead not merely to a "simple" restriction of competition, but to a "significant" restriction of competition.

Outlook

The judgment is understood by many in practice and in the legal commentaries to be a clarification that the SIEC test does not represent a material expansion of the Commission to prohibit a merger. It was only introduced in order to capture those "gap cases" which are not completely covered by the market dominance test. Should the European Court of Justice agree with the General Court in its appeal judgment, Case C-376/20 P, this would result in a reassessment of mergers in concentrated markets under merger control law.

The chances of obtaining a clearance in 4 to 3 scenarios in a tight oligopoly would be greater as a result of the judgment, while the Commission's burden of investigation and presentation would likewise increase considerably. The Commission would have to optimise its economic analyses and adjust them to meet the standard set by the Court, so as to ensure a clear, uniform and foreseeable handling of the SIEC test in the future. The competitive analysis must always take efficiency gains resulting from concentrations into account to a sufficient extent. In any case, the heightened requirement placed on the standard of proof means that a certain limit would be set on the development of novel economic theories of harm.

Some experts have surmised that in suitable cases, the Commission could in the future contemplate once again focusing more on coordinated effects arising from the strengthening of a collective market dominance as an alternative theory of harm. This consideration is based on the fact that the standard of proof for demonstrating the strengthening of the dominant oligopoly would no longer be much higher than it now is for unilateral effects under this judgment. But it remains unlikely that coordinated effects will be invoked beneath the threshold for market domination.

It remains to be seen how the European Court of Justice will decide. In an initial response, the Commission made it clear that this judgment would restrict its ability to enforce effective competition in merger control. The European Court of Justice will therefore most likely conscientiously weigh these arguments regarding the legal consequences. On the other hand, the hopes for companies should not be placed too high if the judgment is upheld (in part) by the European Court of Justice. If the reduction from four to three competitors in a market would lead to consistently higher prices, the Commission can prohibit the proposed concentration and will also do so in the future. However, it is entirely possible that, at least until a final and incontestable decision has been rendered, the Commission now might be more willing to accept even more unconventional commitments in order to avert a prohibition on an uncertain basis. Although the Commission will attempt to maintain its strict line in such scenarios, it is difficult to imagine that it would take the risk of suffering a similar wave of judicial losses in merger issues to those in the early 2000's after the *Airtours* case. Thus, until the European Court of Justice reaches a decision – based on experience, toward the end of 2021 at the earliest –, the Commission may not completely ignore the stipulations of the Court in potential prohibition cases. However, this also means that due to the higher requirements for proof involved, complex concentration proceedings in such markets will most likely lead to even greater procedural expense. It is to be expected that in any event, the Commission will in particular protect itself by collecting and evaluating even more data than it already does now.

Above and beyond the judgment, a tendency can also be gleaned from the personal statements by the President of the General Court, *Marc van der Woude*, that in the future the Court will most likely further intensify its judicial control over merger decisions of the Commission. This would be welcome from the standpoint of the rule of law. However, it does conflict with its still relatively generous control of Commission decisions in cartel investigations. In any case, there is great anticipation as to whether the Court will continue in the direction it has taken in the CK Telecoms v Hutchinson judgment in other pending nullity actions against prohibition decisions of the Commission (e.g. *ThyssenKrupp v Tata*, Case T-584/19) as well.

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