

LATEST INTELLIGENCE

ECJ Hutchison ruling legitimises EC's approach to 'gap' cases - lawyers |

- No immediate impact expected on Masmovil/Orange, Three/Vodafone
 - Parties will have to supply more evidence to prove efficiencies - economist
 - Efficiencies stance may be tougher on mining, energy, commodities mergers
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The European Court of Justice's (ECJ) landmark *CK Hutchison* judgment will give the European Commission (EC) significant lee-way to challenge mergers in consolidated markets but is not expected to lead to any immediate changes in how it looks at mergers in sectors like telecoms, competition lawyers told this news service.

On 13 July, the ECJ ruled that a lower court ruling that annulled the EC's veto of **CK Hutchison's** [HKG:0013] proposed 2016 acquisition of **Telefonica's** UK assets should be set aside given the "breadth, nature and scope of errors" made by the lower court.

The decision marks a significant victory for the EC and its merger control policy in consolidated markets, but its immediate impacts will be limited, competition lawyers told this news service.

"This is a significant triumph for the (EC)," said Stéphane Dionnet, partner at McDermott. He noted that EC had broadly been successful and that the judgment constitutes an important endorsement of the EC's reasoning in 'gap' cases.

The ECJ judgment comes as CK Hutchison looks to combine its UK operations with **Vodafone** [LON:VOD] and as the EC is in the midst of its review of **Masmovil's** combination with **Orange** [EPA:ORA] in Spain – while mobile network

operators more broadly look to consolidate as they face declining margins and need to invest.

“The judgment endorses the legal orthodoxy and the approach that the (EC) has continued to follow in telco mergers and in other mergers in oligopolistic markets,” said White & Case partner Katarzyna Czapracka. “It is very much business as usual,” she said.

The judgment could also boost the UK Competition and Markets Authority (CMA), which while not bound by the judgment, might see increased confidence in its assessment of Three/Vodafone, said Czapracka, flagging that post-Brexit the UK agency is not bound by ECJ case law.

The ECJ had been asked to weigh in on the 2020 ruling from the EU General Court (GC), which involved the assessment of the competitive effects of a transaction that would not create a dominant player, but nonetheless, consolidate an oligopolistic market.

“This judgment is a not wholly unexpected confirmation that the 2004 [significant impediment to effective competition, or SIEC] test is not to be interpreted as a cumulative test,” said Wilko van Weert, partner at Norton Rose Fulbright.

The judgment reaffirms the EC’s margin of discretion when it comes to applying economic tools for quantifying price effects, said Paulo Rocha Abecasis, managing economist at Copenhagen Economics.

“We have already seen an increasing tendency from the [EC] to use these tools, including in non-horizontal cases such as the recent *EssilorLuxxotica/Grandvision* decision,” said Abecasis.

The ECJ’s rejection of the GC’s finding that the agency should have applied standard efficiencies to its analysis will raise the bar for parties that wish to argue that a transaction can have positive impacts.

“Efficiencies cannot be assumed and there should not be an ‘efficiencies credit’. Firms will need to demonstrate this,” said Abecasis.

The court’s findings with regards to the weighing of efficiencies by the EC in merger cases will be of particular concern to players in mature economic sectors, such as mining, energy and commodities, said van Weert.

“In these sectors, consolidation is typically seen as the only way to remain profitable and competitive in global markets, due to efficiencies generated by

scale. Now the ECJ has sided with the Commission in holding that the presence of such efficiencies must not be presumed,” he said.

“The effects of this judgment will be felt well beyond the telecoms sector,” added van Weert.

by Jacob Parry

UNDER COVERAGE

COMPANIES

- [BT Group Plc](#)
- [CK Hutchison Holdings Ltd](#)
- [Hutchison 3G UK Limited](#)
- [Hutchison Whampoa Limited](#)
- [Liberty Global Plc](#)
- [Masmovil Ibercom SA](#)
- [Orange Espagne SAU](#)
- [Orange SA](#)
- [Telecom Italia S.p.A.](#)
- [Telefonica S.A.](#)
- [Vodafone Group Plc](#)
- [Vodafone UK Trading Holdings Ltd](#)

GOVERNMENT AGENCIES

- [Department for Business, Energy and Industrial Strategy of UK Government Investment Security Unit](#)
- [European Commission - Directorate General for Competition \(EC - DG Comp\)](#)
- [Office of Communications - Ofcom](#)
- [UK Competition and Markets Authority \(CMA\)](#)

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