Nr. 16 CK Telecoms UK/Commissie

Gerecht EU 28 mei 2020
ECLI:EU:T:2020:217

In Case T-399/16,

CK Telecoms UK Investments Ltd, established in London (United Kingdom), represented by T. Wessely, O. Brouwer, lawyers, A. Woods, M. Davis, I. Ditchfield, S. Prichard, J. Aitken, R. Romney, M. Dickson and K. Asakura, Solicitors, and B. Kennelly QC,
applicant,
v
European Commission, represented by T. Christoforou, G. Conte, M. Farley, J. Szczodrowski and C. Urraca Caviedes, acting as Agents,
defendant,
supported by
United Kingdom of Great Britain and Northern Ireland, represented by S. Jones, S. Brandon, S. Huijts, C. Blairs, M. Rahman, J. McInnes, M. Brown, B. Potterill, S. Cardell, C. Brannigan, S. Munday, C. Short and A. Dadley, Agents, and R. Williams and J. Morrison, Barristers,
and by
EE Ltd, established in Hatfield (United Kingdom), represented by A. Lindsay, Barrister, C. Chapman and J. Hulsmann, Solicitors,
interveners,

APPLICATION under Article 263 TFEU for the annulment of Commission Decision C(2016) 2796 final of 11 May 2016 declaring incompatible with the internal market the concentration resulting from the acquisition of Telefónica Europe Plc by Hutchison 3G UK Investments Ltd (Case COMP/M.7612 – Hutchison 3G UK/Telefónica UK),

THE GENERAL COURT (First Chamber, Extended Composition),
composed of M. van der Woude, President, E. Buttigieg, P. Nihoul, J. Svenningsen and U. Öberg (Rapporteur), Judges,
Registrar: S. Bukšek Tomac, Administrator,
having regard to the written part of the procedure and further to the hearing on 2 and 3 May 2019,
gives the following

Judgment

I. Background to the dispute

1 On 11 September 2015, the European Commission received notification, in accordance with Article 4 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (OJ 2004 L 24, p. 1), of a proposed concentration whereby CK Hutchison Holdings Ltd was to acquire, through the intermediary of its indirect subsidiary Hutchison 3G UK Investments Ltd, which is now the applicant, CK Telecoms UK Investments Ltd, in the manner described in Article 3(1)(b) of the abovementioned regulation, sole control over Telefónica Europe Plc ('O2').

2 At the time of the facts which gave rise to this case, there were, on the retail market for mobile telecommunication services in the United Kingdom ('the retail market'), four mobile network operators: EE Ltd, which is a subsidiary of BT Group plc, acquired by BT Group plc in 2016 (together 'BT/EE'), O2, Vodafone and Hutchison 3G UK Ltd ('Three'), an indirect subsidiary of CK Hutchison Holdings, whose market shares, in terms of subscribers, were approximately [between 30 and 40%], [between 20 and 30%], [between 10 and 20%], and [between 10 and 20%] respectively. The concentration which is the subject of the present dispute ('the operation', 'the concentration' or 'the transaction') would have enabled the entity resulting from the concentration, a merger of Three and O2 (together 'the parties to the concentration') to account for approximately [between 30 and 40%] of the retail market and thus to become the main player on that market, ahead of the former legacy operator BT/EE and Vodafone.

3 In addition to these mobile network operators, the retail market also included several mobile virtual network operators, such as Tesco Mobile, Virgin Mobile and TalkTalk, which do not own the networks they use in order to provide mobile services to United Kingdom consumers and which had therefore concluded agreements with one or other mobile network operator so as to have access to its network at wholesale prices. Tesco Mobile is owned in equal shares by Tesco and O2. The retail market also included branded resellers (together with the mobile virtual network operators referred to as 'non-MNOs') and independent retailers, such as Dixons.

4 One particular characteristic of the retail market was that BT/EE and Three, on the one hand, and Vodafone and O2, on the other, had shared their networks through network-sharing agreements. This has enabled BT/EE and Three (under the MBNL joint venture, 'MBNL') and Vodafone and O2 (under the so-called 'Beacon' agreements, 'Beacon'), to share the costs of rolling out their respective networks while continuing to compete on retail trade.

[…]

II. Contested decision

17 In the contested decision, the Commission defined the two relevant markets: the retail market and the wholesale market.

18 The Commission developed three theories of harm, all of which were based on the existence of 'non-coordinated' effects on an oligopolistic market.

19 The first two theories of harm relate to the retail market, while the third relates to the wholesale market.

20 More specifically, the first theory of harm relates to the existence of non-coordinated effects on the retail market arising from the elimination of important competitive constraints. In essence, according to the Commission, the sharp reduction in competition which would have resulted from the operation would probably have led to an increase in prices for mobile telephony services in the United Kingdom and a restriction of choice for consumers.

21 According to the second theory of harm, which relates to the existence of non-coordinated effects on the retail market relating to network sharing, the transaction would also be likely to have a negative influence on the quality of services for United Kingdom consumers, hindering the development of mobile network infrastructure in the United Kingdom.

22 The third theory of harm relates to the existence of non-coordinated effects arising from the elimination of important competitive constraints on the wholesale market. On this market, the four mobile network operators provide hosting services to non-MNOs, which in turn offer retail services to subscribers. In particular, according to the Commission, the acquisition is likely to have significant non-coordinated effects on the wholesale market resulting from a reduction in the number of mobile network operators from four to three, the elimination of Three as an important competitive force, the removal of important competitive constraints which the parties had previously exerted upon each other, and a reduction of competitive pressure on the remaining players.

23 As regards the efficiencies alleged by the applicant, the Commission found that they were not verifiable, were not specific to the concentration and were unlikely to benefit consumers.

24 In the final section of the contested decision, the Commission examined the remedies proposed by the applicant in the form of commitments. The Commission found that the Second Commitments did not eliminate the competition concerns identified and that the Third Commitments, proposed on 6 April 2016, did not eliminate the competition concerns identified and were not comprehensive and effective in all respects.

25 Consequently, the Commission declared the operation to be incompatible with the internal market.

III. Procedure

[…]

IV. Forms of order sought

68 The applicant claims that the Court should:
- annul the contested decision;
- order the Commission to pay the costs, including those relating to any intervention.

69 The Commission, supported by BT/EE and the United Kingdom, contends that the Court should:
- dismiss the action;
- order the applicant to pay the costs.

V. Law

A. Legal background

[…]

2. The scope of the change made by Regulation No 139/2004

77 The applicant maintains that the Commission erred in law by establishing in the contested decision such a low intervention threshold that the requirement of a significant impediment to effective competition was rendered meaningless. The application of the legal criterion adopted by the Commission in the present case, based on its own Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ 2004 C 31, p. 5; 'the Guidelines'), would enable it to prevent any horizontal concentration in an oligopolistic market.

78 In its application, the applicant requested the Court to clarify the applicable criteria for establishing the existence of a 'significant impediment to effective competition' where there is no dominant position or coordination between the parties on an oligopolistic market.

[…]

81 The Court notes, in that regard, that Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395, p. 1), now replaced by Regulation No 139/2004, established the principle that a concentration with a Community dimension which creates or strengthens a dominant position as a result of which effective competition in the common market or in a substantial part of it would be significantly impeded is to be declared incompatible with the internal market; this is confirmed by recital 24 of Regulation No 139/2004.

82 Recital 26 of Regulation No 139/2004 states that significant impediments to effective competition are generally the result of the creation or strengthening of a dominant position, and provides that 'with a view to preserving the guidance that may be drawn from past judgments of the European [C]ourts and Commission decisions pursuant to Regulation … No 4064/89, while at the same time maintaining consistency with the standards of competitive harm which have been applied by the Commission and the Community [C]ourts regarding the compatibility of a concentration with the common market, this Regulation should accordingly establish the principle that a concentration with a Community dimension which would significantly impede effective competition, in the common market or in a substantial part thereof, in particular as a result of the creation or strengthening of a dominant position, is to be declared incompatible with the common market'.

83 In addition, Article 2(3) of Regulation No 139/2004, which replaced Article 2(3) of Regulation No 4064/89, now provides that a concentration which would significantly impede effective competition, in the internal market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, is to be declared incompatible with the internal market.

84 It follows that proof of the creation or strengthening of a dominant position within the meaning of Regulation No 139/2004 may in certain cases constitute proof of a significant impediment to effective competition. That observation does not however in any way mean that the second criterion is the same in law as the first, but only that it may follow from one and the same factual analysis of a specific market that both criteria are satisfied (see, to that effect, judgment of 21 September 2005, *EDP* v *Commission*, T-87/05, EU:T:2005:333, paragraph 49).

85 The Courts of the European Union have not, to date, expressly interpreted Regulation No 4064/89 or Regulation No 139/2004 as regards the compatibility with the internal market of concentrations giving rise to non-coordinated effects on an oligopolistic market.

86 It is apparent from the preparatory work for, and the wording of Article 2(3) of, Regulation No 139/2004 (see, in particular, the words 'in particular') that that provision was adopted in order to achieve the following three objectives.

87 In the first place, it was a question of extending the scope of substantive review by enabling the Commission to catch, in the specific context of oligopolistic markets, transactions significantly impeding effective competition even if they do not enable the undertakings concerned to create or strengthen an individual or collective dominant position.

88 In the second place, Article 2(3) of Regulation No 139/2004 was intended to maintain and even strengthen the concept of a dominant position by recognising the role played by that concept in the system established within the European Union by competition law, as interpreted by the Courts of the European Union, which is to enable the authorities to intervene, in a context marked by the freedom to conduct a business, when faced with transactions which, if implemented, would enable one or more operators to determine the competitive conditions and to eliminate competition in whole or in part on the relevant market without fear of the reaction of competitors and consumers.

89 In the third place, that provision was intended to increase legal certainty and render the Commission's analysis of concentrations more transparent and more foreseeable.

90 In order to take those factors into account, Article 2(3) of Regulation No 139/2004 must be interpreted as allowing the Commission to prohibit, in certain circumstances, on oligopolistic markets concentrations which, although not giving rise to the creation or strengthening of an individual or collective dominant position, are liable to affect the competitive conditions on the market to an extent equivalent to that attributable to such positions, by conferring on the merged entity the power to enable it to determine, by itself, the parameters of competition and, in particular, to become a price maker instead of remaining a price taker.

91 However, since the conditions and limits of such an extension of the scope of Regulation No 139/2004 have not been specified by the EU legislature, that regulation must be interpreted in the light of its objectives.

92 Article 3(3) TEU states that the European Union is to establish an internal market, which – in accordance with Protocol (No 27) on the internal market and competition, annexed to the Treaty of Lisbon (OJ 2010 C 83, p. 309), which, under Article 51 TEU, has the same legal value as the Treaties – includes a system ensuring that competition is not distorted.

93 Thus, Regulation No 139/2004 is, like Articles 101 and 102 TFEU, among the competition rules referred to in Article 3(1)(b) TFEU which are necessary for the functioning of that internal market. The function of those rules is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union (see, by analogy, judgments of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraphs 20 to 22, and of 12 December 2018, *Servier and Others* v *Commission*, T-691/14, under appeal, EU:T:2018:922, paragraph 238).

94 In particular, according to now well-established case-law, Regulation No 139/2004 seeks to ensure that the process of reorganisation of undertakings does not result in lasting damage to competition. According to recitals 5, 6 and 8 of Regulation No 139/2004, EU law must include provisions governing those concentrations that may significantly impede effective competition in the internal market or in a substantial part of it and permitting effective control of all those concentrations in terms of their effect on the structure of competition in the European Union (judgments of 7 September 2017, *Austria Asphalt*, C-248/16, EU:C:2017:643, paragraph 21, and of 31 May 2018, *Ernst & Young*, C-633/16, EU:C:2018:371, paragraph 41).

95 More specifically, it should be noted that recital 25 of Regulation No 139/2004 states that, 'under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition'.

96 Thus, Article 2(3) of Regulation No 139/2004 must be interpreted in the light of recital 25 thereof, which lays down two cumulative conditions in order that non-coordinated effects arising from a concentration may, under certain circumstances, result in a significant impediment to effective competition: the concentration must involve (i) 'the elimination of important competitive

constraints that the merging parties had exerted upon each other' and (ii) 'a reduction of competitive pressure on the remaining competitors'.

97 It follows that the mere effect of reducing competitive pressure on the remaining competitors is not, in principle, sufficient in itself to demonstrate a significant impediment to effective competition in the context of a theory of harm based on non-coordinated effects.

98 It is in particular in the light of those considerations that the Commission relied, in the contested decision, on the concepts of 'non-coordinated effects', 'closeness of competition', 'reduction of competitive pressure on the remaining competitors' and 'important competitive force', which do not appear in Article 2(3) of Regulation No 139/2004, but only in recital 25 thereof and in the Guidelines.

99 In that regard, it has been held that the Commission is bound by guidelines and notices which it adopts in the area of control of concentrations, provided that they do not depart from the rules of the Treaty and of Regulation No 139/2004 (see judgment of 7 June 2013, *Spar Österreichische Warenhandels* v *Commission*, T-405/08, not published, EU:T:2013:306, paragraph 58 and the case-law cited).

100 Moreover, although the practice followed by the Commission in its previous decisions or the content of the Guidelines may constitute a useful point of reference and clearly be of interest in the present case, they cannot, on their own, guide the General Court's analysis. The Commission's Guidelines, as well as its previous practice, cannot, in any event, bind the EU Courts which have exclusive jurisdiction to interpret EU law, under Article 19 TEU, since in particular those guidelines merely describe the way in which the Commission, as an administrative authority, interprets the relevant legislation and, acting as the European Union competition authority, applies, in particular from an economic point of view, Regulation No 139/2004 (see, to that effect, judgments of 7 March 2002, *Italy* v *Commission*, C-310/99, EU:C:2002:143, paragraph 52; of 1 October 2015, *Electrabel and Dunamenti Erőmű* v *Commission*, C-357/14 P, EU:C:2015:642, paragraph 68; and of 13 December 2017, *Crédit mutuel Arkéa* v *ECB*, T-712/15, EU:T:2017:900, paragraph 75).

101 Those considerations do not, however, mean that the General Court may not, in carrying out its task of interpreting EU law, adopt the guidance and the economic or legal assessments contained in the Commission's practice in previous decisions or in its Guidelines.

102 As the Commission observes, in paragraph 24 of the Guidelines, on non-coordinated effects, a concentration may significantly impede effective competition in a market by removing significant competitive pressure on one or more sellers whose market power is therefore increased. The most direct effect of the merger is the loss of competition between the merging firms. For example, if prior to the merger one of the merging firms had raised its price, it would have lost some sales to the other merging firm. The merger removes this particular constraint.

103 Non-merging firms in the same market might also benefit from the reduction of competitive pressure that would result from the merger, since the merging firms' price increase might switch some demand to the rival firms, which, in turn, might find it profitable to increase their prices. The reduction in these competitive constraints could lead to significant price increases in the relevant market.

104 As the Commission observes in paragraph 28 of the Guidelines, which relates to the case where the merging parties are 'close competitors', the fact that rivalry between the merging parties has been an important source of competition on the market is a key factor in that analysis.

105 It is in the light of that interpretation of Article 2(3) of Regulation No 139/2004 that it is necessary to examine in turn the applicant's first, third and fourth pleas relating to the three theories of harm developed by the Commission in the contested decision.

3. The burden of proof and standard of proof in relation to concentrations

[…]

118 In the context of an analysis of a significant impediment to effective competition the existence of which is inferred from a body of evidence and indicia, and which is based on several theories of harm, the Commission is required to produce sufficient evidence to demonstrate with a strong probability the existence of significant impediments following the concentration. Thus, 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', on the basis of a 'balance of probabilities', as the Commission maintains. By contrast, it is less strict than a standard of proof based on 'being beyond all reasonable doubt' (see, to that effect, Opinion of Advocate General Tizzano in *Commission* v *Tetra Laval*, C-12/03 P, EU:C:2004:318, points 72 to 77, and of Advocate General Jääskinen in *France* v *Commission*, C-559/12 P, EU:C:2013:766, points 34 and 35; see, *a contrario*, Opinion of Advocate General Kokott in *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2007:790, points 209 to 211).

[…]

B. Summary of the pleas in law and structure of the action

[…]

C. The first theory of harm, relating to the existence of non-coordinated effects on the retail market

[…]

(a) The market share analysis

[…]

(b) Classification of Three as an 'important competitive force'

155 According to the contested decision, one of the factors which the Commission took into account in concluding that the concentration would give rise to non-coordinated effects was that 'Three constitute[d] an important competitive force in the [retail market] … pursuant to paragraph 37 of the … Guidelines, or in any event it exert[ed] an important competitive constraint on that market, and [was] likely to continue exerting such a constraint absent the transaction' (recital 777 of the contested decision).

156 By the second part of the first plea, alleging errors with respect to the classification of Three as an important competitive force, the applicant puts forward three complaints, relating, first, to the distortion of the concept of important competitive force, second, to the degree of competitive constraint exerted by Three in the retail market and, third, to the distortion of the concept of important competitive constraint. Each of those errors is sufficient, according to the applicant, to result in the annulment of the contested decision.

(1) Distortion of the concept of 'important competitive force'

157 According to the applicant, the Commission erred in law in taking the view that it was sufficient, to support the conclusion that it was an important competitive force, that an undertaking 'contribute[d] substantially and consistently to the competitive process', since such an interpretation of the concept of 'important competitive force' fails to differentiate between the contribution to the competitive process made by every competitor in an oligopolistic market and the particular role played by an important competitive force, within the meaning of paragraphs 37 and 38 of the Guidelines.

[…]

163 The Court finds, as was observed in paragraphs 100 and 101 above, that although the Commission's Guidelines, as well as its previous decision-making practice, cannot bind the EU Courts, the General Court may, where appropriate, adopt the guidance and the economic or legal assessments contained in the Commission's practice in previous decisions or in those guidelines.

164 Moreover, the Court observes that, in a number of cases (see Cases COMP/M.6203 – Western Digital Ireland/Viviti Technologies (2011), COMP/M.6497 – Hutchison 3G Austria/Orange Austria (2012), COMP/M.7018 – Telefónica Deutschland/E-Plus (2014) ('the German case'), COMP/M.6992 – Hutchison 3G UK/Telefonica Ireland (2014) ('the Irish case'), COMP/M.7421 – Orange/Jazztel (2015), COMP/M.7637 – Liberty Global/BASE Belgium (2016), COMP/M.7758 – Hutchinson 3G Italy/Wind/JV (2016)), the Commission classified one or both of the merging parties as 'important competitive force(s)', whose elimination as a result of the concentration, in combination

with other factors (barriers to entry, degree of concentration of the market, prices rises, closeness of the competition between the merging parties, etc.), would be liable to result in a significant impediment to effective competition, whilst authorising, subject to conditions, the concentration.

165 As regards the applicant's argument that the Commission's approach to the concept of 'important competitive force' is incompatible with its own precedents, it should be pointed out that the position adopted by the Commission in the contested decision is consistent with that set out in the German case (recitals 120 to 122; see paragraph 164 above), Case COMP/M.7421 – Orange/Jazztel (2015) (recital 245) and Case COMP/M.6497 – Hutchison 3G Austria/Orange Austria (2012) (recitals 265 and 283).

166 Moreover, the Commission examined, inter alia, in Case COMP/M.5650 – T-Mobile/Orange (2010), the question whether one or other of the parties to that concentration could be regarded as a 'particularly important competitor' in the United Kingdom mobile telecommunications market exerting a 'particularly important restraint' on the other participants in that market. In that decision, the Commission found, on the basis of an analysis of the gross add shares, that 3UK could be regarded as a 'maverick in the market' since it 'captured' more customers from Orange and T-Mobile than its market share would suggest. Furthermore, the Commission considered in that decision that 3UK was a market leader in pricing and service innovations.

167 In paragraph 380 of the Statement of Objections, the Commission stated that, for an undertaking to be an important competitive force, it was not necessary for it to be a 'maverick' on the market. More specifically, the Commission took the view that such an undertaking has to contribute, substantially and consistently, to the competitive process on the market based on parameters such as price, quality, choice and innovation. A merger involving a company which has recently entered the market, and which may be presumed to exert significant competitive pressure on the market is, according to the Commission, only one example of a situation where significant non-coordinated anticompetitive effects may arise.

168 The Court observes that, as is apparent from recital 318 of the contested decision, the applicant had already argued during the administrative procedure that, in order for an undertaking to be classified as an 'important competitive force', it must stand out from its competitors in terms of its impact on competition, in that it plays a unique role in the market enabling it to exert disproportionately strong constraints on the other players compared to its market share that is indispensable for the preservation of effective competition.

169 In recital 326 of the contested decision, the Commission responded to that argument by finding that an 'important competitive force' does not need to stand out from its competitors in terms of impact on competition. According to the Commission, the fact that, in previous decisions, it found that certain undertakings had been unique in their 'aggression' in the market and had grown their presence on that market faster than any other competitor, as important competitive forces, does not mean that there is only one definition of the concept of 'important competitive force'.

170 However, in its defence, the Commission conceded that an 'important competitive force' must have more of an influence on competition than its market share would suggest, compete in a particularly aggressive way and force other players to follow that conduct.

171 It is apparent from the contested decision that, as regards the elimination of an 'important competitive force', the Commission is of the opinion that the mere decline in the competitive pressure which would result, in particular, from the loss of an undertaking having more of an influence on competition than its market share would suggest is sufficient, in itself, to prove a significant impediment to effective competition.

172 Such an interpretation of the concept of 'important competitive force', developed in the contested decision, would introduce, if it were to be regarded as an autonomous legal criterion, a concept additional and alternative to the concept of 'important competitive constraint' set out in recital 25 of Regulation No 139/2004. That would lower the standard of proof required to prove a significant impediment to effective competition, according to whether the Commission classifies the foreseeable effects of a concentration as 'non-coordinated effects' or as 'coordinated effects'.

173 The approach taken by the Commission in the contested decision amounts in practice to confusing three concepts, namely the concept of a 'significant impediment to effective competition', which is the legal criterion referred to in Article 2(3) of Regulation No 139/2004, the concept of 'elimination of [an] important competitive [constraint]', referred to in recital 25 of that regulation, and the concept of elimination of an 'important competitive force', used in the contested decision and based on the Guidelines. By confusing those concepts, the Commission considerably broadens the scope of Article 2(3) of Regulation No 139/2004, since any elimination of an important competitive force would amount to the elimination of an important competitive constraint which, in turn, would justify a finding of a significant impediment to effective competition.

174 It follows that the Commission made an error of law and an error of assessment, in recital 326 of the contested decision, in finding that an 'important competitive force' does not need to stand out from its competitors in terms of impact on competition, particularly in so far as such a position would allow it to treat as an 'important competitive force' any undertaking in an oligopolistic market exerting competitive pressure.

175 As the applicant has rightly pointed out, that would amount to allowing the Commission to prohibit, by that fact alone, horizontal concentrations in such markets and would infringe the principle of legal certainty, since the Commission could thus omit to analyse the possible elimination of the important competitive constraints that the merging parties exert upon each other in favour of a theory of harm based solely on a reduction of competitive pressure on the remaining competitors.

176 The complaint relating to distortion of the concept of 'important competitive force' is therefore well founded.

(2) The degree of competitive constraint exerted by Three in the retail market

177 The Commission's conclusion in the contested decision that Three was an 'important competitive force', or that it in any event exerted an important competitive constraint on that market, was based on the following factors: first, gross subscriber additions that are disproportionately high in relation to Three's market share (recital 481 of the contested decision), second, the development of its market share and customer base (recitals 475 to 480), third, its pricing policies (recitals 578 to 633), fourth, its contributions to innovation and competition (recitals 485 to 577) and, fifth, the quality of its network, its customer service and the loyalty of its customers (recitals 653 to 680).

178 According to the applicant, the Commission's evaluation of the first four factors is vitiated by manifest errors of assessment.

(i) Gross subscriber additions

179 In order to conclude that Three is an 'important competitive force', or in any event exerts an important competitive constraint on the retail market, the Commission relied, inter alia, on the fact that its gross subscriber additions were disproportionately high in comparison with its market share (recitals 481 to 484 of the contested decision).

180 According to the applicant, the Commission made a manifest error of assessment by concluding, in recital 397 of the contested decision, that Three's gross add shares (that is to say, the share of new customers won) was 'a first indication that Three exert[ed] on the retail market a greater competitive constraint than its market share would suggest', whereas Three's gross add share of [between 10 and 20%] (depending on whether Three's or the Commission's calculations are used) is (i) very low in absolute terms and (ii) at a similar level to, or even below its subscriber share of [between 10 and 20%].

181 In the present case, the Commission states, in recital 388 of the contested decision that, according to its calculations, Three's gross add share was higher than its market share.

182 However, the Commission acknowledges, in paragraphs 65 and 74 of the defence, that, according to its reconstruction of market shares and gross add shares, Three's gross add shares for 2014 and the first half of 2015 were only slightly higher than its market shares in the same period. In other words, there is no major difference between Three's gross add shares and its market shares.

183 In that regard, it should be pointed out that Three's gross add shares do not indicate that Three would have more of an influence on competition than its market share would suggest. On the basis of the proposition most favourable to the Commission, namely that the undertaking experienced sustained growth, its gross add share would be [between 10 and 20%]. Such a figure is very low in comparison with the market shares described in recitals 335 and 343 of the contested decision. Moreover, such an addition must be regarded as very limited if compared with the figures relating to new subscribers of the undertakings that the Commission classified as 'important competitive forces' in its previous decisions, in Case M.3916 – T-Mobile Austria/Tele.ring (2006), COMP/M.6497 – Hutchison 3G Austria/Orange Austria (2012), and the German and Irish cases (see paragraph 164 above).

184 In response to a question put by the Court at the hearing on the importance to be attached, as evidence of the existence of a significant impediment to effective competition, to a gross add share which is [between 0 and 5%] higher than the market share, the Commission merely stated that that addition was only one indication among others for the purposes of its overall assessment of several factors in support of its findings in the contested decision.

185 In particular, the Commission contended that the fact that an operator such as Three has a gross add share which is even limited in relation to its market share is still sufficient to make it an 'important competitive force' when account is taken of the fact that it has continuously evolved on the relevant market. According to the Commission, the fact that, in the years preceding the adoption of the contested decision, Three recorded strong growth in its gross add share is a sufficient indication to establish that Three is a competitor exerting competitive pressure on the retail market.

186 However, it must be observed that, in relation to the market shares described in recitals 335 and 343 of the contested decision, a gross add share which could be quantified, in this situation – most favourable to the Commission's case – with the highest growth rate, of approximately [between 10 and 20%], appears very low and is not comparable to the figures relating to new subscribers of the undertakings that the Commission classified as 'important competitive forces' in its previous decisions, in Case M.3916 – T-Mobile Austria/Tele.ring (2006), COMP/M.6497 – Hutchison 3G Austria/Orange Austria (2012), and the German and Irish cases (see paragraph 164 above).

187 Moreover, the applicant submitted, during the written part of the procedure and at the hearing, without being contradicted on this point by the Commission, that the gross add share of other undertakings that the Commission had also classified as 'important competitive forces' in the context of concentrations reducing the number of competitors from four to three in the mobile communication sector was between 21% and 50%, which is clearly not the case of Three.

188 It follows that, in any event, the Commission was not entitled to conclude from Three's gross add shares that that operator was an 'important competitive force', in the context of a theory of harm based on non-coordinated effects.

189 Consequently, the Commission's conclusion, in recital 397 of the contested decision, that Three's gross add shares were 'a first indication that Three exert[ed] on the retail market a greater competitive constraint than its market share would suggest' is vitiated by an error of assessment.

190 The line of argument concerning, in essence, an error of assessment relating to Three's gross add shares is therefore well founded.

(ii) The development of Three's customer base

191 According to the applicant, the Commission made a manifest error of assessment in concluding, in recital 474 of the contested decision, that the evolution of Three's market share was an indicator that it was an 'important competitive force'. Indeed, the data set out in recitals 335, 343, 475 and 477 of the contested decision prove that Three's growth is painfully slow.

[…]

193 The Court finds that the data set out in recitals 335, 343, 346 and 477 of the contested decision appear to show that Three experienced stronger growth than its competitors. In that regard, the Commission maintained that the General Court had ruled in the judgment of 14 December 2005, *General Electric* v *Commission* (T-210/01, EU:T:2005:456), that constant growth in market shares is a convincing factor in terms of the competitive pressure exerted by an operator.

194 It must be stated that the strengthening of market shares over several consecutive years is indeed indicative of competitive strength. However, it is necessary to distinguish the present case from the findings made by the Court in the judgment of 14 December 2005, *General Electric* v *Commission* (T-210/01, EU:T:2005:456), where the applicant was by far the leading supplier of aircraft engines, had the highest growth rate on the market, and was thus in a dominant position.

195 That reasoning is not applicable to the present case, which does not concern an undertaking in a dominant position which has strengthened its power on the market. The mere growth in gross add shares over several consecutive years of the smallest mobile network operator in an oligopolistic market, namely Three, which has in the past been classified as a 'maverick' by the Commission (Case COMP/M.5650 – T-Mobile/Orange) and in the Statement of Objections in the present case, does not in itself constitute sufficient evidence of that operator's power on the market or of the elimination of the important competitive constraints that the parties to the concentration exert upon each other.

196 Moreover, the Court finds that, as the applicant submitted in its application and at the hearing, it is apparent from figures No 19 and No 20 of the contested decision that Three's market shares stagnated or stabilised [between 5% and 10%] between 2012 and 2014, in terms of both subscribers and revenue. According to those figures, Three has experienced weak subscriber growth in recent years.

197 Accordingly, the Commission's conclusion, in recital 474 of the contested decision, that the evolution of Three's market share indicates that it was an 'important competitive force' is also vitiated by an error of assessment.

198 The line of argument alleging, in essence, an error in the assessment of Three's growth in subscribers is therefore well founded.

(iii) Three's pricing policy

199 The applicant claims that the Commission made a manifest error of assessment in concluding, in recitals 578 and 579 of the contested decision, on the basis of a 'qualitative and quantitative pricing analysis', that 'Three has consistently exerted an important competitive constraint on the market with its tariffs'.

[…]

209 The Court finds, contrary to the applicant's submission, that the Commission took account, in recitals 584, 589, 590, 592 to 595 and 601 of the contested decision, of the tariffs of non-MNOs and of indirect distributors. Thus, while the Commission took account of the tariffs of mobile virtual network operators in the contested decision, it also stated that a number of tariffs, in particular those of Tesco Mobile and Virgin Mobile, were cheaper than Three's.

210 Moreover, the Court notes that, in Case COMP/M.5650 – T-Mobile/Orange, the Commission found that, 'in the UK mobile retail market, [mobile virtual network operators] play a significant role. … [Mobile virtual network operators] not only compete on price and consumer service with their host networks but they also stimulate competition by introducing innovative business models'.

211 In recital 969 et seq. of the contested decision, the Commission concluded that mobile virtual network operators were unable at the time to meaningfully constrain the competitive behaviour of mobile network operators on the retail market.

212 However, it does not follow from this that Three exerted significant competitive pressure through its pricing policy.

213 Without it being necessary for the Court to adopt a position on that matter, it must be held that the mere fact that Three's tariffs include 4G services at no extra cost is not sufficient to prove that Three was pursuing a particularly aggressive pricing policy.

214 Similarly, as the applicant correctly observes, the mere fact that Three's offer is cheaper for some and not for all market segments is not sufficient, in any event, to demonstrate that it is an 'important

competitive force', since its pricing policy must be capable of significantly changing competitive dynamics.

215 In recitals 588 to 590, the contested decision merely states that Three's prices are 'among the lowest in the market' and 'among the cheapest for [the] low data segment'. That description of Three falls far short of proving that its pricing policy is capable of significantly altering competitive dynamics on the market.

216 The line of argument concerning, in essence, an error of assessment of Three's pricing policy is therefore well founded, since the Commission has not shown, in the present case, to the requisite legal standard and by convincing evidence, that Three was competing particularly aggressively in terms of prices and that it forced the other players on the market to align with its prices or that its pricing policy was capable of significantly altering the competitive dynamics on the market, in accordance with the definition of the concept of 'important competitive force' set out in paragraph 170 above and which the Commission moreover itself set out in detail in its defence.

(iv) The role historically played by Three on the market

217 According to the applicant, the alleged evidence set out in recitals 497 to 575 of the contested decision, which relates to the role historically played by Three on the market, is anecdotal and does not support the conclusion that it is an 'important competitive force'. The evidence which the applicant put forward demonstrates that Three's initiatives, as referred to in the contested decision, had a limited impact on competition.

[…]

219 The Court observes that, in the contested decision, the Commission explained the manner in which Three, the most recent operator to enter the retail market, broke the industry trend of reining in data usage and increasing the price of data by launching its 'One Plan' (see recitals 497 to 522, and, in particular, recitals 515 and 522), by launching free international roaming (recitals 523 to 538) and by offering 4G at no extra cost, which obliged its competitors to abandon their strategies of selling 4G at a premium (recitals 539 to 572, and, in particular, recitals 565 and 572).

220 However, as the applicant observes, the marketing initiatives taken by Three, which are examined by the Commission in recitals 497 to 575 of the contested decision, in order to demonstrate the highly competitive conduct of that company, are now historical in nature, since they were mostly implemented prior to its major strategy shift from price-to brand-led competition in late 2013.

221 The Commission appears initially to have confirmed in its Statement of Objections its previous classification of Three as a 'maverick' on the United Kingdom mobile telecommunications market.

222 In paragraphs 1258 and 1357 of the Statement of Objections, the Commission concluded that, following the transaction, Three would become a market leader with little or even no incentive to disrupt any potential coordination. Following the transaction, there would thus be three non-disruptive undertakings on the market, which would be capable of producing coordinated effects on the market, whereas attempts at coordination had previously failed because of Three's disruptive conduct.

223 Since the theory of harm based on coordinated effects was subsequently abandoned by the Commission in the contested decision, the Commission's line of argument concerning Three's historic role on the market is of anecdotal probative value in the overall analysis of the body of evidence in support of the first theory of harm.

224 Even if the Commission's line of argument concerning Three's historic role were as such correct, which the applicant does not seem to dispute in itself, the Commission has failed to establish in the contested decision that Three's historic role was representative of its pricing policy at the time that the concentration was notified. The Commission's reasoning in that regard seems to imply that an undertaking which has historically played a disruptive role will necessarily play the same role in the future and cannot reposition itself on the market by adopting a different pricing policy.

225 The line of argument alleging, in essence, an error in assessing the historic role played by Three on the market, and in particular its value as evidence of a significant impediment to effective competition, is therefore well founded.

226 In the light of all the foregoing, the complaint relating to the degree of competitive constraint exerted by Three on the retail market must be upheld.

(c) The assessment of the closeness of competition

227 Another factor on which the Commission relied in finding that the concentration would give rise to non-coordinated effects is the fact that Three and O2 'are close competitors on the overall retail market' (recital 463 of the contested decision). That conclusion is based on a qualitative assessment of diversion ratios based on MNP (mobile number portability) data and diversion ratios based on a survey carried out by the Commission.

[…]

234 The Court notes that the concept of a 'close competitor' does not appear in Regulation No 139/2004 but only in the Guidelines, which include a section headed 'merging firms are close competitors'.

235 Moreover, the applicability of Article 2(3) of Regulation No 139/2004, read in the light of recital 25 of that regulation, requires the elimination of important competitive constraints that the merging parties had exerted upon each other, which constitutes the most direct unilateral effect of a concentration on an oligopolistic market, as the Commission rightly pointed out before the General Court.

236 In that regard, 'closeness of competition' was already accepted as an economic item of evidence by the Court in the judgments of 9 July 2007, *Sun Chemical Group and Others* v *Commission* (T-282/06, EU:T:2007:203), and of 6 July 2010, *Ryanair* v *Commission* (T-342/07, EU:T:2010:280, paragraph 63 et seq.).

237 The judgment of 6 July 2010, *Ryanair* v *Commission* (T-342/07, EU:T:2010:280), related to the use of the concept of 'closest competitors' and the question whether the Commission could automatically infer from this concept the existence, and then the elimination, of the important competitive constraints that the merging parties had exerted upon each other. Conversely, in the judgment of 9 July 2007, *Sun Chemical Group and Others* v *Commission* (T-282/06, EU:T:2007:203), the Court found that the Commission could not be criticised for not dealing with the closeness of competitive relations between the merging parties in the contested decision.

238 According to paragraph 28 of the Guidelines, such proximity is assessed by reference to the degree of substitutability between the parties' products. That same paragraph thus states that 'products may be differentiated within a relevant market such that some products are closer substitutes than others. The higher the degree of substitutability between the merging firms' products, the more likely it is that the merging firms will raise prices significantly. … The merging firms' incentive to raise prices is more likely to be constrained when rival firms produce close substitutes to the products of the merging firms than when they offer less close substitutes. It is therefore less likely that a merger will significantly impede effective competition … when there is a high degree of substitutability between the products of the merging firms and those supplied by rival producers'.

239 Depending on the circumstances, a relevant product market may include more or less close substitutes, so that the competition between the products belonging to that market may vary in intensity, irrespective of market shares. Consequently, the non-coordinated effects of a concentration may depend more on the closeness of the products of the merging parties than on their respective market shares.

240 In the present case, first, it should be noted that, according to paragraph 1366 of the Statement of Objections, the reference market is characterised, in general, by a low degree of product differentiation. On that market, operators attempt to overcome this by pursuing differentiation strategies, which have, however, had only limited success.

241 Second, the Court notes that the concept of a 'close competitor' in the Guidelines allows account to be taken of the fact that rivalry between the merging parties is an important source of competition on the market, and may therefore be a central factor in the analysis, as is apparent from paragraph 28 of the Guidelines. Furthermore, it should be borne in mind that the applicability of Article 2(3) of Regulation No 139/2004, read in the light of recital 25 of that

regulation, requires the elimination 'of important competitive constraints that the merging parties had exerted upon each other', which constitutes the most direct unilateral effect of a concentration on an oligopolistic market, as the Commission rightly pointed out before the General Court.

242 However, most of the examples mentioned in the contested decision are not intended to identify how close the parties are, or to show that they exerted important competitive constraints on each other, but are aimed above all at showing that Three and O2 are 'close competitors' rather than 'particularly close competitors'. Thus, the Commission seems more to analyse the closeness of competition between Three and O2, on the one hand, and the other two mobile network operators, on the other. It concludes, in recital 1183 of the contested decision, that the four mobile network operators, and not only Three and O2, 'compete closely'.

243 Third, the data used by the Commission to calculate the diversion ratios, which are used to analyse the degree of closeness of the various operators, are derived from a survey which it carried out on a relatively small sample, of approximately 100 users. Moreover, the results of that analysis do not tally with those of the quantitative analysis set out in Annex A to the contested decision. By contrast, the ratios calculated by the applicant are based on MNP data and relate to 200 000 observations.

244 Fourth, according to the figures submitted by the applicant, in relation to the destination of O2's private customers, [*confidential*] with a diversion ratio of only [*confidential*], whereas BT/EE's diversion ratio is [*confidential*] and Vodafone's is [*confidential*]. Moreover, the closest competitors of O2 [*confidential*] are overall [*confidential*], which account for [*confidential*] of O2 diversions. This means that [*confidential*].

245 At the hearing, the applicant substantiated those figures convincingly, without being contradicted in that regard by the Commission; this confirms the fact that Three was not a particularly close competitor of O2, that [*confidential*] was Three's closest competitor, and [*confidential*] closest competitor, and by a significant margin.

246 Furthermore, the Commission confirmed at the hearing that Three was not active in the segment of professional mobile telephone consumers and that Three and O2 were not therefore competitors in that segment. The lack of closeness of competition in that market segment is borne out by Table 35 of the contested decision, and in particular by footnote 313 on the concentration level and the HHI, which were not provided in the contested decision, since the Commission did not encounter structural concerns in relation to that market segment.

247 It follows that, on the United Kingdom mobile telecommunications market, Three and O2 were not particularly close mobile network operators, even if, on such a market, all operators are, by definition, close to a greater or lesser extent.

248 Also according to the figures submitted by the applicant at the hearing, which were not disputed by the Commission, as regards the destination of Three's customers [*confidential*] of customers who switched from Three, that is to say almost [*confidential*] than O2. In total, [*confidential*] of Three's switchers move to a player other than O2.

249 Although it may indeed be established that Three and O2 are relatively close competitors in some of the segments of a concentrated market comprising four mobile network operators, that factor alone is not sufficient to prove, in the present case, the elimination of the important competitive constraints which the parties to the concentration exerted upon each other and cannot suffice to establish a significant impediment to effective competition; if that were not the case, any concentration resulting in a reduction from four to three operators would as a matter of principle be prohibited.

250 The third part of the first plea, relating to the weak probative value of the analysis of the closeness of competition between Three and O2 in the present case, must therefore be upheld.

(d) The assessment of the quantitative pricing effects of the concentration

251 On the basis of its quantitative analysis of upward pricing pressure ('the UPP analysis'), the Commission concluded, in recital 1225 of the contested decision, that 'the transaction is likely to generate an incentive for the merged entity to significantly increase prices'.

252 By the fifth part of the first plea, the applicant puts forward two complaints concerning the UPP analysis. First, it submits that that analysis does not have the probative value which the Commission ascribes to it. Next, it submits that such an analysis has no probative value in the present case.

(1) The probative value of the UPP analysis as a first 'screen'

253 In the first place, according to the applicant, the Commission made a manifest error of assessment regarding the probative value of the UPP analysis in using it, in recital 1191 of the contested decision, as corroborating evidence of a significant impediment to effective competition, since the purpose of the UPP analysis is to provide a first 'screen' as to whether a merger merits closer investigation, and since such analyses are, in any event, highly contested.

254 The Commission contests those arguments.

255 The Court finds, as a preliminary point, that the indicators of upward pressure on prices, based on the diversion ratios and the margins of the parties to a concentration, reflect those parties' incentives to increase prices following the concentration. They are used to assess the non-coordinated effects of mergers, which are usually observed in the case of homogeneous products.

256 It is generally accepted that, while indicators of upward pressure on prices may be useful for screening purposes, by enabling the competition authorities to judge the need for a more thorough investigation, they must not, however, be regarded as credible forecasts of price increases or simulations of mergers.

257 The applicant therefore rightly states that the UPP analysis, in particular, was initially developed to provide a first 'screen' as to whether a merger merits closer investigation.

258 However, it must be found that, as the Commission observes, its quantitative analysis, based on a GUPPI (Gross Upward Pricing Pressure Index) analysis, is more elaborate than a simple UPP analysis, since it is able to take account of the likely reaction of competitors to a unilateral price increase by the merged entity, as is indicated in recitals 253 and 254 of Annex A to the contested decision.

259 This complaint is not therefore well founded.

(2) The UPP analysis in the present case

260 In the second place, according to the applicant, the Commission made a further manifest error of assessment in connection with the conclusions it drew from the UPP analysis, in that a UPP analysis will predict a price increase for any horizontal merger and can produce useful results only if a threshold is defined above which the predicted post-merger price increase is regarded as sufficiently significant. The Commission failed to take any of those factors into account in the contested decision.

[...]

264 First, the Court notes that the Commission recognises that its quantitative analysis relied on a limited number of key inputs, in particular, diversion ratios and margins, but argues that those measures are key market indicators, as is explained in recital 1195 of the contested decision and in recital 246 of Annex A to that decision.

265 That is why the Commission itself seems to have taken a somewhat prudent approach in the contested decision to the probative value of its quantitative analysis.

266 On the one hand, the Commission concludes, following the qualitative assessment set out in recitals 1175 to 1190 of the contested decision, that the concentration would lead to the elimination of important competitive constraints on the retail market, which would 'probably' result in a price increase. That qualitative assessment is supplemented by a quantitative analysis, summarised in recitals 1191 to 1225 of the contested decision and set out in detail in Annex A to that decision, from which the Commission draws the same conclusion.

267 Moreover, the Commission states, in essence, in recital 250 of Annex A to the contested decision, that the result obtained should not be seen as an exact and precise quantification of the price increases that may result from the transaction, but rather as an 'indication for the likelihood' of such increases.

268 It follows that, as is apparent from the contested decision itself, the quantitative analysis is not regarded as decisive evidence. Accordingly, that analysis is not sufficient to demonstrate, in accordance with the standard of proof referred to in paragraph 118 above, that the elimination of the important competitive constraints that the parties exerted upon each other would result in a significant increase in prices and, therefore, in a significant impediment to effective competition.

269 Second, the applicant submits that it is necessary to define a threshold above which the predicted post-merger price increase is regarded as sufficiently significant.

270 In that regard, it should be noted that, in recital 252 of Annex A to the contested decision, the Commission acknowledges that a UPP analysis will, in the absence of efficiencies, always predict some price increase from a horizontal merger that eliminates competition between the merging parties.

271 The Commission states, however, in recital 252 of Annex A to the contested decision, that the quantitative analysis relating to price increases and the evidentiary weight that may be ascribed to such an analysis will vary from one case to another.

272 Moreover, the magnitude of the price increases is only one of the factors relevant to the Commission's overall assessment, in particular in cases, such as the present case, where significant harm is identified in relation to separate theories of harm, resulting from the elimination of horizontal competition between the parties to the concentration. The Commission explains that, for this reason, it did not consider it necessary to define a threshold above which a price increase indicated by an individual piece of evidence would be significant.

273 However, the Court finds that argument unpersuasive, since, in the present case, the predicted price increase is, according to the applicant – which is not contradicted on that point by the Commission – [*confidential*], whereas a predicted price increase of 6.6% in the Irish case and 9.5% in the German case did not prevent the Commission from authorising those concentrations subject to compliance with certain conditions.

274 Third, even if the Commission had proved to the requisite legal standard in the contested decision that the concentration would be liable to encourage the merged entity to increase prices, and had quantified that price increase in the contested decision, the Commission has not, in any event, demonstrated in the present case that the quantified price increase would be significant.

275 Without there being any need to require the Commission to adopt a '*de minimis*' rule or 'safe harbour' on price increases in the context of demonstrating the possible anticompetitive effects of a concentration, the Commission must, in any event, establish that increase with a sufficiently high degree of probability. When it decides to use quantitative analyses, such as those in Annex A to the contested decision, for that purpose, it must take into account all the relevant factors which may affect the price level.

276 It must be held that, because of the competitive conditions on such a market, concentrations in an oligopolistic market tend to lead almost automatically to an increase in prices in the short term on account of the loss of competition between the merging parties. It is only in the medium term that external competition from players already present on the market or, depending on how high barriers to entry are, from new players, will force the merged entity to lower its prices.

277 Similarly, any concentration will lead to efficiencies, the extent of which will also depend on external competitive pressure. Those efficiencies stem in particular from the rationalisation and integration of production and distribution processes by the merged entity. Indeed, that entity will generally eliminate duplicate structures in the production and distribution chains, and will redeploy members of staff or make them redundant. Depending on the circumstances, those rationalisation efforts may lead the merged entity to lower its prices.

278 It must be stated that the Commission did not include those standard efficiencies in its quantitative analysis, taking the view, in recitals 1197 and 1223 of the contested decision, that it was for the notifying party to demonstrate their existence and referring for that purpose to Section 8.5 of the contested decision relating to efficiencies.

279 The Commission thus confuses two types of efficiencies, namely those referred to in Section VII of the Guidelines and those specific to each concentration. Efficiencies within the meaning of the Guidelines must be taken into account in the overall competitive appraisal of the concentration, in order to ascertain whether they are likely to counteract the restrictive effects of the concentration. However, the category of efficiencies at issue in the present case is merely a component of a quantitative model designed to establish whether a concentration is capable of producing such restrictive effects. It is therefore an evidential matter relating to the existence of restrictive effects which arises prior to the overall competitive appraisal as provided for in paragraph 76 of the Guidelines.

280 Moreover, the Court finds that it is apparent from the evidence submitted during the administrative procedure that, while a positive correlation may be established between concentrations which reduce the number of operators in the mobile telecommunications sector from four to three and result in price increases, a correlation may also be established between those concentrations and an increase in network investments by mobile network operators (see, in particular the Centre on Regulation in Europe (CERRE) Study by Genakos, C., Valletti, T., Verboven, F., CERRE, Brussels, 2015) entitled 'Evaluating Market Consolidation in Mobile Communications', which is referred to inter alia in paragraphs 1, 64 to 68, 71, 72, 76 to 80 and 108 of Annex B to the contested decision).

281 Although an increase in investment by operator does not necessarily mean a better network quality, as the Commission observes in paragraph 79 of Annex B to the contested decision, such a correlation is more likely than the opposite hypothesis, consisting in a degradation in the network quality. The Commission, which bears the burden of proof, has not, in that regard, proved in the contested decision, in accordance with the applicable standard of proof, its proposition of a degradation of network quality, on which its second theory of harm, aimed at demonstrating a significant impediment to effective competition, is based in part.

282 It must therefore be concluded that the quantitative analysis carried out in the present case lacks probative value, since the Commission has not demonstrated with a sufficient degree of probability that prices would increase 'significantly' following the elimination of the important competitive constraints which the parties to the concentration exerted upon each other.

283 In view of the foregoing, the fifth part of the first plea must be upheld.

(e) The overall assessment of non-coordinated effects

284 By the seventh part of the first plea, the applicant claims that the Commission failed to make an overall assessment of the existence of non-coordinated effects, which constitutes an error in law and a manifest error of assessment. Equally, the Commission fails to state on what basis it concluded, in recitals 1226 and 1227 of the contested decision, that the alleged constraints removed by the concentration are important within the meaning of paragraph 25 of the Guidelines and that the alleged impediments to competition brought about by the concentration are significant within the meaning of Article 2(3) of Regulation No 139/2004. It confuses the reduction of competition between Three and O2 with the elimination of important competitive constraints.

[…]

286 In that regard, it is necessary to examine whether the Commission specified or clarified in the contested decision to what extent non-coordinated effects would be so important that they would warrant the conclusion that the concentration would 'significantly' impede effective competition, as is required by Article 2(3) of Regulation No 139/2004.

287 In order to demonstrate the existence of non-coordinated effects on the retail market, the Commission examined various factors in turn in recitals 330 to 1174 of the contested decision and summarised its qualitative and quantitative assessment in recitals 1175 to 1225 of that decision. It then carried out an overall assessment in recitals 1226 and 1227 of the contested decision, concluding therein that effective competition would be significantly impeded. Thus, contrary to what the applicant claims, the contested decision does in fact contain an overall assessment of whether such non-coordinated effects exist.

288 However, that global assessment is limited to a cursory reference to the body of evidence and circumstances concerning, in particular, the elimination of an important competitive force by the concentration, the closeness of competition and the large market share of the merged entity, and which are thus aimed at demonstrating the existence of non-coordinated effects.

289 Irrespective of the probative value of that body of evidence and circumstances, it must be stated that the Commission did not at any point specify in the contested decision whether the non-coordinated effects identified would be 'significant' or would result in the present case in a significant impediment to effective competition, as it asserts in recital 1227 of the contested decision.

290 The Court must therefore uphold the applicant's argument that the Commission did not specify on what basis it concluded that the alleged impediments to competition resulting from the concentration would be significant.

291 In the light of all the foregoing considerations, the first plea must be upheld, without there being any need to examine the sixth and seventh parts thereof.

D. The second theory of harm, relating to the non-coordinated effects produced by the disruption of the network-sharing agreements

[…]

2. The third plea in law, alleging errors in connection with the horizontal non-coordinated effects arising from network sharing

323 By its third plea in law, the applicant maintains that, in the contested decision, the Commission erred in law and made manifest errors of assessment and also infringed essential procedural requirements with respect to non-coordinated effects allegedly arising from network sharing, in particular, in so far as concerns the need for and extent of alignment between the parties to the network-sharing agreements (the first part), the development of the two network-sharing agreements in the counterfactual scenario (the second part), Three's ability to delay or frustrate BT/EE's unilateral deployments (the third part), the Commission's consideration of whether the concentration would harm competitors as opposed to competition (the fourth part), the harm to the competitive position of BT/EE and Vodafone (the fifth part), the effect on overall network investments from increased transparency (the sixth part) and the assessment of the network-sharing commitments (the seventh part).

324 The Commission, supported by the United Kingdom and BT/EE, disputes the applicant's arguments.

(a) The alignment between the parties to the network-sharing agreements

[…]

(1) The novel nature of the theory of harm on the network-sharing agreements

328 As regards the innovative nature of the theory of harm on the network-sharing agreements, set out by way of introduction in the context of the first part of the third plea, the Court finds that it is apparent from recitals 1242 and 1243 of the contested decision that the need for and the importance of an alignment of interests between the parties to a network-sharing arrangement had been raised by 3UK before the Commission in its observations on the concentration notified in Case M.5650 – T-Mobile/Orange.

329 However, the Commission's theory of harm in Case M.5650 – T-Mobile/Orange was based not on the alignment or disruption of interests between the parties to the network-sharing agreement, but on the need to ensure that a given undertaking had access to the network which it would share with another company, whereas the latter had entered into a transaction with a third undertaking which could jeopardise the former's access to that network. For that reason, in order to dispel the serious doubts identified by the Commission, the merging parties had, under Article 6(2) of Regulation No 139/2004, entered into commitments vis-à-vis 3UK relating to the duration of the MBNL network-sharing agreement, which was extended [*confidential*], and to the establishment of a mechanism for the rapid resolution of disputes.

330 It follows that the Commission's theory of harm in the present case, based on the need to avoid disruption of the alignment of the interests of the parties to each network-sharing agreement and on those agreements remaining stable, is novel in the light of its previous decision-making practice.

331 However, the mere fact that a theory of harm formulated by the Commission in a decision is innovative does not, in itself, lead to the conclusion that it is, as such, unlikely or unfounded. As BT/EE correctly observes, the Commission need not limit its analysis to the theories of harm developed in previous decisions.

332 In addition, and as is apparent from paragraph 111 above, the more prospective the analysis is and the chains of cause and effect dimly discernible, uncertain and difficult to establish, the more demanding the EU judicature must be in terms of the specific examination of the evidence produced by the Commission.

(2) The allegedly counter-intuitive and erroneous nature of the theory of the alignment of interests and the disruption to network-sharing agreements

333 The applicant claims that the Commission's conclusion, in recitals 1238 and 1239 of the contested decision, that MBNL and Beacon are 'based on a certain degree of alignment of interests', which the concentration was likely to disrupt, is vitiated by errors.

334 The applicant alleges in particular that a loosening of the ties within MBNL and Beacon following the concentration could encourage greater competition between the parties to those agreements and increase network competition.

[…]

336 In that regard, the Court finds, as a preliminary point, that it may at the outset subscribe to part of the Commission's theory of harm, summarised in recital 1232 of the contested decision, inasmuch as reduced competition from one mobile network operator, which is linked to the parties to the concentration through network-sharing arrangements, could, in certain cases, lead to a significant impediment to competition. That would be the case, for example, of a disruptive undertaking, which would be dependent on a network-sharing arrangement in order to be able to gain access to the market so as to be able to offer its services, and which might be foreclosed from the market following the concentration.

337 As was already noted in paragraph 296 above, according to the Commission, the partners of each of the two pre-existing network-sharing arrangements in the United Kingdom, namely BT/EE and Vodafone, today have an incentive to jointly develop the shared elements of their networks with a view to achieving a better shared network than the other mobile network operators and in particular than the mobile network operators in the other network-sharing arrangement. According to the Commission, post-transaction, this competitive dynamic would thus be lost, inasmuch as the merged entity would, in any event, in the short to medium term, be party to both network-sharing agreements and Vodafone and BT/EE would no longer have a fully committed partner in Beacon and MBNL respectively.

338 In short, the first sub-theory of harm developed by the Commission presupposes, as the Commission itself states in recitals 1777 to 1783 of the contested decision, that the transaction would harm the competitive position of one or both mobile network operators, and would thus be likely to reduce the competitive pressure exerted either by BT/EE or by Vodafone, or by both mobile network operators which are partners of the parties to the concentration in the network-sharing arrangements. The Court notes in that regard that infrastructure-based competition may be an important factor in ensuring the quality of services in the mobile telecommunications market.

339 According to the Commission's decision-making practice relating to Article 101(1) and (3) TFEU, network-sharing agreements, which involve the pooling of certain infrastructures, present, from that point of view, competitive risks which vary according to the context and whether the type of sharing is active or passive. Depending on the method of cooperation chosen, the independence of operators and the risk of collusion are more or less prevalent and the risks of undermining competition are more or less significant. At the same time, network-sharing agreements may produce substantial economic benefits in terms of costs savings, improved coverage, and faster network roll-out (see, in particular, Commission Decision 2003/570/EC of 30 April 2003 relating to a proceeding under

Article 81 of the EC Treaty and Article 53 of the EEA Agreement – Case COMP/38.370 – O2 UK Limited/T-Mobile UK Limited ('UK Network-sharing agreement') (OJ 2003 L 200, p. 59), and Commission Decision 2004/207/EC of 16 July 2003 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/38.369: T-Mobile Deutschland and O2 Germany: Network Sharing Rahmenvertrag) (OJ 2004 L 75 p. 32)).

340 The Court finds that the fact that a network-sharing agreement may, when it is concluded, result in pro-competitive effects, thus counteracting the restrictions which it contains, does not necessarily mean that the termination, renegotiation, or that each subsequent alteration to its balance following a concentration may necessarily be characterised as a significant impediment to effective competition.

341 Such an assessment of the new competitive balance on the market, owing in particular to the existence of such network-sharing agreements, will depend on the possible pro-competitive or anticompetitive effects of the new situation, which is capable of being assessed separately and individually by the Commission or by the national competition authorities, in the light, in particular, of market developments, as was pointed out, moreover, by Ofcom on several occasions during the administrative procedure before the Commission, as is apparent from the annexes to the United Kingdom's statement in intervention which have been submitted to the Court.

342 As the applicant observes in reply to the United Kingdom's statement in intervention on that point, BT/EE and Vodafone's ability to compete and incentives to invest would not depend decisively on Three's investment decisions or on cost increases, but in particular on the level of competition that they would face, their financial resources and their strategies. A reduction in Three's incentives to invest in one or other of the networks cannot result only – and significantly – in the weakening of the ability to compete of the other party to the network-sharing agreement.

343 According to the Commission, that would be the case, however, in particular if the merged entity decided to withdraw from one of the two network-sharing agreements in order to concentrate exclusively on the other, as the Commission considered in two further network consolidation scenarios set out in recitals 1752 to 1756 of the contested decision in respect of the first scenario, where it is envisaged that the merged entity would rely only on MBNL, and in recitals 1757 to 1759 of the contested decision in respect of the second scenario, where it is envisaged that the merged entity would rely only on Beacon. In both those cases, the Commission concluded, in recitals 1755 and 1759 of the contested decision, that reduced industry-wide investments seem unlikely.

344 Even if it were accepted that such scenarios could in fact harm the competitive position of either BT/EE or Vodafone, it must be stated that those anticompetitive effects cannot be classified, in the present case, and as such, as significant impediments to effective competition on the United Kingdom mobile telecommunications market.

345 To conclude otherwise would amount to allowing the Commission to prohibit, as a matter of principle and on that basis alone, any concentration involving a reduction from four to three operators, other than those concentrations which might be effected between partners to network-sharing agreements.

346 In that regard, as the applicant rightly observes, a loosening of the ties within MBNL and Beacon following the concentration could equally encourage greater infrastructure competition between the parties to those agreements and increase network competition.

347 Therefore, it must be held that a possible misalignment of the interests of the partners in a network-sharing agreement, a disruption of the pre-existing network-sharing arrangements the duration of which was extended for the benefit of Three, or even the termination of those agreements does not constitute, in the present case, and as such, a significant impediment to effective competition in the context of a theory of harm based on non-coordinated effects.

348 In those circumstances, the first part of the third plea must be upheld, in so far as the Commission incorrectly found that a lasting disruption to a network-sharing agreement would be likely to significantly impede competition exerted by the partner to such an arrangement.

(b) The effects of the concentration on competitors

349 In the context of the third part of the third plea, the applicant maintains that the Commission's finding in recital 1522 of the contested decision that the merged entity would be likely to harm BT/EE significantly by delaying or frustrating its network investments is vitiated by errors.

[…]

356 The Court considers that the third, fourth and fifth parts of the third plea are interdependent and may be usefully examined together. The Court also notes, as a preliminary point, that the applicant grouped together under that fifth part a number of complaints relating to the assessment of the effects of the concentration on BT/EE and Vodafone, without making a clear distinction between [plan A] and [plan B].

357 That is why the Court will examine in turn the effects on BT/EE and Vodafone, given that the effects on BT/EE resulting from [plan A] which are noted in paragraphs 362 to 379 below also arise, but to a lesser degree, in respect of BT/EE in the context of [plan B].

358 As a preliminary point, it should be noted that the non-coordinated effects of the merger in relation to a possible exercise of market power, in the form of a degradation of the services offered by the merged entity or of the quality of its own network, were not analysed in the contested decision.

359 According to recital 25 of Regulation No 139/2004, the assessment of a possible elimination of important competitive constraints that the merging parties had exerted upon each other and a possible reduction of competitive pressure on the remaining competitors lies at the heart of the assessment of the non-coordinated effects arising from the concentration, as was already found in paragraphs 96 and 97 above.

360 The barriers to competition and thus the harm to consumers would result from the disappearance of the competitive relationship between the parties to the concentration and from the fact that no remaining competitor or potential entrant would be in a position to compete effectively with the merged entity. Aside from the effects on prices, since the entity resulting from the concentration would no longer be subject to the same pressure which previously existed between the parties to the concentration, the concentration would also have repercussions on the quality of the offer and choice made available to customers (see, to that effect, judgment of 6 July 2010, *Ryanair* v *Commission*, T-342/07, EU:T:2010:280, paragraph 224).

361 The absence of a thorough examination of that issue constitutes a weakness in the analysis carried out by the Commission in the contested decision, which, in order to succeed, would require particularly solid and convincing reasoning in relation to the effects on competitors.

(1) The effects on BT/EE

362 First, EU competition rules are primarily intended to protect the competitive process as such, and not competitors. In that regard, the Commission rightly pointed out in its Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ 2008 C 265, p. 6) that the fact that a concentration affects competitors is not in itself a problem. In particular, the fact that rivals may be harmed because a merger creates efficiencies cannot in itself give rise to competition concerns.

363 That reasoning is applicable by analogy in the context of a horizontal concentration, or even in the context of a tight oligopoly, as is the case here.

364 In the present case, in recital 1265 of the contested decision, the Commission states that one of the ways of weakening the competitive position of one of the partners in the network-sharing arrangements would be to degrade the network quality of one or other of those two arrangements. For the Commission, that seems particularly relevant for the partner in the network-sharing arrangement that will not become the basis of the merged entity's consolidated network.

365 By way of example, it is apparent from recitals 1430 and 1431 of the contested decision that, under [plan A], the merged entity did not plan to use [*confidential*] of MBNL sites. Nevertheless, it would still be

obliged to share the costs of those sites on account of the commitments given to Three in 2009 in the context of the T-Mobile/Orange concentration (Case COMP/M.5650), which were intended to allay the fears expressed by Three, [*confidential*].

366 The maintenance of the obligation to share the costs relating to sites which become superfluous in the context of the present concentration would favour BT/EE's competitive position, even though the Commission rightly concluded that that would increase the incentive for the parties to the concentration to reduce such costs. However, any deterioration of the incentive for the parties to the concentration to continue to invest in those redundant sites could not have a disproportionate effect on BT/EE's competitive position or constitute a significant impediment to effective competition.

367 In that regard, although higher costs for a competing operator do not necessarily cause harm to competition, as the Commission correctly found in recital 1679 of the contested decision, it is, in any event, for the Commission to demonstrate that its theory of harm is based on a causal link between the alleged increase in fixed costs and that of incremental costs, which would lead to fewer investments, to a deterioration in the quality of services offered on the market or, if they were passed on to consumers as higher prices, to a decrease in the competitive pressure of BT/EE and Vodafone on the market.

368 In the present case, it must be stated that the Commission has failed to provide proof of such a causal link in the contested decision, in accordance with the standard of proof applicable in the present case, set out in paragraph 111 above.

369 In that regard, there is nothing in the contested decision to suggest that, in the context of an oligopolistic market in the telecommunications sector, comprising a limited number of operators, a loss of competitive pressure by a single operator would be 'highly likely' to translate into an overall loss of competition on that market, as the Commission contends in recital 1679 of the contested decision.

370 Second, the Court finds that, in so far as it was already established in paragraph 96 above that, in the context of a theory of harm based on non-coordinated effects, the concentration must involve 'the elimination of important competitive constraints that the merging parties had exerted upon each other', the mere effect of reducing the competitive pressure that the remaining competitors exerted on the market, in terms of quality, is not in itself sufficient to demonstrate a significant impediment to effective competition.

371 The Commission's findings merely state that, as a result of the reduction in Three's commitment, BT/EE would probably incur, or at least expect, higher costs for maintaining the current network (recitals 1445 to 1455 of the contested decision) and improving the network (recital 1530 of the contested decision).

372 In other words, the Commission has not proved to the requisite legal standard in the contested decision that a possible increase in costs would reduce BT/EE's ability to invest. Nor has it indicated which types of investment would be impacted or likely to be shared as opposed to those that would not be. The contested decision appears to be based on rather improbable assumptions concerning the absence of any reaction by BT/EE, which, it is claimed, would simply cease to invest, following an increase in its costs.

373 Moreover, as the Court has already held in paragraph 280 above, it is apparent from the evidence submitted during the administrative procedure that, while a positive correlation may be established between concentrations which reduce the number of operators in the mobile telecommunications sector from four to three and result in price increases, a correlation may also be established between those concentrations and an increase in network investments by mobile network operators.

374 Third, as regards the possibility that Three might frustrate BT/EE's unilateral deployments, which is developed in recitals 1473 to 1522 of the contested decision, it must be held that that reasoning, based in particular on BT/EE's observations and on a disputed interpretation of MBNL, is not in itself sufficient to demonstrate the existence of a significant impediment to effective competition in the present case so far as concerns [plan A].

375 Any such damage to competition should be based not on the possibility that the parties to the concentration decide unilaterally to reduce the quality of their own network, but on the possible effects of the transaction on the other partner in the network-sharing agreement.

376 Moreover, the chain of cause and effect is especially weak in that case. In particular, the Commission's proposition is based on the assertion that, for the mechanism of impeding BT/EE's investments to be triggered by Three, [*confidential*].

377 [*confidential*].

378 Moreover, the Commission's argument presupposes that the mechanism envisaged by the parties in the context of a cooperative business relationship may easily lend itself to abuses, which could mean that one of the two partners is seriously harmed. Lastly, it assumes that there is no possibility of effective retaliation by BT/EE against Three, by terminating or renegotiating the MBNL agreement, or by requesting that the Commission revise the commitments given vis-a-vis Three which are referred to in paragraph 329 above.

379 The fact that such a development is theoretically conceivable does not mean that it is sufficiently realistic and plausible that such a chain of events would take place and would make it impossible for BT/EE to offer a service level enabling it to compete effectively with the merged entity.

(2) The effects on Vodafone

380 The Court notes, as a preliminary point, that the objection relating to the effects on Vodafone would be effective only if the alternative network consolidation plan was the most likely in the present case, which is disputed by the applicant.

381 First, the Court notes, as has already been found with respect to BT/EE, that the mere fact that Vodafone would exert a lesser degree of competitive pressure following the concentration is not, in itself, sufficient to establish a significant impediment to effective competition in the present case.

382 Second, as regards the effects on Vodafone's network, the Court finds that the Commission did not show in the contested decision that higher costs would have an effect on Vodafone's incentives to invest in its network.

383 As is noted in recitals 1680 and 1681 of the contested decision, it is true that [*confidential*].

384 However, such effects of the concentration, which would result in [*confidential*], which is a priori less likely to favour collusion, would not necessarily entail lower investments by Vodafone. In particular, the Commission acknowledges, in recital 1643 of the contested decision, that Vodafone would have the ability to absorb an increase in costs resulting from the merger.

385 In that regard, as the Commission states in recital 1683 of the contested decision, a degradation of network quality would not be a consequence of a potential or claimed inability of Vodafone to make the investments required [*confidential*] on its own, but would be the result of an economic decision that would have to be made by Vodafone [*confidential*], according to a simulation model submitted by Vodafone during the administrative procedure.

386 The Commission's theory of harm is based, inter alia, on Vodafone's incentives to restrict investment in its own network on the basis of Vodafone's modelling, which suggests that [*confidential*] would be economically justified (recital 1643 of the contested decision).

387 In the present case, the Commission submits, in essence, in recital 1645 of the contested decision, that '[*confidential*] coverage in a market in which all other [operators] are likely to promote [*confidential*] will significantly reduce the competitiveness of tariffs offered by Vodafone'.

388 While there is reason to doubt that such an effect, which would result not from future decisions of the merged entity, but from one of its competitors, could be regarded as a direct and immediate consequence of the concentration, the Commission has not, in any event, proved, in the contested decision, to the requisite legal standard and in accordance with the applicable standard of proof, that such a decision by Vodafone would result in a sufficiently realistic and plausible manner from the merger, would alter the

factors determining the state of competition on the markets affected and would, in the present case, 'significantly' impede effective competition on the relevant market.

389 In that regard, the Commission has not succeeded in proving in the contested decision on what basis – even though Vodafone's ability to cover the cost increase is not disputed – Vodafone would choose deliberately either to degrade the quality of its own network or not to invest in it.

390 Even if that were the case, the assessment of quality as one of the vectors of competition is often a complex and imprecise exercise, which requires, in each individual case, a weighing up of the means of perception of the various consumers, in particular in high-technology industries.

391 Even on the assumption that Vodafone therefore decides deliberately, and on the basis of the profitability of its sites, to reduce its network coverage rate to [*confidential*] in a market where all other operators would be required to ensure a network coverage rate of [*confidential*], it appears, in the present case, more likely that Vodafone would withdraw and degrade its network only in the least populated, and therefore the least profitable, regions.

392 Even if a degradation in the quality of the network alleged by the Commission were to occur as a result of a business decision by Vodafone not to invest in sites with low profitability [*confidential*], in particular in low-population density areas, such an effect of the concentration could be usefully remedied by the United Kingdom regulatory authorities.

393 Third, other factors also cast doubt on the probability of the analysis carried out by the Commission in the contested decision. In so far as the Commission noted, in recital 1736 of the contested decision, that the merged entity would invest in its own infrastructure [*confidential*], it seems likely that similar investments could be made [*confidential*] by Vodafone.

394 Moreover, [*confidential*], the parties to that agreement have already provided for the possibility that the costs incurred by the parties would increase following [*confidential*].

395 Given that such a possibility of the network-sharing agreement evolving was already provided for, it is difficult to see how the exercise of such a contractual option would actually cause significant harm to Vodafone.

396 It must therefore be concluded that the Commission did not demonstrate to the requisite legal standard in the contested decision Vodafone's inability to compete effectively, or even that any increase in Vodafone's costs would be passed on to consumers in the form of a price increase.

397 It follows that the third, fourth and fifth parts of the third plea, taken together, must be upheld.

(c) The effect on overall network investments of increased transparency

398 In the context of the sixth part of the third plea, the applicant claims that the Commission erred in law and made manifest errors of assessment in its analysis of the effects of the concentration on network investments under [plan B] and [plan A] respectively.

399 The applicant maintains, inter alia, that the mechanism by which, under [plan B], the increased transparency of investments as between the mobile network operators could diminish their incentives to invest in the networks (recitals 1732 to 1742 of the contested decision) falls, in accordance with paragraph 22 of the Guidelines, within the category of coordinated effects, not non-coordinated effects.

[…]

402 The Court notes, as a preliminary point, that, in recital 1562 of the contested decision, the Commission concluded that the increased transparency of investments between mobile network operators would be unlikely to have a significant negative impact on investments in the context of [plan A] (recital 1564 of the contested decision).

403 Furthermore, the Commission concluded, in recital 1735 of the contested decision, that [plan B] was likely to have significant adverse effects on industry-wide network investments because the merged entity might become aware of investments made by BT/EE.

404 In addition, and as the applicant itself acknowledged in its own analysis of the consolidation scenarios, the option of [*confidential*], set out in recitals 1388 and 1389 of the contested decision, was discarded in view of the likely reservations of the competition authorities and the low probability of such a scenario being approved.

405 In the present case, the Commission found, in recital 1389 of the contested decision, that, in the short term, the merger would however create a situation of uncertainty, since the merged entity could not have implemented immediately either [plan B] or [plan A]. During an interim period, and in the short term, [*confidential*].

406 The merged entity would, eventually, have an incentive to make the same investments, both in the east and in the west of the country, which would ultimately enable BT/EE and Vodafone to gain knowledge of their respective investments (recitals 1735 and 1736 of the contested decision). That increased transparency would thus entail the risk that BT/EE and Vodafone would wait for the merged entity to make certain investments, primarily in relation the development of new technologies, before themselves investing (recitals 1737, 1739 and 1740 of the contested decision).

407 In other words, according to the Commission, its concerns in the context of the second theory of harm are based on a reduction of each mobile network operator's incentives proactively to invest and improve its network and the reduction in competitive pressure that is likely to result from this. That reduction is due to the market structure which would prevail in the context of [plan B], [*confidential*], and to the increased transparency which that structure would result in for the investment strategies of each mobile network operator.

408 The Court finds, in that regard, that a particular difficulty in the present case, in relation to the judicial review which the Court must carry out of the contested decision, is that the Commission failed to set out the appropriate time frame within which it intends to establish a significant impediment to effective competition. In the contested decision, the Commission analysed the immediate effects of the concentration both in the short and the medium term as a result of a temporary overlap between the two network-sharing agreements, as well as the medium- and long-term effects in the light of the network consolidation plans, without however clearly establishing which of the multiple scenarios would be the most likely or in the light of which scenario(s) the effects of the concentration on competition should be examined as a priority.

409 That is why the General Court asked the parties, for the purposes of the hearing, to set out their respective positions on the appropriate time frame for assessing the effects of a concentration on competition.

410 The Court finds that it is established, in particular in recitals 1239 and 1244 of the contested decision, that, in the present case, whatever the network consolidation plan ultimately adopted by the parties to the concentration, those parties would not maintain two separate networks in the long term, and it does not appear that the long term was taken into consideration as the appropriate time frame for assessing the effects of the concentration in the contested decision.

411 In that regard, it follows from recital 1244 of the contested decision that, according to the applicant's plans, the merged entity would not continue to maintain two separate networks in the long term. The merged entity would, in the long term, have to focus on one of the two network-sharing agreements.

412 In addition, in recital 1239 of the contested decision, the Commission concluded that, following the transaction, the alignment of interests and mutual dependency was likely to be disrupted in both network-sharing arrangements in the United Kingdom mobile telecommunications market. The Commission found that, while the merged entity would need both networks to continue providing mobile telecommunications services to Three and O2 customers, it would have an incentive not to continue operating two networks in the long term. According to the Commission, this will inevitably disrupt the alignment of interests with at least one of the two partners to the network-sharing agreements.

413 In footnote 1012 of the contested decision, the Commission notes that operating two separate, nationwide networks seems highly unlikely for several reasons. First, both network consolidation plans presented by the applicant as the only realistic scenarios provide for the creation of a consolidated network and, second, it seems economically imprudent to operate two separate networks after the transaction in the same way as if on a stand-alone basis, in particular regarding future investments. The Commission states that the merged entity would then have to duplicate investments in order to offer them to its entire customer base.

414 BT/EE drew the Court's attention to the fact that there are a number of merger cases in which the Commission relied on an analysis of long-term effects, and cited Case COMP/M.2375, Shell/Enterprise Oil (2002) where the Commission had taken into consideration a period of more than 10 years when analysing the effects of the concentration.

415 The Court finds that the analysis of the effects of a concentration on an oligopolistic market in the telecommunications sector which requires long-term investment and where consumers are often tied by contracts over several years is a dynamic prospective analysis which requires account to be taken of any coordinated or unilateral effects over a relatively long period of time in the future.

416 Whatever the network consolidation plan ultimately adopted by the parties to the concentration, they would not maintain two separate networks in the long term. Consequently, the Commission's proposition, relating to the effect on overall network investments of increased transparency, must be rejected, in so far as it is based on the assumption of the existence of two separate networks.

417 Accordingly, the sixth part of the third plea must be upheld, inasmuch as the Commission erred in law in classifying the effect on overall network investments of increased transparency as a non-coordinated effect.

418 Consequently, as regards the second theory of harm, the third plea must be upheld, without there being any need to examine the other parts of that plea.

E. The third theory of harm, relating to the existence of non-coordinated effects on the wholesale market

419 The third theory of harm, described in recitals 1815 to 2314 of the contested decision, relates to the existence of non-coordinated effects on the wholesale market arising from the elimination of important competitive constraints. On this market, the four mobile network operators provide hosting services to non-MNOs, which in turn offer retail services to subscribers. According to the Commission, the concentration would reduce the number of mobile network operators wishing to host non-MNOs.

420 More specifically, the Commission considered that Three constituted, prior to the transaction, an 'important competitive force' on the wholesale market. In this connection, the Commission found that, despite its historically low market share, which was [between 0 and 5%] in 2014 and 2015 (recitals 1856 to 1867 of the contested decision), Three had a gross add share that was disproportionately high in comparison with its market share (recitals 1868 to 1920 of the contested decision).

[…]

425 It is appropriate to examine, first and together, the first three parts of the fourth plea, alleging errors regarding the finding that the concentration would significantly impede effective competition in the wholesale market and a manifest error of assessment in relation to the finding that Three is an 'important competitive force'.

[…]

434 The Court finds that the reduction from four to three operators on the wholesale market is not, in itself, capable of establishing a significant impediment to competition on the wholesale market in the present case. As is apparent from recital 25 of Regulation No 139/2004, many oligopolistic markets exhibit a degree of competition which can be described as healthy.

435 As regards market shares, the Court finds that it is not disputed that Three's wholesale market share was very small (namely [between 0 and 5%] in 2014 and 2015).

436 In that regard, the Commission conceded moreover during the procedure before the Court that market shares and additions of market shares provide only first indications of market power, according to paragraph 27 of the Guidelines, since it is generally accepted, including in its decision-making practice, that small market shares are generally a good indicator of a lack of important market power.

437 Just as the existence of very large market shares is highly important and the relationship between the market shares of the parties involved in the concentration and those of their competitors is relevant evidence of the existence of a dominant position or of a significant impediment to effective competition, in that that factor enables the competitive strength of the competitors of the undertaking in question to be assessed (judgment of 23 February 2006, *Cementbouw Handel Industrie* v *Commission*, T-282/02, EU:T:2006:64, paragraph 201), a particularly small market share of one of the parties involved in the concentration tends to suggest, prima facie, an absence of any significant impediment to effective competition, especially where the other operators have much larger market shares.

438 While it cannot be ruled out that, despite the relatively small market share of one of the parties to the concentration, the concentration will have a significant effect on effective competition, it is for the Commission to adduce convincing evidence of this.

439 First, the combined market share of the parties to the concentration of [between 30 and 40%] is not indicative of the creation or strengthening of a dominant position in the present case or even, as such, of a significant impediment to effective competition.

440 Second, the Court notes that the Commission states, in recital 1865 of the contested decision, that the HHI produced by the merger would exceed the threshold laid down in the Guidelines.

441 As regards the calculation of the HHI, paragraph 14 of the Guidelines provides that market shares or the concentration level provide useful first indications of the market structure and the importance of the merging parties. It is also apparent from paragraph 16 of the Guidelines that the overall concentration level in a market may provide useful information about the competitive situation.

442 Paragraphs 19 to 21 of the Guidelines set HHI thresholds below which a concentration will not, in all probability, pose competition concerns. Thus, the Commission considers that a merger is unlikely to raise horizontal competition concerns in a market with a post-merger HHI between 1 000 and 2 000 and a delta below 250, or where a post-merger HHI is above 2 000 and the delta below 150, save in exceptional circumstances.

443 The applicant submitted before the Court, without being contradicted by the Commission, that, in the present case, the post-merger delta would be just [*confidential*]. The Court finds that that value does indeed exceed the threshold below which it is, in principle, precluded that the concentration poses competition concerns. However, the second sentence of paragraph 21 of the Guidelines states that exceeding those thresholds does not give rise to a presumption of the existence of competition concerns.

444 It must however be held that the greater the margin by which those thresholds are exceeded, the more the values will be indicative of competition concerns (see, in that regard, judgment of 9 July 2007, *Sun Chemical Group and Others* v *Commission*, T-282/06, EU:T:2007:203, paragraph 138) and that, in the present case, the delta is only [*confidential*] above the threshold laid down in the Guidelines on horizontal mergers.

445 In the present case, the Court finds that the Commission did not rely on Three's historic market shares and the concentration level in order to conclude that Three is an 'important competitive force' on the wholesale market, but on gross add shares (recital 1857 of the contested decision) and its qualitative analysis of Three's importance on the wholesale market.

446 However, the fact that the Commission determined that Three had more of an influence on competition than its market share would suggest is not, in itself, sufficient evidence to establish a significant impediment to effective competition in the present case.

447 Although the application of only one of the factors set out in the Guidelines may, in certain cases, be sufficient to establish the existence of a significant impediment to effective competition, the Commission did not credibly explain in the contested decision why gross add shares were of such decisive importance in the present case. While it is true that it is not necessary for the Commission to examine in every case all the criteria which it imposed on itself in the Guidelines, nor has it been established that only one of those criteria is sufficient to prove a significant impediment to effective competition, in the absence of a detailed examination of the facts.

448 Third, as regards gross add shares, the Commission states that Three won approximately between [*confidential*] of the total value of contestable contracts relating to wholesale customers. According to the Commission, even if all the adjustments suggested by the applicant were to be accepted, the remaining share of wholesale gross adds would be much higher than Three's historic market share (recitals 1896 and 1917 of the contested decision).

449 However, the mere fact that Three's gross add share is higher than its market share is not sufficient, in the present case, to establish a significant impediment to effective competition, in a context where Three's market share is, in actual fact, very small and even its gross add share, on a market with only four operators, is limited.

450 It must be held that, although those factors permit the inference that Three has the ability to compete with the other players in the wholesale market, that it is a credible competitor and has an influence on competition, even when it does not win bids, and that it strengthened its position on the market, they are not sufficient, in any event, to classify Three as an 'important competitive force'.

451 Fourth, as regards, lastly, its qualitative assessment of Three's importance on the wholesale market, the Commission found that Three is considered to be a credible threat on the market and participated in a significant number of calls for tenders (recitals 1936 to 1987 of the contested decision).

452 As the applicant rightly points out, the Commission has not established that the criteria which it imposed on itself in paragraphs 37 and 38 of the Guidelines apply to Three. The Commission's findings with regard to Three's future market share, its credibility, the competitive terms of its offers and the effects of its participation in tendering procedures (recitals 2294 and 2295 of the contested decision), even if well founded, do not demonstrate that Three stands out from other participants in the wholesale market.

453 Moreover, even if the factors taken into account by the Commission were capable of characterising Three as an 'important competitive force', they do not show that Three and O2 exerted upon on each other important competitive constraints which would be eliminated following the concentration.

454 The first three parts of the fourth plea must therefore be upheld, without there being any need for the Court to examine the fourth, fifth and sixth parts of the fourth plea.

455 The contested decision must therefore be annulled, without there being any need for the Court to rule on whether the three theories of harm are independent or interdependent, or to rule on the applicant's other arguments and pleas.

Costs

[…]

On those grounds,

THE GENERAL COURT (First Chamber, Extended Composition)

hereby:

1. **Annuls Commission Decision C(2016) 2796 final of 11 May 2016 declaring incompatible with the internal market the concentration resulting from the acquisition of Telefónica Europe Plc by Hutchison 3G UK Investments Ltd (Case COMP/M.7612 – Hutchison 3G UK/Telefónica UK);**
2. **Orders the European Commission to bear its own costs and to pay those incurred by CK Telecoms UK Investments Ltd;**
3. **Orders the United Kingdom of Great Britain and Northern Ireland and EE Ltd to each bear their own costs.**

Noot

Gaëlle Béquet
Mr. G.D.G.M.G. Béquet is advocaat te Amsterdam (Brinkhof).

Inleiding

Op 28 mei 2020 wees het Gerecht van de Europese Unie een baanbrekend arrest in de zaak T-399/16, *CK Telecoms UK/Commissie*. Het Gerecht vernietigde het concentratiebesluit van de Europese Commissie, waarin zij de voorgenomen overname van Telefónica UK, in het Verenigd Koninkrijk actief onder de naam O2 UK, door Hutchison 3G UK ("Three") blokkeerde.[1] De Three/O2 overname was een "four-to-three" concentratie, dat wil zeggen een concentratie waarbij het aantal marktspelers zou worden teruggebracht van vier naar drie. De overname zou van de gefuseerde entiteit een leidende (maar niet dominante) speler op de Britse markt voor mobiele telefonie hebben gemaakt.

Hoewel de latere goedkeuring door de Commissie van de four-to-three fusie tussen Tele2 en T-Mobile[2] in Nederland laat zien dat "vier" marktspelers geen magisch aantal is in de consolidatie van de mobiele telefoniemarkt, heeft deze strikte four-to-three aanpak van de Commissie in *Three/O2 UK* tot onzekerheid op de telecommarkt geleid en, als gevolg hiervan, waarschijnlijk de verdere consolidatie ervan in bepaalde mate tegengehouden. Hierbij moet worden opgemerkt dat uit het arrest niet volgt dat four-to-three fusies zijn toegestaan; alleen dat de Commissie deze grondiger en zorgvuldiger moet beoordelen.

Vanuit mededingingsrechtelijk oogpunt is het arrest van groot belang, omdat het Gerecht voor het eerst sinds de invoering van de Concentratieverordening[3] uit 2004 een besluit van de Commissie toetst waarin een concentratie is verboden, terwijl deze niet zou hebben geleid tot het ontstaan of versterken van een dominante positie van de gefuseerde entiteit.

Feiten

Op 11 september 2015 diende Hutchison 3G UK (hierna: Three) een verzoek in bij de Europese Commissie om Telefónica UK (hierna: O2) over te nemen. Ten tijde van dit verzoek waren er op de betreffende markt voor mobiele telecommunicatiediensten in het Verenigd Koninkrijk (VK) vier mobiele netwerkexploitanten actief: Everything Everywhere (in 2016 overgenomen door British Telecom (BT)), O2, Vodafone en Three. BT had een marktaandeel van 30-40%, O2 20-30% en Vodafone en Three beide 10-20%.[4] Door de overname zou de combinatie Three/O2 met een marktaandeel van 30-40% de belangrijkste speler zijn geworden op de Britse markt, vóór Vodafone en BT.[5]

Een bijzonder kenmerk van de retailmarkt was dat BT en Three enerzijds en Vodafone en O2 anderzijds hun netwerken hebben gedeeld door middel van zogenaamde *network sharing agreements*. Dit heeft deze partijen in staat gesteld de kosten van de gezamenlijke uitrol van hun netwerken te delen en tegelijkertijd te blijven concurreren op het gebied van de detailhandel.[6] Naast deze mobiele netwerkexploitanten omvatte de retailmarkt ook verschillende virtuele mobiele netwerkexploitanten, zoals Tesco, Virgin en TalkTalk, die geen eigenaar zijn van de netwerken die zij gebruiken om mobiele diensten aan te bieden aan consumenten in het VK en die daarom overeenkomsten hadden gesloten met één van de mobiele netwerkexploitanten om toegang te krijgen tot zijn netwerk tegen wholesaletarieven.[7]

Op 11 mei 2016 blokkeerde de Commissie de overname.[8] Het verbod van de Commissie was niet gebaseerd op het feit dat door de fusie een machtspositie zou ontstaan of worden versterkt, maar doordat de fusie tot zogenaamde niet-gecoördineerde effecten zou leiden.[9] Met

1 Arrest, par. 15. Zie Besluit van de Europese Commissie van 11 mei 2016 in de zaak COMP/M.7612 – *Hutchison 3G UK/Telefónica UK*.
2 Besluit van de Europese Commissie van 27 november 2018 in de zaak M.8792 – *T-Mobile NL/Tele2 NL*.
3 Verordening (EG) nr. 139/2004 van de Raad van 20 januari 2004 betreffende de controle op concentraties van ondernemingen ("Concentratieverordening").
4 De exacte marktaandelen van de marktspelers zijn als vertrouwelijk aangemerkt door de Commissie en het Gerecht.
5 Arrest, par. 2.
6 Arrest, par. 4.
7 Arrest, par. 3.
8 Arrest, par. 15. Zie Besluit van de Europese Commissie van 11 mei 2016 in de zaak COMP/M.7612 – *Hutchison 3G UK/Telefónica UK*).
9 Arrest, par. 18.

andere woorden: ondanks het ontbreken van een machtspositie zou de gefuseerde entiteit de concurrentievoorwaarden op de markt toch kunnen beïnvloeden op een wijze die vergelijkbaar is met die waarop een machtpositie dat doet. Deze mogelijkheid speelt met name in oligopolistische markten zoals de telecomsector, dat wil zeggen markten met een beperkt aantal aanbieders. De toets die door de Europese Commissie hiervoor wordt (en werd) toegepast, is of er sprake is van een "significante belemmering van een daadwerkelijke mededinging" (hierna: SIEC test, voor *Significant Impediment of Effective Competition*).

De Commissie baseerde haar verbod op drie *theories of harm*. De eerste *theory of harm* was dat de overname tot gevolg zou hebben dat een belangrijke concurrent op de markt voor mobiele telefonie in het VK zou verdwijnen en de gefuseerde entiteit nog alleen concurrentie zou ondervinden van twee mobiele netwerkexploitanten, namelijk BT en Vodafone. Hierdoor zou de fusie waarschijnlijk hebben geleid tot hogere prijzen voor mobiele telefoniediensten en een beperking van de keuze voor de consumenten.[10] De tweede *theory of harm* hield in dat, doordat de gefuseerde entiteit partij zou zijn bij beide *network sharing agreeements*, BT en Vodafone in hun gedeelde netwerken geen volledig toegewijde partner meer zouden hebben. Dit zou leiden tot hogere kosten en/of een lagere kwaliteit voor BT en Vodafone, met als gevolg dat zij minder goed in staat en minder geneigd zouden zijn om na de fusie te concurreren.[11] De derde hield in dat de overname het aantal mobiele netwerkexploitanten dat bereid is andere mobiele exploitanten op hun netwerken toe te laten zou verminderen, omdat de gefuseerde entiteit partij zou zijn bij de twee bestaande *network sharing agreements*. Hierdoor zou er een vermindering zijn van het aantal mobiele netwerkhosts en zou dit de virtuele exploitanten in een minder comfortabele onderhandelingspositie hebben gebracht om gunstige voorwaarden voor wholesaletoegang te verkrijgen.[12]

Three heeft tegen het besluit van de Commissie om de concentratie te verbieden beroep ingesteld bij het Gerecht.

Arrest

In zijn arrest van 28 mei 2020 overweegt het Gerecht dat de Concentratieverordening de Commissie in staat stelt onder bepaalde omstandigheden concentraties op oligopolistische markten te verbieden die, hoewel zij niet leiden tot een machtspositie, de concurrentievoorwaarden op de markt toch kunnen beïnvloeden op een wijze die vergelijkbaar is met die waarop een dergelijke machtpositie dat doet, doordat de gefuseerde entiteit een positie heeft die haar in staat stelt zelf de parameters van concurrentie, en in het bijzonder de prijzen, vast te stellen in plaats van ze van de rest van de markt te moeten accepteren.[13] Het Gerecht overweegt echter dat het enkele feit dat de concurrentiedruk op de andere concurrenten afneemt, op zichzelf niet voldoende is om te spreken van een significante beperking van de concurrentie.[14] Het Gerecht komt vervolgens tot de conclusie dat de Commissie bij de toepassing van de criteria voor de beoordeling van niet-gecoördineerde effecten fouten heeft gemaakt.

Met betrekking tot de eerste *theory of harm* stelt het Gerecht vast dat de Commissie ten onrechte heeft geconcludeerd dat Three een belangrijke drijvende kracht achter de mededinging was. Om te kunnen kwalificeren als "*important competitive force*", is voor een marktspeler volgens het Gerecht nodig dat: "*it must stand out from its competitors in terms of its impact on competition, in that it plays a unique role in the market enabling it to exert disproportionately strong constraints on the other players compared to its market share that is indispensable for the preservation of effective competition*".[15] Nu de Commissie de impact van Three op de concurrentie niet als relevant oogpunt heeft beschouwd, heeft zij de verkeerde toets toegepast. De toets gebruikt door de Commissie zou er volgens het Gerecht toe leiden dat (letterlijk) elke onderneming die op een oligopolistische markt concurrentiedruk uitoefent, als "belangrijke drijvende kracht achter de mededinging" kan worden aangemerkt, hetgeen niet de gedachte achter de Concentratieverordening is.[16] Ook heeft de Commissie onvoldoende aangetoond dat de fusie tot een prijsstijging op de markt zou leiden.[17]

In verband met de tweede *theory of harm* heeft de Commissie onvoldoende aangetoond dat de fusie een negatief effect zou hebben op de *network sharing agreements*. Het Gerecht overweegt dat zelfs indien deze overeenkomsten positieve gevolgen kunnen hebben, dit niet betekent dat de beëindiging, de heronderhandeling of een latere wijziging van het evenwicht in de overeenkomsten na de overname noodzakelijkerwijs moet worden aangemerkt als een significante belemmering van de daadwerkelijke mededinging. Het is hooguit een nieuwe situatie die moet worden geanalyseerd.[18] Ook hier oordeelt het Gerecht dat de Commissie te snel tot een conclusie is gekomen. Niet alleen is deze tweede schadetheorie niet aannemelijk, ook heeft de Commissie de gevolgen van de fusie in de zin van een verslechtering van de door de gefuseerde entiteit aangeboden diensten of van de kwaliteit van haar netwerk niet geanalyseerd, en heeft de Commissie geen rekening gehouden met de waarschijnlijke reactie van BT of Vodafone in het geval van een stijging van de kosten van hun netwerk of een verslechtering van de kwaliteit van het netwerk.[19]

Ten slotte, met betrekking tot de derde *theory of harm*, is het Gerecht van oordeel dat het loutere feit dat Three een belangrijkere rol heeft gespeeld in de concurrentie dan zijn marktaandeel op de wholesalemarkt doet vermoeden (0-5%[20]), niet voldoende is om vast te stellen dat er sprake is van een significante belemmering van daadwerkelijke concurrentie.[21]

Het Gerecht vernietigt dus het besluit van de Commissie.

Commentaar

Het arrest van het Gerecht is van belang om (in ieder geval) twee cruciale punten die hierna zullen worden uitgewerkt.

Ten eerste is dit de eerste uitspraak van het Gerecht over de "significante belemmering van een daadwerkelijke mededinging" toets ("Significant Impediment to Effective Competition" of SIEC test) bij zogeheten niet-gecoördineerde effecten, zoals deze in 2004 in de Concentratieverordening werd ingevoerd. Daarmee wordt gedoeld op één van de twee belangrijke manieren waarop een "horizontale" fusie (dus een fusie tussen directe concurrenten) de concurrentie kan beïnvloeden, namelijk als door de fusie belangrijke concurrentiedruk op één of meer ondernemingen wordt weggenomen, hetgeen vervolgens zou leiden tot een grotere marktmacht, zonder dat het nodig is dat die ondernemingen hun marktgedrag onderling met elkaar afstemmen, coördineren.[22] Dat kan ook aan de orde zijn als de fuserende ondernemingen weliswaar niet een heel groot marktaandeel hebben (en dus geen economische machtspositie hebben), maar hun samengaan niettemin toch negatief voor de concurrentie uitpakt, bijvoorbeeld als daarmee een kleinere maar agressieve prijsvechter verdwijnt die grotere spelers dwong hun prijzen te beperken.

Ten tweede vindt de concentratie plaats in de telecomsector, waar de Commissie werd bekritiseerd omdat zij een strikte aanpak had gekozen voor four-to-three overnames in de mobiele telefoniesector. Deze strikte beoordeling zou de consolidatie van de industrie hebben verhinderd. Hierbij moet worden opgemerkt dat het Gerecht in het arrest *niet* heeft vastgesteld dat er *geen* mededingingsproblemen waren met de Three/O2 fusie en dat four-to-three fusies die niet tot een dominante positie leiden, in beginsel zijn toegestaan. Het Gerecht heeft alleen vastgesteld dat de Europese Commissie haar *theories of harm* niet hard heeft weten te maken en een overname op een oligopolistische markt niet kan verbieden op basis van enigszins vage kwalitatieve bevindingen over een "belangrijke drijvende kracht achter de mededinging" of de waarschijnlijkheid van een prijsverhoging. Het taalgebruik van het Gerecht over de beoordeling van de Commissie (van bijna 1000 pagina's) is soms opmerkelijk hard. De Commissie zal haar beoordelingen dus moeten aanscherpen om met een "grote waarschijnlijkheid" de aanwezigheid van een "significante belemmering van daadwerkelijke mededinging" door de concentratie aan te tonen.

Toepassing SIEC test

De SIEC test is met de nieuwe Concentratieverordening in 2004 ingevoerd om de mededingingsbezwaren in kaart te brengen die voortvloeien uit fusies op oligopolistische markten, dat wil zeggen in situaties waarin er weliswaar maar een paar spelers op de markt aanwezig zijn maar geen sprake is van het ontstaan of het versterken

10 Arrest, par. 20 en 128-136.
11 Arrest, par. 21 en 296-299.
12 Arrest, par. 22 en 419-423.
13 Arrest, par. 90.
14 Arrest, par. 97.
15 Arrest, par. 168.
16 Arrest, par. 174.
17 Arrest, par. 282.
18 Arrest, par. 340.
19 Arrest, par. 358, 361, 369, 372 en 396.
20 De exacte marktaandelen van de marktspelers zijn als vertrouwelijk aangemerkt door de Commissie en het Gerecht.
21 Arrest, par. 446.
22 Richtsnoeren voor de beoordeling van horizontale fusies op grond van de Verordening van de Raad inzake de controle op concentraties van ondernemingen, *Pb EU* 2004, C 31, p. 5 e.v., nr. 22 onder a.

van een machtspositie (wat voorheen de enige basis was voor het blokkeren van een fusie).[23] Considerans 25 van de Concentratieverordening bepaalt dat voor de SIEC test op basis van niet-gecoördineerde effecten aan twee cumulatieve vereisten moet zijn voldaan, i.e. dat de concentratie zal leiden tot (i) de uitschakeling van belangrijke concurrentiedruk tussen de fuserende partijen en (ii) een vermindering van de concurrentiedruk op de overige concurrenten.[24]

Dit arrest is het eerste arrest waarin het Gerecht (en straks in beroep het Hof van Justitie van de Europese Unie) de toepassing van de SIEC test door de Commissie toetst in de context van niet-gecoördineerde effecten.[25] Het arrest is van belang omdat het richtsnoeren geeft voor de normen en concepten uit de Concentratieverordening die moeten worden toegepast voor de vaststelling van een SIEC. Het Gerecht oordeelt dat de SIEC test de bewijsdrempel voor de Commissie niet heeft verlaagd en dat niet-gecoördineerde effecten alleen tot een SIEC kunnen leiden als zij effecten opleveren die gelijkwaardig ("*equivalent*") zijn aan het in het leven roepen of versterken van een machtspositie.[26]

Daarbij merkt het Gerecht meerdere malen op dat de SIEC toets verder reikt dat alleen het vaststellen van een vermindering van de concurrentie als gevolg van de concentratie. Een andere (minder stringente) uitleg zou ertoe leiden dat elke concentratie in een oligopolistische markt zou kunnen worden verboden, omdat juist op een markt met weinig partijen (bijna) altijd sprake zal zijn van een vermindering van de mededinging.[27] Sterker nog: elke concentratie waarbij feitelijke of potentiële concurrenten betrokken zijn, leidt per definitie tot een vermindering van de concurrentiedruk en dus tot een toename van de marktmacht (hoe klein ook). Indien deze interpretatie zou worden aanvaard, zou de Commissie in feite over de discretionaire bevoegdheid beschikken om te beslissen welke horizontale fusie wordt toegestaan en welke wordt geblokkeerd. Deze discretionaire bevoegdheid wordt door het Gerecht nu echter ingeperkt.

Four-to-three fusies

De Commissie was in de jaren voorafgaand aan het bestreden besluit al begonnen met het strikter beoordelen van fusies in de telecomsector. Op de markt voor mobiele telefonie-exploitanten waren in 2012 tot en met 2015 een aantal concentraties gemeld waarbij het aantal marktspelers, net als in de onderhavige concentratie, zou worden gereduceerd van vier naar drie, de zogenoemde "four-to-three" fusies. Deze four-to-three fusies had de Commissie slechts voorwaardelijk goedgekeurd, nadat de fuserende partijen remedies hadden aangeboden, te beginnen met de overname van Orange Austria door Hutchison (eind 2012),[28] de overname van O2 Ireland door Hutchison (mei 2014)[29] en de overname van E-Plus door Telefónica Deutschland (juli 2014).[30] Ook werd de aanvraag voor de voorgenomen Deense joint venture tussen TeliaSonera en Telenor in september 2015 ingetrokken, omdat partijen het niet eens konden worden over een remediepakket.[31] Hoewel deze besluiten door de benodigde remedies tot op zekere hoogte de consolidatie in de telecomsector hebben geremd, suggereerden deze dat het nog steeds mogelijk was om goedkeuring te krijgen voor een four-to-three concentratie.
De remedies die Three had aangeboden om de negatieve effecten van de onderhavige concentratie te beperken, waren uitgebreider dan de remediepakketten aangeboden in de bovengenoemde zaken. Het besluit van de Commissie de overname van O2 door Three te blokkeren, verraste dan ook de telecomgemeenschap. Misschien speelde toen bij de Commissie mee dat de implementatie van sommige remedies in de *Hutchison/Orange Austria* concentratie verre van soepel verliep en dat de *Bundeswettbewerbsbehörde*, de Oostenrijkse toezichthouder voor de telecommunicatiesector, in maart 2016 naar aanleiding van deze fusie ook nog eens aanzienlijke prijsstijgingen had vastgesteld.[32] In een speech in oktober 2015 en later herhaald, stelde Margarethe Vestager, Eurocommissaris voor Mededinging, dat "*the Commission has not laid down a general rule saying that three or four network operators are necessary – there is no 'magic number'*".[33] Hoewel de Commissie met zoveel woorden pleitte dat elke concentratie op een zaak-per-zaak basis moest worden bekeken, werd het verbod van de fusie tussen Three en O2 toch gezien als het begin van het einde van de consolidatie in de telecomsector.

Hoewel de gevestigde telecomexploitanten pleiten voor een soepelere toepassing van de EU-concentratieregels op de consolidatie van de telecomsector, met het argument dat dit een noodzakelijke voorwaarde was om meer investeringen in telecommunicatie-infrastructuur mogelijk te maken, stelde de Commissie bij de beoordeling van de efficiëntieclaims nooit vast dat consolidatie een aanzienlijke stimulans zou zijn voor investeringen. De Commissie zag concurrentie en de vraag van klanten als de belangrijkste drijfveren voor investeringen, en niet noodzakelijkerwijs consolidatie.[34]

Dit gevoel werd versterkt door de totstandkoming van de Italiaanse joint venture tussen Vimpelcom en Hutchison. Die transactie werd in september 2016 goedgekeurd door de Commissie, mits remedies zouden worden aangeboden die bestonden uit een afstoting van een deel van de gefuseerde entiteiten met inbegrip van alle activa die nodig waren om een nieuwe vierde mobiele-netwerkexploitant in Italië op te richten. Ook was hier sprake van een "fix-it-first" oplossing, waardoor de koper van het afgestoten deel al tijdens de beoordeling van de concentratie moest worden gevonden en door de Commissie zijn goedgekeurd.[35]

De onvoorwaardelijke goedkeuring van de overname van Tele2 Nederland door T-Mobile Netherlands in 2018 toonde aan dat in de telecomsector wellicht nog consolidatiemogelijkheden zouden zijn.[36] De concentratie onderscheidde zich van het onderhavige geval, doordat de gefuseerde entiteit de derde speler op de Nederlandse markt zou zijn – na KPN en VodafoneZiggo. Ook was de Commissie van mening dat Tele2 een verzwakkende partij was, gezien haar beperkte marktaandeel van 5% en het feit dat zij voor haar diensten al afhankelijk was van het mobiele netwerk van T-Mobile.

Het besluit inzake *T-Mobile/Tele2* bevestigde wat Vestager eerder had gesteld: vier is geen magisch getal en per geval moet worden gekeken of een concentratie tot stand mag komen en onder welke voorwaarden. Het lijkt er echter nog steeds op dat four-to-three concentraties vaker wel dan niet tot mededingingsbezwaren zullen leiden. In een verslag uit 2018 geeft BEREC, de *Body of European Regulators for Electronic Communications*, aan dat naar zijn mening de drie four-to-three concentraties die voorwaardelijk zijn goedgekeurd, Hutchison/Orange Austria, Hutchison/O2 Ireland en Telefónica Deutschland / E-Plus, tot prijsstijgingen op de verschillende nationale markten hebben geleid, en dat ondanks die voorwaarden.[37] Verwacht wordt dan ook dat de Commissie de four-to-three concentraties nauwlettend zal blijven onderzoeken. Het valt niet uit te sluiten (integendeel) dat het aantal mobiele netwerkexploitanten op een nationale markt slechts in beperkte omstandigheden tot drie zal kunnen worden teruggebracht. Met inachtneming van de regels uiteengezet door het Gerecht in het arrest over het voldoende aantonen van de te verwachten mededingingsbeperkingen uiteraard.

Conclusie

Het arrest geeft duidelijkheid over de SIEC test die in oligopolistische markten moet worden gebruikt en de bewijsstandaard waar de Commissie aan moet voldoen. Hiermee wordt alleen nog niet duidelijk wat partijen die een consolidatieslag op het oog hebben kunnen verwachten. Gezien de strenge bewijslast die door het Gerecht is opgelegd, zal het arrest waarschijnlijk leiden tot nog diepgaandere onderzoeken en langere beoordelingstermijnen voor fusies op oligopolistische markten. De Europese Commissie is echter van mening dat de toets opgelegd door het Gerecht te streng is en heeft aangekondigd beroep in te stellen tegen het arrest van het Gerecht. To be continued.

23 Concentratieverordening, considerans 25; Arrest, par. 79 en 82-83.
24 Arrest, par. 96.
25 Arrest, par. 85.
26 Arrest, par. 90.
27 Arrest, par. 150, 174.
28 Besluit van de Europese Commissie van 12 december 2012 in de zaak COMP/M.6497 – *Hutchison 3G Austria/Orange Austria*.
29 Besluit van de Europese Commissie van 28 mei 2014 in de zaak COMP/M.6992 – *Hutchison 3G UK/Telefonica Ireland*.
30 Besluit van de Europese Commissie van 2 juli 2014 in de zaak M.7018 – *Telefónica Deutschland/E-Plus*.
31 Zaak M.7419 *TeliaSonera/Telenor/JV*.
32 Luca Manigrassi, Eleonora Ocello, Violeta Staykova, 'Recent developments in telecoms mergers, Competition Merger Brief 3/2016 (Special Edition Telecoms)', ISBN 978-92-79-57016-2, ISSN: 2363-2534, p. 5.
33 Statement by Commissioner Vestager on competition decision to prohibit Hutchison's proposed acquisition of Telefónica UK, 11 mei 2016.
34 Zie bijv. Arrest, par. 23; Luca Manigrassi, Eleonora Ocello, Violeta Staykova, 'Recent developments in telecoms mergers, Competition Merger Brief 3/2016 (Special Edition Telecoms)', p. 3-4.
35 Besluit van de Europese Commissie van 1 september 206 in de zaak M.7758 – *Hutchison 3G Italy/WIND JV*.
36 Besluit van de Europese Commissie van 27 november 2018 in de zaak M.8792 – *T-Mobile NL/Tele2 NL*.
37 BEREC, 'Report on Post-Merger Market Developments – Price Effects of Mobile Mergers in Austria, Ireland and Germany', 15 juni 2018, p. 2-3.