

TRIBUNA

Telefónica-Liberty Global: entre el Brexit y el Covid

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La llamada de Telefónica para anunciarme que nos habían elegido para asesorarles en la mayor operación de su historia fue uno de esos momentos dulces en la carrera de un abogado que, aunque pueda no parecerlo, también los hay. La operación tenía lugar en Inglaterra, pero se llevaría desde España. En el Reino Unido solo estaban al corriente los principales ejecutivos y había que mantener la confidencialidad más absoluta. Se trataba de la integración de O2, líder en telefonía móvil del grupo Telefónica en el Reino Unido, y de Liberty Global, el operador número dos en banda ancha y de televisión de pago, que en el Reino Unido opera bajo la marca Virgin Media.

La complementariedad de las empresas era absoluta. Se generarían sinergias de 7.200 millones de euros y un valor combinado de 43.500 millones de euros. Una jugada maestra y un paso de gigante en el cambio de dirección estratégica que ya anunciara José María Álvarez Palleto en noviembre: centrarse en ser líder en cuatro países: Brasil, España, Alemania y el Reino Unido.

Desde el comienzo de la operación la confidencialidad era máxima y una filtración podía dar al traste con todo. Recuerdo cómo en febrero ambas partes se reunieron en un hotel en Londres donde, como en la mejor película de espías, nos dejaron entrar por la cocina para que nadie reconociera a los consejeros delegados.

Todos éramos conscientes de las especiales circunstancias en las que se llevaría a cabo la operación en el complejo contexto del Brexit. Lo que nadie esperaba era el Covid y el confinamiento obligatorio decretado por el estado de alarma. Situación complicada, ya que en nuestras casas nadie podía escuchar nada, al estar obligados a mantener el más absoluto secreto profesional. Por ello, utilizábamos siempre nombres en clave: Telefónica era *White* y Liberty Global era *Red*. Debíamos evitar imprimir cualquier documento. Menos mal que nada más empezar el confinamiento el despacho había expedido a todos los empleados, incluyendo las secretarías, pantallas, teclados y ratones para poder trabajar a doble pantalla en las mismas condiciones que en la oficina.

La integración con los equipos de Telefónica siempre había sido muy buena, pero, en este caso, sucedió algo sorprendente. A pesar de lo que inicialmente pudiera parecer, el trabajo en remoto nos acercaba. No importaba si estábamos en Londres, Madrid o Australia, como le ocurrió a una abogada durante gran parte de la operación. Ya no había un espacio de



La recta final de la operación se ha hecho en remoto, y en el más absoluto secreto: Telefónica era *White* y Liberty era *Red*

trabajo que separara a los abogados externos de los abogados de la casa. Éramos todos unos confinados remando desde las mismas galeras, y eso une mucho.

La urgencia era máxima porque el objetivo era firmar el 7 de mayo. Y la tarea, descomunal, al ser necesario condensar el trabajo de seis meses en cinco semanas. Había que negociar acuerdos de cientos de páginas, revisar cientos de contratos, activos y contingencias, estructurar desinversiones, asesorar sobre la financiación, analizar las implicaciones fiscales, de competencia, y un sinfín de otros aspectos, implicando a equipos de diferentes especialidades que trabajaban en paralelo en la más estricta coordinación.

El equipo de la casa de Telefónica es de primera división. Era su apuesta más importante, y Telefónica reunió lo mejor. Puedo asegurar que los ocho abogados internos al mando de la operación se han ganado el respeto que se tiene al jefe que se entrega y se remanga. Ninguno de nosotros sacrificó tanto sueño como hicieron ellos. Por el lado de Clifford Chance teníamos más recursos, llegamos a ocupar a 150 abogados en la recta final.

Al final, resultó que trabajar en remoto nos permitió ser más eficientes. Se ahorraba mucho tiempo. Ya no había que viajar a Londres para asistir a reuniones o negociaciones. Tampoco había que ir y venir al trabajo ni se podía salir a correr... Ello no quiere decir que no fuera agotador. Las llamadas telefónicas se enlazaban una tras otra y en alguna ocasión llegamos a comparar una sala del ya conocido programa de conferencias Teams como el camarote de los hermanos Marx. También aprendimos mucho sobre nueva etiqueta de la videoconferencia: si es con vídeo hay que dejarse ver pues hace sentir bien ver a los demás e indica que se atiende a la llamada sin distracciones.

La calidad de vida durante estas últimas semanas no ha sido la mejor y nuestras familias se resintieron, no cabe duda. Pero al final, tras la firma, llegó la satisfacción del trabajo conseguido. Las vistas desde la cima son espléndidas. Aunque solo se trata de la primera meta volante. Ahora, tras haber recuperado fuerzas, abordamos la segunda, la autorización de competencia, con la mirada puesta en la definitiva: el cierre.



Mergers: Commission prohibits Hutchison's proposed acquisition of Telefónica UK

Brussels, 11 May 2016

Today's decision follows [an in-depth investigation](#) by the Commission of the deal, which would have combined Telefónica UK's "O2" and Hutchison 3G UK's "Three", creating a new market leader in the UK mobile market. The takeover would have removed an important competitor, leaving only two mobile network operators, Vodafone and BT's Everything Everywhere (EE), to challenge the merged entity. The significantly reduced competition in the market would likely have resulted in higher prices for mobile services in the UK and less choice for consumers than without the deal. The takeover would also likely have had a negative impact on quality of service for UK consumers by hampering the development of mobile network infrastructure in the UK. Finally, the takeover would have reduced the number of mobile network operators willing to host other mobile operators on their networks.

The remedies proposed by Hutchison failed to adequately address the serious concerns raised by the takeover.

Commissioner Margrethe **Vestager**, in charge of competition policy, said: *"We want the mobile telecoms sector to be competitive, so that consumers can enjoy innovative mobile services at fair prices and high network quality. The goal of EU merger control is to ensure that tie-ups do not weaken competition at the expense of consumers and businesses."*

Allowing Hutchison to takeover O2 at the terms they proposed would have been bad for UK consumers and bad for the UK mobile sector. We had strong concerns that consumers would have had less choice finding a mobile package that suits their needs and paid more than without the deal. It would also have hampered innovation and the development of network infrastructure in the UK, which is a serious concern especially for fast moving markets. The remedies offered by Hutchison were not sufficient to prevent this."

The UK mobile market

The UK mobile market is currently competitive – retail mobile prices are among the lowest in the entire EU. The UK is also one of the most advanced countries in the EU in terms of roll-out of 4G technology and take-up of 4G services.

There are currently four mobile network operators in the UK – BT's mobile business EE, Telefónica's O2, Vodafone and Hutchison's Three.

EE and Three have combined their networks as "Mobile Broadband Network Limited" - MBNL. Similarly, Vodafone and O2 combined their networks to set up Beacon. This allows EE / Three, and Vodafone / O2 respectively, to share the costs of rolling out their networks but they continue to compete with each other for retail customers.

In addition to the four mobile network operators, there are a number of mobile "virtual" operators active in the UK retail mobile market, such as Virgin Media, Talk Talk and Dixons Carphone's iD. These mobile virtual operators do not own the networks they use to provide mobile services to UK consumers. Instead, they entered agreements with one of the mobile network operators to access their network at wholesale rates.

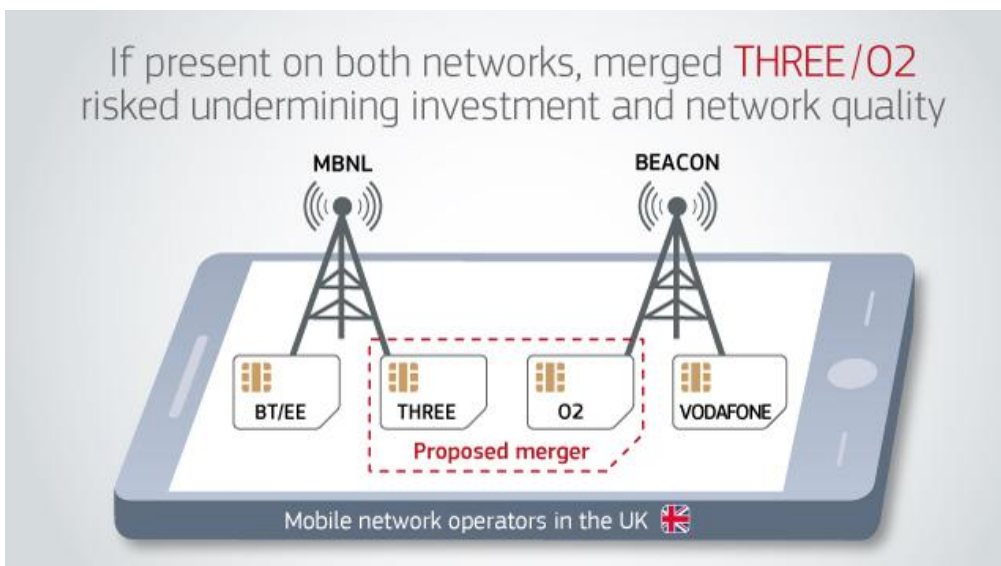
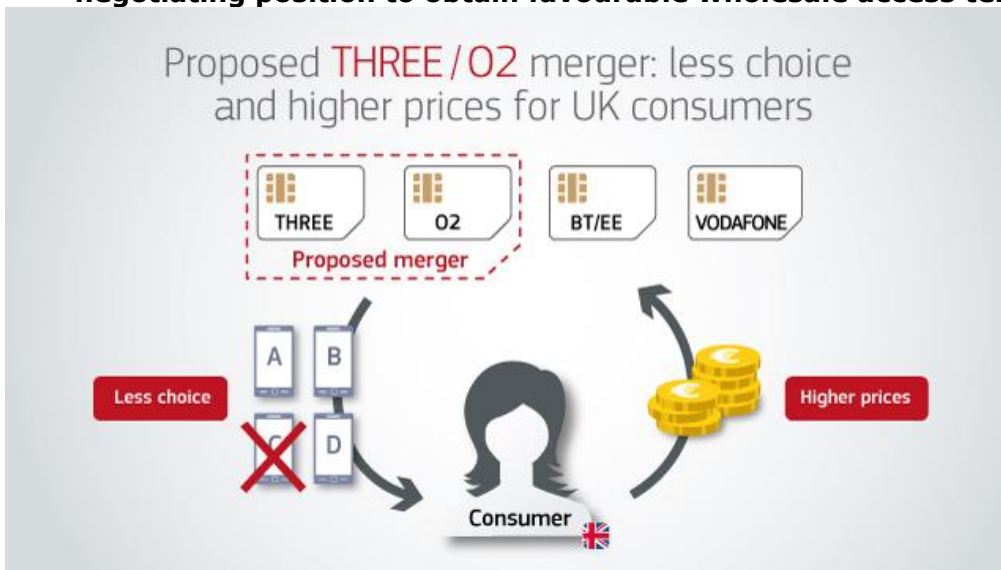
The Commission's competition concerns

The Commission had serious concerns that the takeover would have reduced competition in the market, hampered the development of the UK mobile network infrastructure as well as the ability of mobile virtual operators to compete.

- 1. Less competition leads to higher prices and reduced choice and quality for consumers:**
The takeover would have eliminated competition between two strong players in the UK mobile market. Three is the latest market entrant and has been an important driver of competition in the UK mobile market. O2 has a strong position with high brand value and reputation. It is the second largest mobile operator by revenues and the largest in terms of subscribers (if its share in the Tesco Mobile joint venture is included). Combined, Three and O2 would have been the market leader with a share of more than 40%. They would have had much less incentive to compete with

Vodafone and EE. This would have **reduced choice and quality of service for UK consumers**. The Commission's analysis also showed that with the takeover **retail mobile prices would have been higher** for all UK operators than without.

- Future development of entire UK mobile network infrastructure hampered:** The merged entity would have been part of both network sharing arrangements, MBNL and Beacon. It would have had a full overview of the network plans of both remaining competitors, Vodafone and EE. Its role in both networks would have **weakened EE and Vodafone** and **hampered the future development of mobile infrastructure** in the UK, for example with respect to the roll-out of next generation technology (5G), to the detriment of UK consumers and businesses.
- Reduced number of mobile network operators effectively willing to host virtual operators:** The transaction would have reduced the number of mobile network operators willing to host other mobile operators on their networks. Mobile virtual operators rely on access to the infrastructure to provide mobile services to consumers. The reduced number of host mobile networks would have left prospective and existing mobile virtual operators in a **weaker negotiating position to obtain favourable wholesale access terms**.



The infographics are available in high resolution [here](#).

Proposed remedies

To address the Commission's competition concerns, Hutchison offered remedies, which however did not adequately address the Commission's competition concerns.

In short, the proposed remedies **did not resolve the structural problems** created by the **disruption to the current network sharing agreements** in the UK. They were also **not capable of replacing the weakened competition** in the retail and wholesale mobile telecoms markets as a result of the takeover. Furthermore, the largely behavioural measures **raised significant uncertainty as regards**

their effective implementation and monitoring, also because they were difficult to define precisely and some depended on the agreement of others:

- As regards the Commission's **first concern** (regarding the loss of competition between Three and O2), Hutchison proposed a set of measures aimed at strengthening the development of existing mobile virtual operators or supporting the market entry of new ones, including:
 - o Hutchison proposed to give access to a share of the merged entity's network capacity to one or two mobile virtual operators.
 - o Hutchison proposed to divest O2's stake in the Tesco Mobile joint venture, and to offer a wholesale agreement for a share of its network capacity to Tesco Mobile.
 - o Hutchison proposed to offer a wholesale agreement for a share of its network capacity to Virgin Media.

Even if those offers were taken up, the mobile virtual operators would have been **commercially and technically dependent on the merged entity**, with limited ability or incentive to differentiate their offerings, including in terms of network quality.

- As regards the Commission's **second concern** (regarding the UK network sharing agreements), Hutchison offered certain behavioural remedies, which would have been **difficult to implement and monitor effectively**. Three and O2 would have kept their respective stakes in the two network sharing agreements, MBNL and Beacon.
- As regards the Commission's **third concern** (regarding the takeover's effect on mobile virtual operators), Hutchison offered a set of behavioural measures aimed at granting mobile virtual operators access to 4G and future technologies. These were **commercially unattractive** for the mobile virtual operators and raised **significant uncertainty as regards effective implementation**.

The Commission therefore concluded that the proposed remedies would not have been able to prevent the likely negative impact on prices, quality of service and network innovation in the UK mobile sector as a result of the takeover, which is why it decided to block the proposed transaction to protect UK customers and businesses.

Merger control rules and procedures

For background on the UK mobile market and the Commission's approach to assessing mergers in the mobile telecoms sector, please see [Factsheet](#).

The Commission has the duty to assess mergers and acquisitions involving companies with a turnover above certain thresholds (see Article 1 of the [Merger Regulation](#)) and to prevent concentrations that would significantly impede effective competition in the EEA or any substantial part of it.

The vast majority of notified mergers do not pose competition problems and are cleared after a routine review. From the moment a transaction is notified, the Commission generally has a total of 25 working days to decide whether to grant approval (Phase I) or to start an in-depth investigation (Phase II). There are three on-going phase II merger investigations:

- The proposed acquisition of [Arianespace by Airbus Safran Launchers \(ASL\)](#), with a decision deadline on 10 August 2016
- The proposed joint venture between the telecommunications activities of [Hutchison and VimpelCom](#) in Italy, with a decision deadline on 18 August 2016 and
- The proposed acquisition of the Greek gas transmission system operator [DESFA by the Azeri state oil company SOCAR](#).

More information will be available on the [competition](#) website, in the Commission's [public case register](#) under the case number [M.7612](#).

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Press and Information

General Court of the European Union

PRESS RELEASE No 65/20

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Judgment in Case T-399/16

CK Telecoms UK Investments v Commission

The General Court annuls the Commission's decision to block the proposed acquisition of Telefónica UK by Hutchison 3G UK in the sector of the mobile telephony market

On 11 May 2016,¹ the Commission adopted a decision in which it blocked, under the Merger Regulation,² the proposed acquisition of Telefónica UK ('O2') by Hutchison 3G UK³ ('Three').

According to the Commission, that acquisition would have removed an important competitor on the United Kingdom mobile telephony market and the merged entity would have faced competition only from two mobile network operators, Everything Everywhere (EE), belonging to British Telecom, and Vodafone. The Commission considered that the reduction from four to three competitors would probably have led to an increase in prices for mobile telephony services in the UK and a restriction of choice for consumers. The acquisition would also have been likely to have a negative influence on the quality of services for consumers, hindering the development of mobile network infrastructure in the UK. Lastly, it would have reduced the number of mobile network operators wishing to host other mobile operators on their networks.

Three brought an action before the General Court seeking annulment of the Commission's Decision.

By today's judgment, **the General Court upholds the action and annuls the Commission's Decision.**

I – The effects of the operation on prices and on the quality of services for consumers have not been proved to the requisite legal standard

The Commission's assessment was based on the consideration that the acquisition would have eliminated competition between two powerful players on the UK mobile telephony market, one of which, Three, is allegedly an important competitive force on the UK mobile telephony market and the other of which, O2, allegedly holds a strong position: together, the two would have been the market leader, with a share of approximately 40%. In particular, it seemed likely to the Commission that the merged entity would have been a less aggressive competitor, that it would have increased prices and that, moreover, the concentration would have been likely to have a negative impact on the ability of the other operators to compete on price and by means of other parameters (innovation, network quality).

After clarifying the scope of the change made by the Merger Regulation, as well as the burden of proof and the standard of proof in relation to concentrations, **the General Court finds that the Commission's application of the assessment criteria of the so-called 'unilateral' (or 'non-**

¹ Commission Decision C(2016) 2796 of 11 May 2016 declaring the operation incompatible with the internal market (Case COMP/M.7612 — Hutchison 3G UK/Telefónica UK).

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

³ Hutchison 3G UK Investments Ltd, an indirect subsidiary of CK Hutchison Holdings Ltd, became the applicant, CK Telecoms UK Investments Ltd.

coordinated') effects – namely, the concept of 'important competitive force', the closeness of competition between Three and O2 and the quantitative analysis of the effects of the concentration on prices – is vitiated by several errors of law and of assessment.

The Court acknowledges that the Merger Regulation allows 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. However, **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.**

As regards the classification of Three as an 'important competitive force', the Court finds that the Commission erred in considering that an 'important competitive force' need not necessarily stand out from its competitors in terms of its impact on competition. If that were the case, that position would allow it to treat as an 'important competitive force' any undertaking in an oligopolistic market exerting competitive pressure.

In addition, as regards the assessment of the closeness of competition, the Court finds that, although the Commission established that Three and O2 are relatively close competitors in some of the segments of a market, that factor alone is not sufficient to prove the elimination of the important competitive constraints which the parties to the concentration exerted upon each other and therefore to establish a significant impediment to effective competition.

The Court also finds that the Commission's quantitative analysis of the effects of the concentration on prices does not establish, with a **sufficiently high** degree of probability, **that prices would increase significantly.**

II – The Commission failed to show that the effects of the concentration on the network-sharing agreements and on the mobile network infrastructure in the UK would constitute a significant impediment to effective competition

The current four mobile network operators in the UK are parties to two network-sharing agreements: on the one hand, EE and Three have brought together their networks under the 'Mobile Broadband Network Limited' – MBNL joint venture; on the other hand, Vodafone and O2 have brought together their networks to create 'Beacon'. That enables them to share the costs of rolling out their networks while continuing to compete at the retail level.

According to the Commission, the future development of the mobile network infrastructure in the UK would have been hindered to the extent that the merged entity would have been party to both network-sharing agreements, MBNL and Beacon. That entity would have been afforded an overview of the network plans of the two remaining competitors, Vodafone and EE, and the possibility of weakening them, thereby hindering the future development of the mobile network infrastructure in the country. In particular, according to the Commission, one of the ways of weakening the competitive position of one or other of the partners in the network-sharing agreements would be to degrade the network quality of that agreement. For the Commission, that seems particularly relevant for the partner in the network-sharing agreement that would not become the basis of the merged entity's consolidated network.

The Court finds that a possible misalignment of the interests of the partners in a network-sharing agreement, a disruption of the pre-existing network-sharing agreements, or even the termination of those agreements do not constitute, as such, a significant impediment to effective competition in the context of a theory of harm based on non-coordinated effects.

In that regard, the Court notes, first, that the effects of the concentration 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, even though the assessment of a possible elimination of important competitive constraints between the parties to the concentration and a possible reduction of competitive pressure on the remaining competitors should lie at the heart of the assessment of the non-coordinated effects arising from a concentration.

The Court notes, second, that, even if the merged entity had favoured one of the two network-sharing agreements and was induced in particular to reduce the costs associated with the other network, that could not have a disproportionate effect on the position of the other partner in the network-sharing agreement or constitute a significant impediment to effective competition, since the Commission has failed to make the case that the other party would have neither the ability nor the incentive to react following an increase in its costs and would simply cease to invest in the network.

III – The effects of the concentration on the wholesale market were not found to be sufficient to establish the existence of a significant impediment to effective competition

In addition to the four mobile network operators, there are also several ‘virtual’ operators on the UK mobile telephony retail market, such as Virgin Media, Talk Talk and Dixons Carphone which use the infrastructure of the ‘host’ mobile network operators to provide their services to consumers in the UK.

According to the Commission, the loss of Three as an ‘important competitive force’ and the ensuing reduction in the number of host mobile networks would have placed the virtual operators in a weaker negotiating position to obtain favourable wholesale access conditions.

The Court finds that neither Three’s wholesale market shares nor their recent increase justify its classification as an ‘important competitive force’. The mere fact that Three had more of an influence on competition than its market share would suggest is not sufficient to establish the existence of a significant impediment to effective competition, particularly as it was not disputed that Three’s market share was small.

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months and ten days of notification of the decision.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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The [full text](#) of the judgment is published on the CURIA website on the day of delivery

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