The Commission’s Merger Enforcement in Mobile Mergers:
Brave New World for Non-coordinated Effects?

Nikolaos Peristerakis, Lodewick Prompers, & Mar García

Linklaters LLP
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I. INTRODUCTION

In the wake of the replacement of the traditional dominance standard by the significant impediment of effective competition (“SIEC”) standard by the European Commission (the “Commission”) in 2004, there was a general consensus among practitioners and enforcers that the new test would not lower the intervention threshold for merger control enforcement, but would merely fill in a gap.

The gap related to mergers in non-collusive oligopolies and, more specifically, mergers between particularly close competitors in differentiated product markets with high barriers to entry and expansion that do not result in a dominant position. The same consensus remained five years on, when leading practitioners and enforcers concluded that the SIEC had not materially changed the intervention threshold.

However, after 2007, it appears that there was a shift in the Commission’s enforcement in mergers occurring in oligopolistic markets, particularly in mergers involving mobile network operators (“MNOs”). As discussed below, the Commission has significantly expanded the scope of non-coordinated effects to capture (i) mergers between parties that are not each other’s closest competitors, but merely close competitors (see section II); and (ii) even to mergers between parties that are not close competitors, but where one of the parties is an Important Competitive

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1 Nikolaos (Nick) Peristerakis is Counsel, and Mar García and Lodewick Prompers are Associates with the competition practice of Linklaters LLP.
3 See “Implications of the recent reforms in the antitrust enforcement in Europe for National Competition Authorities,” speech at Italian Competition/Consumer Day, Rome (December 9, 2003). See also Philip Lowe’s speech at the RBB/FIPRA seminar “The future shape of European merger control,” Brussels, February 17, 2003.
4 See the Commission’s contribution to the 2002 OECD roundtable on Substantive Criteria used for Merger Assessment, section 3.2 at page 313: “In non-collusive oligopolies, the increase of post-merger prices above competitive levels is not the result of co-ordination between the oligopolists, but stems from the fact that the merger removes a substantial competitive constraint each of the merging parties was facing previously. Whereas before the merger, the two merging parties exercised a competitive constraint on each other, in the sense that if one party would raise price, it would lose customers to the other party and vice versa, the merger lifts these constraints.” (emphasis added).
5 Philip Lowe’s speech at the RBB/FIPRA seminar “The future shape of European merger control,” Brussels, (February 17, 2003). See also S.A. Ryan (DG Competition, Directorate B), Reform of the EU Merger Control System — a comprehensive package of proposals, (1) COMM. COMP. POL’Y NEWSLETTER, 10 (Spring 2003); and M. Loughran (DG Competition, Directorate B), EC Merger Control Conference — highlights of proceedings, COMM. COMP. POL’Y NEWSLETTER, 83 (Spring 2003).
6 N. Levy, The EU’s SIEC test five years on: has it made a difference?, EUR. COMP. L. J. (April 2010).
 Force (“ICF”) (see section III). It is clear that with these considerably broader substantive tests, the Commission can now challenge mergers—such as the Airtours/First Choice merger—that it was not able to challenge under the old dominance standard (see section IV).

II. FROM “CLOSEST” TO “CLOSE” COMPETITORS

Before the adoption of the 2004 EUMR, there was a widely held view that when the merging parties would not become dominant as a result of the transaction, non-coordinated effects could only arise if the following conditions were met: (i) the merger involves a differentiated product market,⁸ (ii) there are high barriers to entry/expansion and repositioning; and, most importantly, (iii) the parties were each other’s closest competitors.⁹

A. Closest Competitors

In the 2001 Green Paper on the review of the EUMR, the Commission provided as a typical example of a gap case the scenario in which a merger involves the second and third largest players in a market, in which they are the closest substitutes. In that case, even if the firms would remain smaller than the market leader, they could still exercise market power and unilaterally raise prices.¹⁰

Even though the Commission’s HMG under the EUMR¹¹ use the term “close,” as opposed to “closest,” the HMG acknowledge that non-coordinated effects are more likely to arise when the parties are closer competitors: The greater the level of rivalry, the higher this risk of anticompetitive effects becomes.¹²

In line with this approach, the Commission concluded in T-Mobile/Orange Netherlands (2007)¹³ that the merger did not raise non-coordinated effects concerns, as the Commission

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⁸ As the Commission notes in its Horizontal Merger Guidelines, products may be differentiated in various ways. There may, for example, be differentiation in terms of geographic location, based on branch or stores location; location matters for retail distribution, banks, travel agencies, or petrol stations. Likewise, differentiation may be based on brand image, technical specifications, quality, or level of service. The level of advertising in a market may be an indicator of the firms’ effort to differentiate their products. For other products, buyers may have to incur switching costs to use a competitor’s product. See, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ 2004/C 31/03 5.2.2004, (hereinafter “HMG”) (at footnote 32).
¹⁰ Green Paper on the Review of Council Regulation (EEC) No 4064/89, of 11 December 2001. See paragraph 166: “One of the more specific hypothetical questions that has occasionally been raised about the reach of the dominance test in the Merger Regulation is the extent to which it would allow for effective control in some specific situations where firms unilaterally may be able to raise prices and thus exercise market power. The type of example that tends to be cited is of a merger between the second and third largest players in a market, where these firms are the closest substitutes. In such a scenario the merging firms may remain smaller than the existing market leader. The argument goes that the SLC test would be better adapted to addressing such a situation, in particular if the market characteristics would not be conducive to a finding of collective dominance. While interesting as a hypothetical discussion, the Commission has so far not encountered a situation of this kind,” (emphasis added).
¹¹ HMG, supra note 8 at pp. 5-11.
¹² Id. at, ¶ 28.
¹³ Commission decision of 20 August 2007 in Case COMP/M.4748.
investigated and found that Orange and T-Mobile were not each other’s “closest” or “particularly close” competitors.\textsuperscript{14} The Commission based its conclusion on (i) the parties’ different business strategy and target customers and (ii) churn data (20-30 percent churn rate).\textsuperscript{16}

\textbf{B. The Move to Close Competitors}

Despite its findings in \textit{T-Mobile/Orange Netherlands}, the Commission has since taken the view that it is sufficient that the parties are merely “close competitors.”\textsuperscript{17} This shift has lowered the intervention threshold for merger enforcement based on non-coordinated effects.\textsuperscript{18}

Even though the Commission has still occasionally used the “closest competitor” standard in mergers involving non-telecom sectors,\textsuperscript{19} it has eventually moved to the considerably broader “close competitor” standard in mobile mergers:

- In \textit{Hutchison 3G Austria/Orange Austria} (2012),\textsuperscript{20} the Commission referred to “closest competitors,” but also suggested that mere closeness of competition could suffice to raise non-coordinated effects.\textsuperscript{21}
- In \textit{T-Mobile/Orange UK} (2010)\textsuperscript{22} the Commission dropped the term “closest competitors” altogether and concluded that the transaction would not raise competitive concerns as the parties were not “particularly close” competitors.\textsuperscript{23}
- In the \textit{Hutchison 3G UK/Telefónica Ireland} (2014) case,\textsuperscript{24} the Commission reconfirmed that it is not necessary to show that the merging parties are each other’s closest competitors on the relevant markets, but it is sufficient that the parties are merely close competitors.\textsuperscript{25}

\textsuperscript{14} Id. at ¶ 35.
\textsuperscript{15} Id. at ¶ 41.
\textsuperscript{16} Id. at ¶ 42: KPN captured a significantly higher number of customers switching away from Orange (30-40 percent).
\textsuperscript{17} See, e.g., BASF/Ciba, Commission decision of 12 March 2009 in Case COMP/M.5355, ¶ 126: “the market investigation showed that no sufficient close substitute to bismuth vanadate, which is considered as a specific pigment, exists. … Given these factors and the Parties’ high combined market shares in the market for bismuth vanadate, the Commission considers the transaction raises serious doubts as to its compatibility with the common market in relation to bismuth vanadate.” (emphasis added)
\textsuperscript{18} BASF/Ciba, inter alia, ¶s 135 (“the market investigation provided no indications that would confirm BASF’s claim that its own and Ciba’s indanthrone blues are not close substitutes”) and 145 (“BASF submits that, regardless of the high combined market shares, the transaction will not lead to competition concerns, since Ciba is a niche player in the market and BASF and Ciba’s products are not particularly close substitutes. Furthermore, the parties are aware of several companies considering or preparing market entry. In that regard, the market investigation corroborated that new entries are foreseen within the next three years. However, it did not confirm that BASF and Ciba’s products were not close substitutes.”)
\textsuperscript{19} See, e.g. \textit{Porsche/Volkswagen}, Commission decision of 23 July 2008 in Case COMP/M.5250, ¶ 59 (the sports cars of Porsche and Volkswagen were not considered as the closest substitutes). However, the Commission has also used the “close competitors” standard outside the telecommunications sector. See e.g., \textit{Western Digital Ireland/Viviti Technologies}, Commission Decision of 23 November 2011 in Case COMP/M.6203, in particular ¶s 560 to 568.
\textsuperscript{20} \textit{Hutchison 3G Austria/Orange Austria}, Commission decision of 12 December 2012 in Case COMP/M.6497.
\textsuperscript{21} \textit{Hutchison 3G Austria/Orange Austria}, where the Commission indicates that the parties were at least the closest competitors on certain variables, or particularly close competitors (¶s 176 and 225-226). However, other recitals of the decision suggest that mere closeness is enough (see, e.g., ¶s 177-178).
\textsuperscript{22} \textit{T-Mobile/Orange UK}, Commission decision of 1 March 2010 in Case COMP/M.5650.
\textsuperscript{23} \textit{T-Mobile/Orange UK}, ¶s 54-58 and 64.
The lower intervention threshold based on a “close competitor,” as opposed to the “closest competitor” standard, creates legal uncertainty and raises a number of questions that currently remain open, such as: How close do the merging parties need to be in order for non-coordinated effects to arise? What kind of quantitative and qualitative evidence should be used to established closeness? Are there specific diversion ratios above which closeness would be established? How “close” is “close”?

Such uncertainty is further exacerbated by the Commission’s increased use of the concept of an ICF in recent mobile telecommunications mergers (see section III below).

III. THE INCREASED USE OF THE CONCEPT OF IMPORTANT COMPETITIVE FORCE

In recent years, the Commission has by-passed the requirement of closeness of competition altogether, relying instead on the concept of the elimination of an ICF to challenge mergers in oligopolistic markets.

The concept of an ICF is, as such, not new. Indeed, the HMG identify the elimination of an ICF as one of the factors that may influence whether significant non-coordinated effects are likely to result from a merger.26 In particular, the HMG state that an ICF would typically be a firm that has more of an influence on the competitive process than its market share would suggest. The HMG provide as examples: (i) a recent entrant that is expected to exert significant competitive pressure on the other firms in the market, and (ii) an important innovator with important pipeline products.27

In mobile telecommunications mergers, the concept of ICF was originally assimilated to that of a maverick. In the 2006 T-Mobile/Telefónica decision28 decision, an early gap case, the Commission indicated for the first time that the elimination of a maverick would amount to the elimination of an ICF.29

Expansion of the Concept of ICF

However, in recent cases, the Commission has expanded the scope of an ICF beyond traditional mavericks. In Hutchinson 3G UK/Telefónica Ireland, the Commission found that the target could be considered as an ICF even if it was not the most aggressive competitor in the

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24 Hutchinson 3G UK/Telefónica Ireland, Commission decision of 28 May 2014 in Case COMP/M.6992.
25 Hutchinson 3G UK/Telefónica Ireland, ¶ 200: “Furthermore, contrary to the Notifying Party’s claims, the Commission is not required, for the purposes of finding non-coordinated effects in the absence of dominance, to show that Three and O2 are each other’s closest competitors on the relevant markets.”
26 HMG, supra note 8 ¶ 26.
27 Id. ¶¶ 37-38.
29 Indeed, already in its Decision of 30 July 1997 in Case COMP/M.877 – Boeing/McDonnel Douglas, the Commission noted: “Although (…) the market share of MDC has been continuously declining, it appears that the impact of MDC on the conditions of competition in the market for large commercial aircraft was higher than reflected by its market (…).This is confirmed by a study (…) in which (…) it was found that the MDC presence led to a reduction of over 7% in the realized price.” (at ¶ 58).
market, let alone a maverick.\(^{30}\) In particular, the Commission noted that a market player does not need to “stand out” from all the other competitors in order to be considered an ICF for the following reasons:

1. The Commission does not have a higher burden of proof to find a SIEC based on the elimination of an ICF compared to the burden of proof for closeness of competition or dominance;\(^{31}\)

2. In contrast with prior cases, there is no need for the target firm to be a maverick or an otherwise “unique” firm in its aggressiveness or market positioning in order to be considered an ICF.\(^{32}\)

With such a broad interpretation, virtually every firm active in an oligopolistic market with high barriers to entry could be viewed as an ICF. Indeed, in *Hutchinson 3G UK/Telefónica Ireland*, the Commission found that in a concentrated market, such as the Irish mobile telecommunications market, all MNOs are “arguably important,” given that they all contribute to competition to a “certain degree.” The Commission argued that the fact that other MNOs (other than the merging parties) are also competing aggressively on the market does not invalidate the conclusion that one of the merging parties is an ICF.\(^{33}\) In other words, the Commission does not consider that there is any need to show that the alleged ICF’s offers are significantly better than those of its competitors or that the alleged ICF is uniquely positioned in terms of exercising a competitive constraint on the market as a whole, like a maverick would.\(^{34}\)

In addition to expanding the concept of an ICF, the Commission has in recent cases taken the position that the elimination of an ICF could by itself be sufficient to establish non-coordinated effects. In *Oracle/Sun Microsystems*, the Commission developed the elimination of an ICF as a stand-alone theory of harm, detached from the finding of a dominant position or closeness of competition. Up until then, the Commission had never used the elimination of an ICF as a stand-alone theory of harm, but instead used the elimination of an ICF merely as an

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\(^{30}\) Commission Decision of 28 May 2014 in Case COMP/M.6992. The Commission reached similar conclusions in *Telefónica Deutschland/E-Plus* (Commission Decision of 2 July 2014 in Case COMP/M.7018). For conciseness, this article will focus on the arguments made in *Hutchinson 3G UK/Telefónica Ireland*.

\(^{31}\) Id. at ¶ 205.

\(^{32}\) Id. at ¶ 205, 208. See also Commission Decision of 21 January 2010 in Case COMP/M.5529, ¶¶ 164-165. In this specific case, the Commission was faced with a transaction that involved the largest and strongest proprietary database vendor (with substantial market power) acquiring the largest open source database (MySQL). It was the open source nature of the services offered by Sun which the Commission considered relevant while analyzing whether Sun could be considered an ICF. This analysis is highly case-specific and therefore provides little general guidance on the definition of an ICF. More specifically, the Commission’s investigation showed that MySQL had the potential to exert an important and growing competitive constraint on Oracle and other proprietary database vendors due to *inter alia* its specific modular architecture, its business model resulting in low pricing and absence of lock-in, and the other strengths it derives from its open source nature. See Commission Decision of 21 January 2010 in Case COMP/M.5529, ¶ 170.

\(^{33}\) *Hutchinson 3G UK/Telefónica Ireland*, ¶ 283.

\(^{34}\) Id. at ¶ 303.
“aggravating factor” in situations where either the merged entity would achieve a dominant position or the parties to the merger were particularly close competitors.\(^{35}\)

The Commission concluded, however, that under the SIEC test the elimination of an ICF was in itself sufficient, and that it was no longer required to show that the parties were close competitors.\(^{36}\) The Commission adopted the same approach in *Hutchinson 3G UK/Telefónica Ireland*.

**IV. HAS THE INTERVENTION THRESHOLD LOWERED FOR MERGERS IN OLIGOPOLISTIC MARKETS?**

The developments set out above beg the question whether the SIEC test introduced in 2004, at least as applied in mobile telecommunications mergers, has lowered the intervention threshold and is enabling the Commission to go after mergers that it would not have been able to challenge under the traditional dominance standard.

In this context, it is important to note that the landmark *Airtours* judgment of the General Court, which concerned a 4-3 merger being challenged on the basis of a coordinated effects theory, substantially raised the burden of proof for the Commission to establish coordinated effects.\(^{37}\) In that case, the Commission took the position that the Airtours/First Choice merger raised collective dominance concerns because the merger would create a market structure which would create an incentive for the three remaining large players post-merger to restrict output. The Commission took the position that it was sufficient that the merger would make it rational for the three remaining oligopolists to adapt themselves to market conditions and act—individually—in ways in which will substantially reduce competition between them.\(^{38}\)

It is noteworthy that the theory of harm used by the Commission in *Airtours*—a case that was presented as a coordinated effects case—is quite similar to the concept of non-coordinated effects in the HMG. A central piece in the Commission’s theory of harm in non-coordinated effects is the accommodating responses of the rivals, especially in those cases where the Commission relied on the concept of an ICF as opposed to the concept of closeness of competition. In *Hutchinson/Telefónica Ireland*, the Commission emphasized the likely accommodating reaction of competitors following the merger as a key factor for its finding of


\(^{36}\) More specifically, the Commission noted that: “… beyond the concept of dominance, 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, under certain circumstances, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition. (…) the Commission is not required, for the purposes of the assessment of this case, to show that the merging parties are the closest competitors on the relevant market. Closeness of competition is only one of the factors listed in the Horizontal Guidelines as conducive to influence whether significant non-coordinated effects are likely to result from a merger.” (Commission Decision of 21 January 2010 in Case COMP/M.5529, ¶¶ 163-164. Referring explicitly to recital 25 of the EU Merger Regulation).

\(^{37}\) Commission Decision of 22 September 1999 in Case COMP/M.1524. In this case, Airtours’ proposed acquisition of First Choice would reduce the number of major tours operators in the United Kingdom from four to three, while no firm would be individually dominant post-merger. The General Court, on appeal, annulled the Commission’s decision (Case T-342/99) and associated collective dominance with coordinated effects.

\(^{38}\) Id. ¶¶ 54-56.
non-coordinated effects concerns. Indeed, the use of the term “non-coordinated” instead of “unilateral” was to emphasize that the Commission would focus not only on whether the combined firm would increase prices (or restrict output) post-merger, but also on whether other firms would find it profitable to raise their prices as a result of the diverted customer demand from the merged group to other competitors.

It is also interesting that the concept of a maverick, which was originally assimilated to the concept of an ICF, demonstrates that the Commission is applying concepts typically limited to coordinated effects concerns under the banner of non-coordinated effects. In its analysis of non-coordinated effects in Hutchinson/Telefónica Ireland, the Commission in fact noted the link between the two. This seems logical. In order to sustain collusion, the coordinating parties need to deviate from the behavior that would be optimal in the short run, i.e. given the prices of the competitors it would be profitable to set the price below the collusive level. The existence of a maverick can thereby render the ability of other firms to coordinate impossible.

V. CONCLUSION

The Commission appears to have significantly lowered the intervention threshold for challenging mergers on the basis of non-coordinated effects well beyond what was originally anticipated back in 2004. This appears to be clearly the case for mobile telecommunications mergers.

The Commission is now essentially carrying out an analysis of the post-merger incentives for the merging parties and their competitors. Against this background, it becomes even more crucial what type of evidence the Commission is using to conclude what the post-merger incentives will be.

Against this background, the reliance on price pressure tests such as GUPPI/UPP to assess post-merger incentives will virtually always lead to the conclusion that the post-merger incentives of the merging parties and their competitors will be to increase prices, because these tests will always show a price increase. An increased reliance on this type of tests, originally

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39 Hutchinson 3G UK/Telefónica Ireland, ¶¶ 588 onwards. Interestingly, the Commission notes in its decision: “Despite Vodafone’s claims during the Oral Hearing and written submissions that it would continue to effectively compete post-merger, the Commission therefore considers that Vodafone’s likely strategy would be a moderate price increase (inferior to that of the merged entity) in order to optimize profits from this additional demand.” The Commission refers to the finding that competing firms have incentive to raise prices as a response to a price increase by another firm “strategic complementarity” of pricing decisions and considers this a general characteristic in standard models of oligopolistic competition.

40 ICN Report on Merger Guidelines at Ch. 3 (April 2004).
41 Hutchinson 3G UK/Telefónica Ireland, ¶ 731 (“the merger will remove Three in its maverick role from the market”) and 739 (“After the merger, the threat of Three disrupting coordination will be removed”).
43 GUPPI stands for gross upward pricing index and UPP for upward pricing pressure. These concepts are used to measure predicted price increases post merger.
designed as a screen that would be used in lieu of market shares, significantly lowers the intervention threshold.

It remains to be seen whether the Commission will expand the use of non-coordinated effects and, in particular, the concept of an ICF, in sectors outside the mobile telecommunications sector. What is clear, however, is that the intervention threshold has been significantly lowered for mergers in oligopolistic markets.