CPI EU News Presents:

The General Court's ruling in Case T-43/16, *1&1 Telecom GmbH v. European Commission*

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Facts of the Case

In July 2014, the European Commission adopted decision M.7018 - *Telefónica Deutschland/E-Plus*, whereby it declared that the acquisition of E-Plus Mobilfunk GmbH by Telefónica Deutschland (hereinafter Telefónica) was compatible with the internal market, subject, however, to Telefónica's compliance with certain Final Commitments. Commitments accepted in mobile mergers, such as this one, typically consists of three components: (i) the MNO; (ii) the MVNO or MBA (Mobile Bitstream Access); and (iii) the general non-MNO remedy.[2] Under the MNO component, Telefónica undertook to lease frequency spectrum to a new MNO and to also sell it and provide it with certain assets necessary for it to start providing services in Germany. To comply with the MVNO MBA part, and more importantly to be able to implement the concentration, Telefónica had to sell 20 percent of the combined network capacity of the merged entity to at least one (but no more than to three) non-MNOs. Last but not least, under the non-MNO component, Telefónica committed to offer all existing wholesalers that were at that time procuring access to 2G, 3G and/or 4G from either Telefónica or E-Plus to extend their existing contracts until the end of 2025 (thereby waiving its right to ordinary termination) or such earlier date on which it could terminate to offer such products to its own clients. It is in relation to the issues raised by the non-MNO component that 1&1 Telecom decided to file a case to the General Court.

1&1 Telecom, the applicant in the present case, in December 2013 signed with E-Plus an MVNO agreement for the provision of access to 2G/3G/4G. The agreement was signed for a minimum period of four years, after which the contract was to be automatically extended for an indeterminate period, unless either party chose to cancel the contract in compliance with the cancellation terms laid down in the contract. Moreover, the parties stipulated that 1&1 Telecom would activate a determined percentage of its new customers on E-Plus network or any other network affiliated with E-Plus.[3] In the event of non-compliance, 1&1 Telecom was to pay financial compensation to E-Plus. Finally, Article 15.7 of the MVNO agreement provided that any dispute concerning the agreement fell under the competence of the Düsseldorf courts.

To comply with paragraphs 77 and 78 of the Final Commitments, Telefónica sent to 1&1 Telecom a Self-Commitment and a Clarification Letter, in February and August 2015, respectively. Although 1&1 Telecom initially agreed with the terms of the Self-Commitment letter, soon afterwards it informed the Commission that it had doubts about the legality of Clause 2.3. Pursuant to the clause in question, E-Plus would waive its right to ordinary termination on the condition that 1&1 Telecom would continue to comply with its obligations, and in particular the purchase of the minimum percentage of services until 2025. However, according to the applicant, to comply with the Final Commitments, Telefónica's Self-Commitment letter should have included unconditional waiver of its right to ordinary termination of the MVNO agreement.

In September 2015, DG COMP, having considered the case, informed 1&1 Telecom by email that in its view Clause 2.3 of the Self-Commitment Letter did not violate the Final Commitments. In response to the email, 1&1 Telecom requested the Commission to take a formal decision on whether Telefónica's Self-Commitment Letter complied with the Final Commitments. In a letter dated November 19, 2015, Director General of DG COMP informed 1&1 Telecom that there was no reason to adopt a decision. This is because, according to the Director General "the [Final] Commitments [did] not prevent Telefónica from including [Clause 2.3] in the text of the Self-Commitment Letter," and also because such insertion simply sought to ensure that "the commercial balance achieved in the MVNO agreement with E-Plus (as originally […] concluded) [was] not eliminated following its prolongation under the Final Commitments."[4] In light of the above, 1&1 Telecom asked the Court to (i) annul the Commission's alleged decision contained in the letter of November 19, 2015; and (ii) order the Commission to request Telefónica to issue a new Self-Commitment Letter. The Commission, on the other hand, asked the

Court to dismiss the action as in its view the letter in question did not constitute an act which could be challenged under Article 263 TFEU. The Court's judgment focused almost entirely on the applicant's first claim while the second claim was promptly rejected on the ground that it constituted an attempt to obtain an injunction.

The General Court's Judgment

The Court sided with the European Commission and ruled that the letter sent by DG COMP did not constitute "a decision-making act against which an action for annulment may be brought in accordance with Article 263 TFEU."[5] In order to reach this conclusion the Court made a number of observations. First, it noted that according to the settled case law concerning the admissibility of actions for annulment, it is necessary to examine the substance of the act, as the form in which the act is adopted is in principle irrelevant.[6] Second, "only measures or decisions which seek to produce legal affects which are binding on, and capable of affecting the interests of, the applicant, by bringing about a distinct change in his legal position may be subject of an action for annulment."[7] The Court, therefore, had to determine whether the letter in question brought about a distinct change in the legal position of the applicant. In that regard, the Court first observed that "a written expression of opinion or a simple statement of intention cannot constitute a decision that is challengeable by an action for annulment, since it cannot produce legal effects nor is intended to produce such effects."[8] However, even if the interpretation of a legal provision put forward by the Commission is not challengeable, the Court agreed with the applicant that the application of the interpretation "to a given situation can, in principle, produce legal effects."[9] Yet, in the present case, the letter in question did not modify nor was capable of substantially modifying the applicant's legal position "insofar as only the Final Commitments govern the rights and obligations of [Telefónica] and of non-MNO operators."[10]

The Court, thus, ruled that the letter in question did not constitute a decision, and that it was "a purely confirmatory act,"[11] and "merely a legally non-binding statement that the Commission is authorized to make in the context of *ex post* supervision of the correct implementation of its decisions relating to the control of concentrations."[12] The Court also stated that the applicant had no individual right to oblige the Commission to adopt a decision declaring that Telefónica infringed Final Commitments and taking measures to restore conditions of effective competition, even if the conditions justifying such a decision were satisfied.[13] The Court also remarked that a potential loophole in the control of concentration concerning the lack of a procedure by which third parties to a concentration could lodge a complaint for the breach of conditions attached to the decision clearing the merger, even if they are potential beneficiaries of such conditions, should be addressed by the legislature, and not the EU Courts.[14]

The applicant, in its turn, argued that the rejection of its claim would infringe its right to effective judicial protection. The Court disagreed and noted that Articles 263 and 267 provide "a complete system of legal remedies and procedures" entrusting judicial review of the legality of the acts of EU institutions to EU courts.[15] Where conditions for admissibility do not allow natural or legal persons to directly challenge EU measures, they can still argue the invalidity of such measures before the national courts, which in turn can make a reference to the Court of Justice for a preliminary ruling on validity.[16]

The Court also reflected on the nature of commitments and decisions adopted on the basis of Article 8(2) of Regulation 139/2004 stating that such decisions "may indirectly have legal effects *erga omnes*,"[17] and that respect of such effects is subject to review by the competent national courts.[18] When ruling on the disputes arising with respect to the implementation of Final Commitments, the competent national courts are not bound by the opinions expressed by the Commission concerning the

interpretation to be given to the such Commitments as such opinions have only "persuasive value" contrary to decisions taken under Article 288 TFEU and as such, constitute only "a possible interpretation."[19]

Opinion

The judgment of the General Court in the present case is the third one in a series of cases brought by different German and Austrian companies that were unsatisfied with the Commission's approach to commitments imposed on Telefónica in the wake of its acquisition of E-Plus. The other two cases are case T-884/16, *Multiconnect GmbH v. European Commission*, and case T-885/16, *Mass Response Service GmbH v. European Commission*. In all these three judgments, which were all delivered on October 9, 2018, the General Court held that the Commission's letters did not amount to legally binding decisions, and thus did not give the third parties in question a right to challenge potential non-compliance by Telefónica with the Final Commitments. Given the increasing importance of commitments adopted in the context of a merger review, and the risk of non-compliance with such commitments, these judgments raise questions as to the efficacy of procedures available to third parties to mergers at national level in light of their lack of right to obtain a formal decision from the European Commission.

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[2] Remedies imposed in mobile mergers seek to lower barriers to entry to new players, be it MNOs or MVNOs, so that the same level of competition at the wholesale and retail level can be maintained post-merger. Under the MNO remedy, a mobile network operator typically commits to conclude an agreement with a new MNO entrant, and in particular to offer (i) spectrum; (ii) national roaming; (iii) divestiture of sites; (iv) the passive radio network sharing; and (v) the sale of shops. The MVNO or MBA remedy, on the other hand, requires that an MNO enters into MBA agreements with MVNO(s) and sells a pre-determined share of its total capacity. Finally, the general non-MNO remedy typically requires that an MNO improves or extends existing network sharing agreements.

[3] The percentage, determined on an annual average basis, varied from 37 percent during the first year after marketing to 46 percent from the beginning of the 25th month until the 48th month.

[4] Case T-43/16, *1&1 Telecom GmbH v. European Commission*, para. 17.

[5] *Ibid*, para. 27.

[6] *Ibid*, para. 33

[7] *Ibid*, para. 34.

[8] *Ibid*, para. 38.

[9] *Ibid*, para. 39. See see order of September 2, 2009, *E.ON Ruhrgas and E.ON Földgáz Trade v. Commission*, T-57/07, not published, EU:T:2009:297, paragraph 31.

[10] *Ibid*, para. 40.

[11] *Ibid*, para. 41

[12] *Ibid*, para. 44.

[13] *Ibid*, para. 46.

[14] *Ibid*, para. 47. Note that Article 11 of Regulation 802/2004 identifies categories of parties that only have the rights to be heard in accordance with Article 18 of Regulation 139/2004.

[15] *Ibid*, para. 54.

[16] *Ibid*.

[17] *Ibid*, para. 59.

[18] It is recalled that in accordance with Article 15.7 of the MVNO agreement any dispute connected with that contract falls under the competence of the Düsseldorf courts.

[19] *Ibid*, para. 60.