

**Request for a preliminary ruling from the Bundesgerichtshof (Germany) lodged on 7 August 2020 —
Pro Rauchfrei e.V. v JS e.K.**

(Case C-370/20)

(2020/C 390/29)

Language of the case: German

Referring court

Bundesgerichtshof

Parties to the main proceedings

Appellant on a point of law: Pro Rauchfrei e.V.

Respondent in the appeal on a point of law: JS e.K.

Questions referred

1. Does the concept of ‘placing on the market’ within the meaning of the first sentence of Article 8(3) of Directive 2014/40/EU ⁽¹⁾ cover the offering of tobacco products via vending machines in such a way that, although the cigarette packets contained in them display the warnings prescribed by law, the cigarette packets are initially stocked in the machine in such a way that they are not visible to the consumer, and the warnings on them become visible only when the customer operates the machine, which has previously been enabled by the cashier, and the cigarette packet is thus dispensed onto the checkout belt prior to the payment process?
2. Does the prohibition in the first sentence of Article 8(3) of Directive 2014/40/EU on warnings being ‘hidden by other items’ cover the case in which the entire tobacco packaging is hidden when the goods are presented by an automatic vending machine?
3. Is the criterion of ‘images of unit packets’ in Article 8(8) of Directive 2014/40/EU satisfied even if an image is not a faithful depiction of the original packaging, but the consumer associates the image with tobacco packaging on account of its design in terms of outline, proportions, colour and brand logo?
4. Are the requirements of Article 8(8) of Directive 2014/40/EU satisfied even if the consumer has the opportunity to see the cigarette packaging with the prescribed warnings prior to the conclusion of the contract of sale, irrespective of the depiction used?

⁽¹⁾ Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC (OJ 2014 L 127, p. 1).

**Appeal brought on 7 August 2020 by European Commission against the judgment of the General
Court (First Chamber, Extended Composition) delivered on 28 May 2020 in Case T-399/16, CK
Telecoms UK Investments Ltd v Commission**

(Case C-376/20 P)

(2020/C 390/30)

Language of the case: English

Parties

Appellant: European Commission (represented by: G. Conte, C. Urraca Caviedes, J. Szczodrowski, M. Farley, Agents)

Other parties to the proceedings: CK Telecoms UK Investments Ltd, United Kingdom of Great Britain and Northern Ireland, EE Ltd

Form of order sought

The appellant claims that the Court should:

- set aside the judgment of the General Court of 28 May 2020 in Case T-399/16, *CK Telecoms UK Investments Ltd v Commission*;
- refer the proceedings back to the General Court for reconsideration;
- order the applicant at first instance to pay the costs of the appeal; and
- reserve the costs of the proceedings at first instance.

Pleas in law and main arguments

First ground of appeal: The Judgment applies a standard of proof for the existence of a SIEC ('strong probability') that is stricter than the test set out in the case law and in the EUMR ⁽¹⁾, which requires the Commission to identify the 'most likely' outcome.

Second ground of appeal: By requiring that, in order to find a SIEC, the Commission should prove that a concentration confers on the merged entity the power to determine, by itself, the parameters of competition, the General Court applies a legal test that is not supported by the EUMR and undermines the very purpose of the 2004 reform. Moreover, the General Court errs in law in setting out a two-criteria test for establishing a SIEC based on non-coordinated effects.

Third ground of appeal: By requiring that an 'important competitive force' ('ICF') needs to stand out from its competitors in terms of impact on competition and also that merging parties need to be 'particularly close competitors', the General Court exceeds the limits of its judicial review, disregards the value of guidelines and distorts the content of the contested decision ⁽²⁾; or, alternatively, violates the principle of judicial review, fails to provide adequate reasoning and infringes Article 2 EUMR.

Fourth ground of appeal: By considering that the predicted price increase was not significant and by stating that the Commission should have taken into account 'standard efficiencies', the General Court departs from the EUMR, exceeds the limits of its judicial review, fails to provide adequate reasoning and distorts the evidence.

Fifth ground of appeal: By limiting the review to only some of the findings in the contested decision and by examining those findings in isolation, without assessing all the evidence together, the General Court distorts the contested decision, exceeds the limits of its judicial review, infringes the applicable rules on evidence, misapplies the legal test and fails to provide adequate reasoning.

Sixth ground of appeal: The General Court distorts the contested decision by considering that it does not examine degradation of the quality of the merged entity's network as part of the second theory of harm. The General Court also breaches its duty to state reasons when concluding that the Commission erred in law in classifying the effect of increased transparency on overall network investments as a noncoordinated effect.

⁽¹⁾ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (OJ 2004 L 24, p. 1).

⁽²⁾ Commission Decision C(2016) 2796 final of 11 May 2016 declaring a concentration incompatible with the internal market (Case M.7612 — Hutchison 3G UK/Telefónica UK) (OJ 2016 C 357, p. 15).