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Merger Control Unchained

On the legal (un)certainty of the substantive test in EU merger control

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Summary

The existing substantive test in EU merger control was adopted in 2004 with the aim of covering concentrations between undertakings which would significantly impede effective competition in the market without creating or strengthening a dominant position. Concentrations giving rise to such so-called unilateral effects typically take place in oligopolistic markets, which is why the perceived gap in the legislation was referred to as the 'oligopoly gap'. In closing the gap, the scope of the substantive test in EU merger control was widened. This gave rise to concern as to the legal certainty of the test, which has not yet been remedied.

This paper deals with legal certainty issues related to the substantive test in the EU merger control regime and the way the test is applied by the European Commission. By identifying current problems, the paper further aims to examine how legal certainty could be increased in merger appraisals. Special attention is given to the application of the test to concentrations between undertakings in oligopolistic markets.

The introductory part of the paper gives a background to the adoption of the substantive test as well as an overview of its design and scope. Furthermore, the concept of legal certainty is discussed and the understanding of legal certainty that is adopted in the paper and which forms the basis for the analysis is established. The core feature of legal certainty, i.e. predictability, as well as legal certainty in the EU context are also discussed.

The analysis suggests that the main problem with merger assessments is the lack of predictability. The factors contributing to the legal uncertainty stem from the legislation and the uncertainty as to the normative value of the Commission's guidelines for applying the test, as well as the Commission's way of applying the latter. The paper suggests a domino-efficient solution which mainly targets the Commission's way of applying the test and which should increase legal certainty all while taking into account the need for flexibility in the market.

Sammanfattning

Det nuvarande substantiella testet i EUs regim för koncentrationskontroll infördes år 2004 i syfte att täcka koncentrationer mellan företag som påtagligt skulle hämma den effektiva konkurrensen på marknaden utan att skapa eller förstärka en dominant position. Koncentrationer som ger upphov till sådana så kallade icke-samordnade effekter uppkommer typiskt sett på oligopolmarknader, varför den upplevda luckan i lagstiftningen kallades ”oligopolgapet”. Genom att stänga gapet vidgade man också testets tillämpningsområde. Detta orsakade oro kring rättssäkerheten hos testet, vilken ännu inte har botats.

Denna uppsats behandlar rättssäkerhetsfrågor relaterade till det substantiella testet i EUs koncentrationskontrollsystem och till EU-kommissionens sätt att tillämpa testet. Genom att identifiera aktuella problem syftar uppsatsen vidare till att undersöka hur rättssäkerheten skulle kunna ökas vid bedömningar av företagskoncentrationer. Särskilt fokus ägnas testets tillämpning på koncentrationer mellan företag på oligopolmarknader.

Uppsatsens inledande del ger en bakgrund till testets införande samt en överblick över dess utformning och tillämpningsområde. Vidare diskuteras begreppet rättssäkerhet och fastslås den uppfattning om rättssäkerhet som antas i uppsatsen och som utgör grund för analysen. Kärnfunktionen hos rättssäkerheten, det vill säga förutsebarhet, samt rättssäkerheten i EU-kontexten diskuteras också.

Analysen ger vid handen att det största problemet vid bedömningar av företagskoncentrationer är brist på förutsebarhet. De till rättsosäkerheten bidragande faktorerna härrör dels från lagstiftningen och en osäkerhet kring det normativa värdet hos kommissionens riktlinjer för tillämpning av testet, dels från kommissionens tillvägagångssätt vid bedömningen. I uppsatsen föreslås en dominoeffektiv lösning som främst innebär förändringar i kommissionens sätt att tillämpa testet och som torde öka rättssäkerheten samtidigt som behovet av flexibilitet i marknaden beaktas.

Abbreviations

CFI	Court of First Instance
CJEU	Court of Justice of the European Union
EU	European Union
EUMR	EU Merger Regulation
HHI	Herfindahl-Hirschman Index
MD	Market Dominance
SIEC	Significant Impediment to Effective Competition
SLC	Significant Lessening of Competition
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom

1 Introduction

Concentrations between firms can have serious anti-competitive effects. In order for effective competition to prevail in a market, mechanisms to control concentrations that pose a risk to competition are necessary.[1] In European Union (EU) law, the possibilities for merger control are based on Regulation 139/2004 on the control of concentrations between undertakings[2], more commonly known as the EU Merger Regulation (EUMR).[3]

The EUMR gives the European Commission (henceforth: the Commission) the possibility to intervene against concentrations with EU dimension[4] which may cause *significant impediment to effective competition* (SIEC). According to Article 2(3) of the EUMR, '[a] concentration which would significantly impede effective competition [...] shall be declared incompatible with the common market'. Conversely, a concentration that would not cause SIEC shall be declared compatible with the internal market.[5] The substantive test that the Commission carries out when assessing a concentration is commonly known as the SIEC test.

The SIEC test was introduced in EU merger control with the EUMR, as the result of a heated debate between, on the one hand, advocates for the preservation of the old substantive test,[6] the so-called market dominance test (henceforth: MD test), and on the other hand, those holding the view that the MD test contained an 'oligopoly gap' that needed to be closed through the introduction of a new substantive test.[7] [8] This alleged gap consisted in that concentrations between undertakings which would significantly impede

[1] Bernitz (2015), p. 56.
[2] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.
[3] Whereas the term 'merger' is in general used in competition law to designate a concentration between firms, the EUMR uses the term 'concentration' (although the regulation itself is commonly known as the *Merger* Regulation). In this paper, the terms 'merger' and 'concentration' will be used synonymously.
[4] Article 1 EUMR.
[5] Article 2(2) EUMR.
[6] E.g. Germany, Italy and the Netherlands.
[7] E.g. the United Kingdom (UK), Ireland and Sweden.
[8] See e.g. Kokkoris (2011), pp. 45–46; Böge & Müller (2002).

effective competition without creating or strengthening an individual or collective dominant position fell outside the scope of merger control.[9] Concentrations giving rise to such unilateral anti-competitive effects[10] typically take place in oligopolistic markets, of which interdependence of the competitors is a characteristic feature;[11] with only a few firms present or accountable for a very large share of the market,[12] competition essentially takes place between around 3 to 5 firms, which have good knowledge of each other and good opportunities to adapt their measures to the actions of the competitors.[13] Concentrations between firms in such markets are said to be *horizontal*,[14] the competitors operating within the same production or distribution stage in the same market.[15]

Horizontal mergers are the merger type most likely to give rise to anti-competitive effects,[16] hence the need was felt to close the oligopoly gap and allow the Commission to intervene against all concentrations posing a threat to competition, including those between firms in oligopolistic markets giving rise to unilateral effects.[17] Although adopted as a compromise,[18] the introduction of the SIEC test did not pour oil on the troubled waters of the debate. On the contrary, concerns were voiced about the new, relatively unchained regime, both regarding the extended scope of the new substantive test and about the Commission getting too much leeway in interpreting and applying the test.[19]

Although the EUMR has been in force for seventeen years, it was only recently, in the judgment in the *CK Telecoms* case, delivered in May 2020,

[9] Hinds (2006), p. 1712.
[10] Also referred to as 'non-coordinated effects'.
[11] Guidelines, note 29; Dethmers & Baxter (2005), p. 381.
[12] Grego (2015), p. 220.
[13] Bernitz (2015), p. 49.
[14] Cf. *vertical concentrations* (between firms at different production or distribution stages) and *conglomerate concentrations* (between firms operating in different industries).
[15] Bernitz (2015), p. 172.
[16] Cook & Kerse (2009), p. 212.
[17] Hinds (2006), p. 1713.
[18] See e.g. Kokkoris & Shelanski (2014) p. 62.
[19] See e.g. Schmidt (2004), p. 1566; González Díaz (2004), p. 191; Voigt & Schmidt (2004), p. 588.

that the scope of the SIEC test was somewhat locked down. There is still great uncertainty as regards the Commission's application of the test to concentrations between firms in oligopolistic markets and the factors taken into account in the application. The Commission's decisional practice has been widely criticized by scholars[20] and practitioners[21] as well as the EU Courts, recently and most importantly in the judgment in *CK Telecoms*, in which the Court of First Instance (CFI) annulled the Commission's decision to declare the proposed concentration incompatible with the internal market, and which is the first judgment where the EU Courts have expressly dealt with the compatibility with the internal market of concentrations giving rise to unilateral effects in oligopolistic markets.[22] The above raises questions as to the legal certainty of the SIEC test and its application by the Commission, and calls for an examination of the issues and of possible solutions to remedy them and thus increase legal certainty in merger control.

1.1 Purpose and research questions

The purpose of this study is to discuss legal certainty issues related to the SIEC test and its application by the Commission to concentrations between undertakings in oligopolistic markets. By examining current issues and their origin, the thesis further aims at identifying where and how the assessment of concentrations between undertakings in oligopolistic markets could be improved, from a legal certainty point of view. In order to achieve the purpose of the study, the thesis mainly deals with the following questions.

1) From a legal certainty perspective, what issues can be identified with regards to the SIEC test and its application by the Commission on concentrations between undertakings in oligopolistic markets?

2) What developments in legislation and in Commission practice would be desirable in order to solve the problems identified?

[20] See e.g. Moeschel (2013).
[21] See e.g. Dethmers (2016).
[22] *CK Telecoms*, para. 85.

1.2 Method

The CJEU has held that the EU constitutes an autonomous legal order in international law based on the rule of law.[23] It is a legal order with two levels. On the European level operate the common sources of law, including primary legislation, secondary legislation and so-called soft law or 'tertiary' law.[24] The second level of the EU legal order consists of the national legislation of the 27 Member States.[25]

The two-tier nature of the legal order has been a contributing factor to the status of doctrine of EU law.[26] The EU legal order follows neither the doctrines of international law, nor those of any Member State's national legal system,[27] and although a development towards a more harmonized European doctrine can be discerned,[28] the doctrinal treatment of EU law is still relatively undeveloped; Member States' different views on EU law as well as the intra-union language diversity throw spanners into the works of establishing a common European legal debate.[29] In order to properly consider the characteristics of the EU legal order, European legal method is used for the realization of this study. Reichel describes European legal method as being not a single method for interpreting and applying EU law, but rather as a way of treating the different legal sources of the EU.[30] These latter will be discussed in the following.

[23] See *Van Gend en Loos.*
[24] Senden (2012), p. 229.
[25] Reichel (2018), p. 109.
[26] Ibid., p. 129.
[27] Scheinin (2012), p. 117.
[28] See e.g. the three anthologies Neergaard, Nielsen & Roseberry (2011), *European Legal Method – Paradoxes and Revitalisation*; Neergaard & Nielsen (2012), *European Legal Method – a Multi-Level EU Legal Order*; Neergaard & Nielsen (2013), *European Legal Method – Towards a New Legal Realism*, all published as part of the research project 'Towards a European Legal Method: Synthesis or Fragmentation' funded by the Danish Social Science Research Council for the period 2010–2012.
[29] Reichel (2018), pp. 110 and 129.
[30] Ibid., p. 109.

The Treaties[31] and their protocols, the Charter of Fundamental Rights of the European Union, international agreements and the general principles of law constitute the primary legislation of EU law.[32] The secondary legislation consists of the legal acts of the EU, which include regulations, directives, decisions, opinions and recommendations.[33] The general principles of law thus have a higher hierarchical value in EU law than the legal acts. They serve, among other things, to interpret the secondary legislation in a way that is consistent with the principles.[34] There is no exhaustive list of exactly which principles classify as 'general principles of EU law'.[35] However, for the purposes of this study, suffice it to say that the principle of legal certainty is recognized as a general principle of EU law.[36]

Soft law is a source of law that has emerged, in a rather unstructured way, in recent years. This category comprises non-binding documents such as guidelines, including the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (henceforth: the Guidelines) and preparatory works, such as Green and White Papers.[37] The normative value of soft law is not cast in stone; although theoretically non-binding, soft-law documents are often normative in practice.[38] In competition law in particular, soft-law instruments have become increasingly important.[39] As regards the preparatory works, while traditionally viewed as rather unimportant as a basis for interpretation within the EU,[40] the EU Courts have sometimes in more recent years referred to these in their interpretation of legal acts.[41] In the present study, soft-law documents will be regarded not as binding sources of law, but as instruments

[31] Treaty on European Union (TEU); Treaty on the Functioning of the European Union (TFEU); The Treaty Establishing the European Atomic Energy Community.
[32] Bux (2021).
[33] Article 288 TFEU.
[34] Reichel (2018), p. 126.
[35] See e.g. Raitio (2010), p. 127, who addresses e.g. proportionality, equality, and certain procedural and fundamental rights of individuals as general principles of EU law.
[36] See e.g. *Sermes*, paras. 14–20.
[37] Reichel (2018), pp. 127–128.
[38] See e.g. *Grimaldi*.
[39] Hettne & Otken Eriksson (2011), p. 47.
[40] Reichel (2018), p. 128.
[41] See e.g. *Commission v Belgium*, paras. 134–141.

that provide guidance as to the interpretation of the law.[42] The question of the *de facto* normative value of the Guidelines is further discussed in the analysis.[43]

Not all EU law is written. In fact it is to a great extent court-made.[44] The EU Courts take an active part in the development of EU law.[45] Whereas the Courts' case-law is not part of the primary or secondary legislation, it is considered to be a binding source of law. The EU case-law is both more comprehensive and more significant than what case-law from e.g. the Swedish courts is within the Swedish legal system. As to its hierarchical value within the EU legal system, case-law from the EU Courts is ranked right below the secondary legislation.[46]

The use of legal literature as a source of law varies considerably between Member States.[47] The EU Courts never cite legal doctrine in their judgments, and according to Hettne and Otken Eriksson, legal literature has less relevance to the EU Courts than it does in many Member States. However, analyses and arguments in literature referenced by the parties to a case can in fact significantly influence the judges.[48] Nielsen argues that legal literature is relevant for a dogmatic analysis of EU law.[49] Following this reasoning, literature will be used for a better understanding of EU law and for discussion purposes in the present study. The literature as well as the other sources used are further discussed in Section 1.3 below.

[42] The non-binding character of the Guidelines was also confirmed by the CFI in *CK Telecoms* (paras. 100–101).
[43] See esp. Sections 4 and 5 below.
[44] Hettne & Otken Eriksson (2011), p. 41.
[45] Reichel (2018), pp. 114–115.
[46] Hettne & Otken Eriksson (2011), p. 40.
[47] Nielsen (2012), p. 111.
[48] Hettne & Otken Eriksson (2011), pp. 120–121.
[49] Nielsen (2012), p. 111.

1.3 Material and state of research

The starting point for the present study is the EUMR. Since this regulation forms an integral part of EU law, it should not be regarded in isolation from other components of the latter. Hence, other documents of primary and secondary legislation will also be regarded, including Commission decisions on the compatibility of concentrations with the internal market. These will allow to see the Commission's reasoning and considerations in different cases. Case-law from the EU Courts will further provide insights about Commission practice as well as about points of improvement of the latter.

As discussed in the previous section, soft-law documents will be regarded in order to gain a better understanding of the law. Thus, for this purpose are used the Guidelines, as these play an important role for the understanding and interpretation of the EUMR, the SIEC test and its application, and the Green Paper on the Review of Council Regulation (EEC) No 4064/89 (henceforth: Green Paper), which provides background information as to the underlying purposes of the EUMR.

Additionally, several books and articles are used for the completion of this study. Whereas the works of Bernitz and Kokkoris have provided insightful information about EU merger control, some works have been particularly useful in the specific examination of the SIEC test and its application, including those by Cook & Kerse and Lindsay & Berridge. Articles on the SIEC test dating from around the time of the adoption of the new EUMR abound. Some articles of this genre are used, mainly for background purposes and to get an understanding of the SIEC test in relation to the old substantive test.[50] More recent articles are useful in examining the developments in Commission practice and the more current legal situation in EU merger control.[51] Naturally, considering the quite recent date of the CFI's judgment in the *CK Telecoms* case, not that much has been written since it was

[50] E.g. Hinds (2006); Dethmers & Baxter (2005); Schmidt (2004); Böge & Müller (2002).
[51] E.g. Furse (2020); Dethmers (2016); Moeschel (2013).

delivered. Some case-analysis, articles and other publications by practitioners are used for discussion purposes.[52]

Many of the articles are critical to and express concerns about the SIEC test, as regards economic and welfare issues as well as the legal certainty of the test.[53] However, there seems to be a lack of up-to-date, in-depth analysis which, from a legal certainty perspective, examines the SIEC test, its application by the Commission, the issues relating to it or emanating therefrom and possible solutions to remedy the latter.

As regards legal certainty, this has been the subject of the works of several scholars. The works by Peczenik and Aarnio deserve special mention, as they provide the conception of legal certainty which forms the basis of the analysis and discussion of this paper. Other works on and understandings of the notion of legal certainty have been produced by, among others, Raitio and Frändberg. These are also discussed in establishing the understanding of legal certainty which is adopted in this study.

1.4 Delimitations and scope

The global subject of this paper is EU merger control. The EUMR forms part of the EU legislation and thus of the first level of the EU legal order. As national Member State legislation operates in the second level of the EU legal order, it is only mentioned where relevant to the purpose of the study as presented above.

The study of this paper is focused on concentrations between undertakings in oligopolistic markets. These take place between competitors or, in other words, are horizontal. The scope of this study is thus limited to horizontal mergers. Non-horizontal mergers fall outside the scope and consequently will not be discussed.

[52] E.g. Bunworth (2021), Furse (2020); Wardhaugh (2020), Powell et al. (2020); Sullivan & Cromwell LLP (2020).
[53] See e.g. Voigt & Schmidt (2004); González Díaz (2004).

Since the introduction of the SIEC test in EU merger control, three different substantive tests for merger assessments contemporarily exist and operate within the EU.[54] Effectively, this means that there is an intra-EU discrepancy in merger control, in that the Commission carries out a substantive appraisal of mergers which is different from that of many Member States. It has been argued that this would cause legal certainty issues relating to jurisdictional competences and referral of cases to the Commission from Member States and vice versa. Arguably, this would result in uncertainty among undertakings as regards the substantive test to ultimately be applied to their concentration.[55] However, the issue seems jurisdictional rather than substantive. This paper focuses on the SIEC test and its application by the Commission and disregards questions of referral. Furthermore, the legal uncertainty related to the intra-EU discrepancy does not emanate from the SIEC test itself, nor from the Commission's applying the test. Rather, it results from the fact that the national legislation of some Member States provides other substantive tests. It thus seems as though this issue, although being one of legal certainty, falls outside the scope of this paper.

1.5 Relevant terms

The EUMR regulates concentrations between *undertakings*. The term 'undertaking' is not defined in the EUMR itself, nor in the Guidelines. However, the concept has been considered by the EU Courts in several cases.[56] In general, in EU competition law, an undertaking is an autonomous economic entity, in terms of function rather than from a legal point of view.[57] Hence, it may be e.g. a company, a group of companies or a joint venture.[58]

[54] Apart from the SIEC test, the MD test, which is applied e.g. in Italy (Italian Competition and Fair Trading Act Section 6 para. 1), and the significant lessening of competition (SLC) test, which is applied in Ireland (Irish Competition Act Part 3 Section 20(1)(c)).
[55] See Hinds (2006), p. 1713.
[56] See e.g. *Michelin v Commission*, para. 290; *VIHO v Commission*, para. 50.
[57] The Swedish, French and Spanish versions of the EUMR use the terms '*företag'*, '*entreprise*' and '*empresa*' respectively, which all literally mean 'company' or 'enterprise'.
[58] Cook & Kerse (2009), p. 97; See *VIHO v Commission*, para. 50.

This paper will use the term ‘undertaking’ accordingly. It will also use the term ‘market participant’ with the same meaning.

1.6 Disposition

The remainder of this paper is divided into five main sections. The introductory section (Section 2) gives an account of the background leading to the adoption of the SIEC test as well as of the scope and application of the test as enshrined in the EUMR and in the Guidelines.

The introductory section is followed by a section about the perspective adopted in the analysis of the study, i.e. legal certainty (Section 3). Thus, this section discusses, firstly, different conceptions of the notion of legal certainty, in order to explain and justify the understanding of legal certainty used in this study. Secondly, the core feature of legal certainty, i.e. predictability, is further examined. Thirdly, legal certainty is discussed in the context of the EU legal system. The last subsection presents some concerns as to the legal certainty of the SIEC test that were raised around the time of the adoption of the substantive test.

The analysis of the study is essentially carried out in Section 4 of the paper, where the SIEC test is discussed from a legal certainty point of view. Thus, this section identifies and deals with current legal certainty issues relating to the SIEC test and its application by the Commission on concentrations between undertakings in oligopolistic markets. This comprises a discussion on the scope and application of the SIEC test, a discussion about the role of the Guidelines and other issues emanating from these, and a discussion on issues related to the Commission’s decisional practice, including on the material it uses when applying the test and on which it bases its decisions, as well as on the way it presents its legal reasoning.

The following section (Section 5) is discussional and takes a prospective perspective while considering and proposing possible solutions to address the

problems identified in the analysis and thereby increase legal certainty in merger cases as regards the application of the SIEC test. The study is concluded in the final section of the paper (Section 6), in which the most important results from the analysis and discussion are presented and the research questions answered.

2 The SIEC test

This section considers, firstly, the reasons for abandoning the MD test in merger control for the benefit of a new substantive test, i.e. the SIEC test (Section 2.1). Then, the content, scope and application of the SIEC test will be examined with regards to Articles 2(2) and 2(3) of the EUMR, which constitute the legal basis for the test, and with regards to the Guidelines, which provide guidance on the interpretation and application of the test. (Section 2.2).

2.1 The road to adoption of a new substantive test

Article 2(2) of the old Merger Regulation[59] (henceforth: Regulation 4064/89) provided that '[a] concentration which does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared compatible with the common market'. Article 2(3) provided that '[a] concentration which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market'. Albeit in theory a two-part assessment, consisting of a *dominance* limb and a SIEC limb, the substantive test under the old merger regime was mainly focused on *market dominance*.[60]

As part of the MD test, the Commission had to consider a number of factors.[61] The primary concern, however, was the market share of the merged entity; the larger the market share, the more likely that the Commission would find the concentration to cause significant impediment to effective competition.

[59] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings.
[60] Hinds (2006), pp. 1700–1701.
[61] See Article 2(1) of Regulation 4064/89.

Thus, the SIEC limb of the substantive test was largely subsumed into the market dominance assessment.[62] In evaluating the effects of a concentration, the Commission was reluctant to consider efficiencies that could result from the concentration, as there was 'no real legal possibility of justifying an efficiency defense under the [old] Merger Regulation'.[63] Hence no comparison was made in the assessment between the possible reduction of competition resulting from the concentration and the economic advantages the latter could generate.[64]

At first, it was unclear whether the MD test could catch concentrations between undertakings in an oligopolistic market, where none of the market participants were individually dominant following the concentration.[65] Through a trilogy of court decisions, the situation was clarified; the concept of collective dominance was used in order to bring such a situation into the scope of merger control.[66] Still, however, there was an alleged gap in the MD test, consisting in that it did not catch concentrations which could impede competition but where the merged entity did not have an individual or collective dominant position and did not coordinate its behaviour with any third party.[67]

Considering the consequences that concentrations in oligopolistic markets can have, it is of great importance to maintain effective competition in such markets.[68] Hence the need was felt for a new substantive test which would allow the Commission to assess concentrations that could cause unilateral anti-competitive effects,[69] i.e. effects resulting from the elimination of 'important competitive constraints on one or more firms, which consequently would have increased market power, without resorting to coordinated behaviour'.[70]

[62] Hinds (2006), pp. 1700–1701.
[63] European Commission (1995), p. 53.
[64] Hinds (2006), p. 1700.
[65] Ibid., p. 1703.
[66] See *Kali und Salz*, *Gencor* and *Airtours*.
[67] See e.g. Hinds (2006), p. 1712.
[68] Recital 25 EUMR.
[69] See e.g. Hinds (2006), p. 1713.
[70] Guidelines, para. 22.

The proposed reform considered the possibility to change from the MD test to the so-called SLC test,[71] which targets concentrations causing a significant lessening of competition. This test is concerned with changes in the market resulting from a concentration, rather than merely the post-merger market conditions,[72] and would arguably be better adapted to merger control, especially in oligopolistic markets.[73] Furthermore, a change to the SLC test would bring EU merger control more in line with other jurisdictions employing this substantive test, such as the US, Canada and Australia. However, as previously discussed, it would at the same time cause an intra-EU disparity in merger control. Furthermore, there was a risk it would increase legal uncertainty, the SLC test being more open-ended than the MD test.[74]

The solution finally adopted, i.e. the SIEC test, was a compromise designed to preserve the guidance from case-law under Regulation 4064/89 and aiming to cover not only concentrations caught by the MD test, but also those which the old test did not reach[75] and which typically arise in oligopolistic markets.[76] In other words, the new test would 'close the oligopoly gap'.

2.2 Scope and application of the SIEC test

The Commission appraises proposed concentrations that fall within the scope of the EUMR with the purpose of establishing whether the concentration is compatible or not with the internal market.[77] Articles 2(2) and 2(3) EUMR lay down that

> 2. A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market.

[71] Green Paper (2001), pp. 36–38.
[72] Kokkoris (2011), p. 43.
[73] Green Paper (2001), p. 38; Kokkoris (2011), p. 41.
[74] Green Paper (2001), p. 37–38.
[75] Recitals 25 and 26 EUMR.
[76] Dethmers & Baxter (2005), p. 381.
[77] Article 2(1) EUMR.

> 3. A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market.

Thus, to prohibit a concentration, the Commission must prove that it is likely to significantly impede effective competition. The application of these two articles is called the SIEC test. Clearly, market dominance is kept as an important criteria of the test in Articles 2(2) and 2(3), and according to the Commission, even with the SIEC test, most cases of incompatibility are likely to be based on a finding of dominance.[78] However, with the new wording of the test, dominance is no longer positioned as the crux of the test. Rather, the make-or-break question is whether a concentration would significantly impede effective competition. The need for a finding of collective dominance in order to apply the test to concentrations between undertakings in oligopolistic markets is thus disposed of.

As regards the meaning of 'significant impediment to effective competition', Alison and Berridge makes a textual interpretation of the concept; according to them, it means a material reduction or lessening in a market of the extent of effective competition, i.e. competition which provides material benefits to consumers. This interpretation is supported by case-law from the EU courts under Regulation 4064/89.[79]

The extent to which the substantive test is extended so as to cover concentrations between firms in oligopolistic markets which would give rise to unilateral effects without creating or strengthening a dominant position, however, is not specified in the legislation. The question has been unanswered until recently when the CFI pronounced on it in *CK Telecoms*, where it said that in order to define the extension of the scope of the substantive test, the

[78] Guidelines, para. 4.
[79] See Alison & Berridge (2017), pp. 45–47; see e.g. *Tetra Laval*, esp. para. 285.

EUMR must be interpreted in the light of its objectives,[80] especially Recital 25 thereof,[81] which declares that

> [...] Many oligopolistic markets exhibit a healthy degree of competition. However, 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. [...] The notion of 'significant impediment to effective competition' in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned.

Recital 25 thus lays down two cumulative conditions in order that unilateral effects arising from a concentration may, under certain circumstances, result in a SIEC, i.e. 'the elimination of important competitive constraints that the merging parties had exerted upon each other' and 'a reduction of competitive pressure on the remaining competitors'.[82]

In its assessment of a concentration's compatibility with the internal market, the Commission must take into account a number of factors. These include the need to maintain and develop effective competition in the internal market, considering e.g. the structure of all concerned markets and the actual or potential competition from undertakings located either in or outside of the EU. Furthermore, the Commission shall take into account the market position and the economic and financial power of the concerned undertakings, the alternatives available to suppliers and users as well as their access to supplies or markets, supply and demand trends for the relevant goods and services, consumer interests, and the development of technical and economic progress, provided that the progress is to the advantage of consumers and that it does not impede competition.[83] This list of factors is, however, not exhaustive.[84]

[80] *CK Telecoms*, para. 91.
[81] Ibid., para. 96.
[82] Ibid.
[83] Article 2(1) (second para.) EUMR.
[84] Cook & Kerse (2009), p. 233.

Further guidance on the Commission's approach to horizontal mergers, including those between competitors in oligopolistic markets, is found in the Guidelines. Such mergers may give rise to SIEC by removing important competitive constraints on the market participants which consequently gain market power,[85] which is consistent with what the CFI pronounced in *CK Telecoms*. The Commission's assessment of a concentration normally consists in defining the relevant markets and making a competitive assessment of the concentration.[86] In assessing the compatibility of a concentration, the Commission 'compares the competitive conditions that would result from the notified merger with the conditions that would have prevailed without the merger'.[87] It is thus a prospective assessment consisting of comparing the future with and without the concentration. This process is commonly known as the 'counterfactual'.[88] The Guidelines, however, do not 'provide details of all possible applications of this approach'; the Commission applies it to the particular circumstances of each individual case.[89]

The Guidelines provide a list of factors which may influence whether a concentration is likely to give rise to significant unilateral effects. These regard horizontal mergers in general; the Commission does not present specific criteria for the assessment of unilateral effects in oligopolistic markets. The factors listed include the market shares of the merging entities, the closeness of competition between them, the consumers' possibilities of switching suppliers, the likelihood that competitors will increase supply following a price increase, the merged entities possibilities to hinder expansion by competitors, and the elimination by the concentration of an important competitive force. Elimination of an important competitive force may take place where a concentration involves a firm which has more influence on the competition in the market than its market shares would suggest; in particular in oligopolistic markets, such a concentration may

[85] Guidelines, para. 24.
[86] Ibid., para. 10.
[87] Ibid., para. 9.
[88] Cook & Kerse (2009), p. 212.
[89] Guidelines, para. 5.

significantly change the competitive dynamics in an anticompetitive way. Taken separately, the factors listed 'are not necessarily decisive', and it is not necessary that all factors be present for unilateral effects to be likely to arise as the result of a concentration. Furthermore, the list provided is not exhaustive.[90]

Further guidance as to the Commission's approach to horizontal mergers in oligopolistic markets and the factors which are being taken into account thus can be searched for in the Commission's case work. The case work shows that the Commission has shown a tendency to pay special attention to the 'closeness of competition', i.e. how close the merging entities are as competitors, as well as to the post-merger competitive restraints.[91] This seems reasonable, considering that concentrations in oligopolistic markets involving the elimination of important competitive constraints may give rise to SIEC mainly if the merging parties are each other's closest rivals. In a tight oligopolistic market, however, any competitor can be said to be of particular importance.[92] The Commission's decisional practice will be further discussed in relation to the current issues with regard to legal certainty (Section 4.4).

Lastly, for the sake of completion, it is appropriate to mention that after its appraisal of a concentration, it is the Commission alone who decides on the compatibility of the concentration with the internal market.[93] The decision may be appealed to the CFI, which may invalidate the Commission's decision but not make a decision of its own in its place. The CFI's decision, in its turn, is subject to appeal to the Court of Justice of the EU (CJEU).[94]

[90] Ibid., para. 26–38.
[91] Cook & Kerse (2009), p. 234; See e.g. *Hutchison/Telefónica*, paras. 463 and 1183.
[92] See Grego (2015), pp. 222–223. See also *CK Telecoms*, in which the CFI held that whereas Three and O2 were relatively close competitors, they were not each other's closest competitors and not *particularly* close (paras. 245–247).
[93] Article 8 EUMR.
[94] Bernitz (2015), p. 175.

3 Legal certainty

In the following sections (Sections 4 and 5), the SIEC test and its application by the Commission in assessments of concentrations between undertakings in oligopolistic markets is examined and discussed from a legal certainty point of view. In order to properly do so, it is necessary to discuss this perspective and to define the understanding of it that will be used in this study. Thus, Section 3.1 discusses the concept of legal certainty. Section 3.2 further discusses the core element of legal certainty, i.e. predictability. In section 3.3, legal certainty is discussed in the context of the EU legal system. Lastly, Section 3.4 presents legal certainty concerns that were raised in the debate surrounding the adoption of the SIEC test.

3.1 The notion of legal certainty

The EU legal system is based on the rule of law,[95] which means that it is characterized by *legal certainty*.[96] The notion of legal certainty has been discussed both extensively and deeply in legal literature.[97] Many scholars have provided their definition of the concept, and although these vary and are subject to dispute, the most common understanding of legal certainty is that the concept comprises a requirement of *predictability.*[98] Some scholars even equate legal certainty with predictability,[99] a view which, however, is not shared by all.[100] However important an element this latter, legal literature also provides definitions of legal certainty that are way more comprehensive and nuanced. It thus seems natural and necessary to adopt a conception on legal certainty which includes more than merely predictability.

[95] See Section 1.2; *Rechtsstaat* in German and *État de droit* in French.
[96] See e.g. Frändberg (1986), p. 31; Peczenik (1995), pp. 51–52; *Rechtssicherheit* in German and *Sécurité juridique* in French.
[97] See e.g. Peczenik, Aarnio & Bergholtz (1990).
[98] See e.g. Peczenik (1995), p. 89; Hartley (2010), p. 160; Beyer (1990).
[99] See e.g. Frändberg (1986), p. 31, who defines legal certainty as '*förutsebarhet i rättsliga angelägenheter*' (English: predictability in legal matters).
[100] See e.g. Klami (1989), p. 101; Peczenik (1995), pp. 91–92.

Peczenik distinguishes between two aspects of legal certainty: *formal* and *material* legal certainty. Formal legal certainty refers to the predictability of legal decisions, based on the law and without any requirements of ethical acceptability. Material legal certainty is at hand when legal decisions are based on a reasonable balancing of the law-based predictability and other moral considerations,[101] or, phrased differently, 'material legal certainty is the optimal compromise between predictability of legal decisions and their acceptability in view of other moral considerations'.[102]

In order for any legal system to be considered a *Rechtsstaat* in both the formal and material sense, both formal legal certainty, i.e. predictability of the exercise of authority, and material legal certainty, i.e. compatibility with other moral values, are required.[103] It is not enough to merely consider the formal side of the legal certainty coin.[104] As regards the practice by courts and authorities, Peczenik suggests that this be subject to a legal certainty norm meaning that a decision should be reasonably predictable on the basis of the law (formal legal certainty) *and* compatible with other moral values (material legal certainty).[105]

Aarnio makes a division similar to that of Peczenik,[106] and talks about two ideologies of legal certainty, namely the *formal rule of law ideology* and the *substantial rule of law ideology.* According to the formal rule of law ideology, the degree of legal certainty depends on the degree of predictability. The substantial rule of law ideology, on the other hand, emphasizes elasticity and just solutions of individual cases.[107] In terms of legal reasoning, this latter can be said to be *rule-based*, if formalistic, or *particularistic*, if elastic and taking 'all things' into consideration.[108] In his introduction to Peczenik's *On Law and Reason*, Aarnio puts it into a nutshell definition: 'the concept of legal

[101] Peczenik, Aarnio & Bergholtz (1990), p. 53.
[102] Peczenik (2008), p. 24.
[103] Ibid. (1995), pp. 60–61.
[104] See Peczenik, Aarnio & Bergholtz (1990), pp. 53–54.
[105] Peczenik (1995), p. 92.
[106] As we can see, the two even have authored some of the works cited together.
[107] Aarnio (1997), p. 23.
[108] Ibid., p. 24.

certainty involves two central elements, law and values or, in order to use everyday language, law and morality'.[109]

In analyzing the work of several scholars, Beyer tries to define legal certainty. Just like Peczenik and Aarnio, he highlights predictability as an important feature, but also stresses that this requirement does not fully explain some of the other elements of legal certainty, such as the independence of courts and the right to court trial in the case of deprivation of liberty.[110] Thus, without explicitly distinguishing between formal and material legal certainty, he presents an understanding of the concept of legal certainty which is similar to that of Peczenik and Aarnio: predictability is one side of it, but there are also other values that determine whether legal certainty (in both the formal and material sense) is at hand.

Whereas some, as discussed, say legal certainty has only one aspect, i.e. predictability, and others, including Peczenik and Aarnio, consider it to have two, Raitio presents a threefold understanding of legal certainty, departing from Peczenik's and Aarnio's conception of the term but including the additional *factual* legal certainty, which would be 'situated between' formal and material legal certainty.[111] However, the two-faceted conception of legal certainty considers the *formal* and the *material* as two aspects of legal certainty, not as two extremes on a scale. Placing a third conception of legal certainty 'between' the two thus does not make much sense, nor does it seem necessary. In fact, the threefold concept seems uncalled-for. Raitio presents a relatively narrow understanding of *moral values*, as being related to fundamental and human rights. This makes it necessary to bring a third term into the discussion, in order to consider other moral values, such as economic objectives.[112] Peczenik, on the other hand, gives a broader meaning to morality. According to him, legal policies such as economic and environmental ones are moral values.[113] Thus, adopting this broader

[109] Ibid. (2008), p. 4.
[110] Beyer (1990), p. 22.
[111] Raitio (2010), pp. 372–376.
[112] See Raitio (2013), pp. 102–104.
[113] Peczenik (1995), p. 93.

understanding of morality, it is not necessary to use the term factual legal certainty, since this element can be seen as covered by the more general definition of legal certainty involving a formal and a material aspect.[114]

Just like legal certainty has not been unanimously defined in literature, there is no precise definition of the term in EU law.[115] Although the use of the term 'legal certainty' in a formal sense, i.e. as synonymous to 'predictability', may be adequate in some cases,[116] it seems too narrow a definition in the present case; the EU legal norms are consubstantial with the moral norms of the society, hence they and the legal decisions based on them must be morally acceptable, in order for legal certainty to be achieved.[117] A definition of legal certainty which takes into consideration both the formal and material aspect thus seems more appropriate. There is no need, for the discussion of the present study, to extract the 'factual' and discuss it in separation from the material aspect. Therefore, in the present study, the term 'legal certainty' is used in the material sense, thus as consisting of a formal element (predictability) and a material element (other[118] moral values).

The requirement of predictability will be further discussed in the following (Section 3.2). As to the material aspect of legal certainty, Peczenik considers this to correspond to that which is 'good for people'. This includes values such as economic, distributive, environmental and other legal policies.[119]

3.2 Excursion on predictability

As discussed above, predictability is widely recognized as one of the core features, if not *the* core feature, of legal certainty. Furthermore, predictability is primordial in competition policy, merger control included; market participants can act efficiently only when they trust that the economic

[114] See Raitio (2010), pp. 372–376.
[115] Raitio (2010), p. 125.
[116] See e.g. Peczenik (2008), p. 24.
[117] See the reasoning in Peczenik (2008), pp. 24–26.
[118] 'Other' because predictability is itself a moral value, see Peczenik (2008), pp. 25–26.
[119] Peczenik (1995), p. 93.

consequences of their actions will not be altered by unpredictable exercise of power by the authorities.[120] For these two reasons, special attention will be paid to this aspect of legal certainty. In EU merger policy, the term 'predictability' can be understood as the capacity of a firm to predict the likely decision of the Commission regarding the firm's intention to merge with another firm.[121] It is a legitimate interest of market participants that mergers are being appraised according to predictable rules which are being applied in a predictable manner.[122] There are several factors that can increase or decrease predictability.

Firstly, predictability is influenced by the exactness and generality of the legal rules; only when the legal rules are sufficiently exact and general, the exercise of power can be highly predictable.[123] However, every legal system has its lacunas, ambiguities and contradictions, hence no system is so complete as to be able to resolve each individual case with clear and unambiguous rules. Time and time again, law practitioners face the same problem: uncertainty about the content of the legal system.[124] Nonetheless, every rule needs to be given an interpretable content and every case needs to be resolved.

In overcoming the uncertainty, the judge (or the authoritative decision-maker) must find an equilibrium between, on the one hand, the stability created by the legislation and, on the other, the flexibility necessary in its application. Whereas the stability serves to guarantee the predictability of legal decisions, the continuity of the development of the society and the individuals' equality before the law, the flexibility allows for the law to consider the practical reality. This tension between stability and flexibility can also be expressed in terms of predictability and justice.[125] It is highly important to find an equilibrium between the two scales, i.e. a carefully balanced solution that satisfies both the requirement of formal equality before the law and that of

[120] Ibid., p. 96.
[121] Voigt & Schmidt (2004), p. 586.
[122] See Westin (2007), p. 227.
[123] Peczenik (1995), p. 52.
[124] Peczenik, Aarnio & Bergholtz (1990), p. 11.
[125] Peczenik (1995), pp. 44–45.

substantive justice; the modern-day legal consciousness in general does not approve of a law or an application of the law whose outcome is unpredictable or clearly unfair.[126] In this tension lies one of the main problems of modern law. However important the predictability of the legal system, the need for flexibility becomes all the more prominent in an ever-changing society, whose structure is becoming more and more complex. The more dynamic the development of the society, the more flexibility is required by the legal system; a static legal system, unable to consider the practical reality, would impede development.[127]

Another important element of legal certainty is the subsumption of legal decisions. This means that all legal decisions by the authorities must be subsumed under legal rules, i.e. the decision must be seen as an application of the legal rules.[128] This is also connected to predictability; if legal decisions were not subsumed, the outcome of any case would be impossible to predict. The requirement that the predictability be based on the law is justified by the fact that the law creates order, which is presumed to be better than chaos.[129] Without going deeper into a discussion in this direction, it is worth mentioning that the underpinning reason for avoiding chaos is moral.[130] Hence the *prima facie* formal requirement of law-based predictability would in fact be a moral value. However, in order not to fall too deeply into philosophical discussions on this matter, this study will confine itself to the established division between a formal and a material aspect of legal certainty discussed above (Section 3.1).

Protection from arbitrary decision-making also requires a transparent application of the legal rules, which also promotes predictability. The notion of transparent application includes the publication of the most important legal rules, individuals' access to public documents, and that authorities act in an open manner. The most important element is the obligation of the authorities

[126] Aarnio (2008), p. 4.
[127] Peczenik (1995), pp. 44–45; Westin (2007), p. 227.
[128] Peczenik (1995), p. 53; Frändberg (1986), p. 31.
[129] Peczenik (1995), p. 90.
[130] For a further discussion on this matter, see Aarnio (2008), p. 8.

to publish all reasons relevant to their decisions or, to phrase this element differently, the transparency of the legal reasoning.[131] The decision in itself, even if made public, is not sufficient to achieve legal certainty. It must be justified by reasons that fit the law.[132]

3.3 Legal certainty in the EU context

As a legal system based on the rule of law, the EU is characterized by the fact that power is to a great extent exercised in accordance with the rules of EU law. Following the here adopted definition of legal certainty, this implies a high degree of formal legal certainty, the exercise of power being to a great extent predictable.[133] The predictability increases the individuals' possibilities to plan their actions and act accordingly[134] and the fact that power is exercised in the framework of the EU legal order contributes to their being protected from arbitrary decisions by the authorities.[135]

Legal certainty in the formal sense is of high importance to the free market economy; for the actors operating in the EU's internal market to be able to make rational decisions and plan their actions, they must be able to predict authoritative decision-making, and when this latter brings surprises, they must be ensured legal guarantees to mitigate these.[136] Predictability is especially important as regards merger control, since it allows for market participants to make predictions concerning the interpretation of the legislation by the Commission and the Courts, and thus concerning the outcome of merger assessments.[137]

In EU law, predictability is connected to the principle of legitimate expectations,[138] according to which EU measures must not violate the

[131] Peczenik, Aarnio & Bergholtz (1990), p. 22.
[132] Aarnio (2008), p. 4; Peczenik (2008), p. 14.
[133] Peczenik (1995), p. 51; Aarnio (1997), p. 23.
[134] Peczenik (1995), p. 51.
[135] Peczenik, Aarnio & Bergholtz (1990), p. 22.
[136] Raitio (2010), p. 127.
[137] Voigt & Schmidt (2004), p. 586.
[138] '*Vertrauensschutz'* in German and '*protection de la confiance légitime'* in French.

legitimate expectations of the persons concerned. A 'legitimate expectation' can be defined as a 'reasonable expectation of a person acting in the normal course of business' (i.e. not speculatively trying to take advantage of a weakness of the legal system).[139] Predictability, and the principle of legitimate expectations, are also connected to the principle of non-retroactivity.[140] It is not impossible for EU decisions to have retroactive effect. However, such effect is permitted only in exceptional circumstances, provided that it is necessary to achieve certain objectives and that it does not shatter the concerned persons' legitimate expectations. Furthermore, if the CJEU adopts measures with retroactive effects, it must state its reasons for doing so.[141]

Following the reasoning above (Section 3.1), the need for flexibility is prominently important in a changing and increasingly complex society. This epithet certainly applies to the EU's internal market.[142] Increased flexibility and greater importance attached to material justice, however, threatens predictability and thus undermines the possibility for individuals to plan their actions and act accordingly.[143]

Another increasingly important element, in the EU as well as in other modern societies, is that of legal reasoning,[144] as this latter contributes to reducing the inevitable vagueness of law.[145] The case-law of the EU Courts in general includes thorough explanations of the facts of the case and the relevant grounds for the judgment.[146] The grounds need to be predictable (rational) *and* acceptable (reasonable).[147] From a legal certainty point of view, this is primordial because public, legally acceptable reasons show that the interpretation made by the court is precisely that: legally acceptable (and

[139] Hartley (2010), pp. 162–163.
[140] Raitio (2010), p. 129.
[141] See e.g. *Diversinte and Iberlacta*, paras. 9–10; *Crispoltoni*, para. 17.
[142] See also Vestager (2020) and Madero Villarejo (2020) for recent reflections by the Commission on this topic as regards EU merger control.
[143] Peczenik (1995), p. 45.
[144] Aarnio (1997), p. 193.
[145] Peczenik (1995), p. 698.
[146] Raitio (2010), p. 8.
[147] Ibid., p. 345.

hence morally acceptable, since a *legal* decision based on legal rules implies a legal decision based on a *morally acceptable interpretation* of legal rules).[148] Legal certainty in both the formal and material sense is thus promoted by transparent legal reasoning. As regards EU merger control, the importance of legal reasoning implies that the Commission should state the criteria and the analytical tools used in its merger assessment as clearly as possible in its decision.[149]

3.4 Concerns about the legal certainty of the SIEC test

At the time of the adoption of the EUMR, the then European Commissioner for Competition, Mario Monti, praised the new regulation for being 'a modern, more flexible and efficient legislation' which, according to the Commission, would also retain 'the much praised predictability' of Regulation 4064/89.[150] Around the same time, however, quite a few concerns were raised about the new SIEC test, many of which were related to legal certainty. Arguably, ensuring legal certainty under the new regime would be a significant challenge for the Commission.[151] Absent detailed guidance on the practical conduct of the unilateral effects analysis, the change to the new substantive test was expected to cause at least a temporarily increased uncertainty, due to the fact that subjects to the EUMR would be unsure of how the new test would be applied and interpreted by the Commission and the Courts.[152] However, whereas a transition period of uncertainty is natural when changing legislation, predictability was feared to be decreased on a lasting basis through the introduction of the SIEC test.[153]

[148] Aarnio (1997), p. 193; See the reasoning in Peczenik (2008), p. 25.
[149] Voigt & Schmidt (2004), p. 586.
[150] See European Commission (2004).
[151] See Kokkoris (2005).
[152] See e.g. ibid.; Böge & Müller (2002), p. 498; Volcker (2004), pp. 403–405.
[153] See e.g. Voigt & Schmidt (2004).

Firstly, both scholars and practitioners expressed uncertainty about the scope of the SIEC test.[154] The 'obscure and certainly ill-drafted'[155] Recital 25 of the EUMR, which emphasizes that the SIEC test is to be applied beyond dominance only in situations of non-collusive oligopoly, would maybe not be adhered to in practice, since the wording of Articles 2(2) and 2(3) in the EUMR itself is not limited. Furthermore, whereas the application of the substantive test to situations of non-collusive oligopoly was now indubitable, there was a profound uncertainty about the scope of this category, which did not have a clear definition.[156] Concerns were thus voiced about the Commission getting too much leeway in its interpretation.[157] Evidently, leeway implies increased flexibility and thus risks reducing predictability.

Secondly, whereas the Commission limited its discretion by adopting the Guidelines, which aim at providing guidance as to the interpretation and application of the SIEC test, this instrument seems in fact to have contributed to the uncertainty. The Guidelines were not expected to reduce the Commission's discretion, as they contain quite a few ambiguities[158] and fail to define the notion of non-collusive oligopoly.[159] Furthermore, the Guidelines are a soft-law instrument upon which firms cannot be sure to rely.[160]

Thirdly, although one reason for keeping the market dominance criterion as a part of the new substantive test was to preserve the relevance of case-law from the time of Regulation 4064/89 and the MD test, there was uncertainty *ex ante* about how much this case-law would in fact be worth under the new EUMR. This uncertainty was feared to reduce market participants' possibilities to predict the outcome of merger assessments.[161]

[154] See e.g. Schmidt (2004), p. 1566; González Díaz (2004), p. 191.
[155] González Díaz (2004), p. 189.
[156] Schmidt (2004), p. 1569.
[157] Voigt & Schmidt (2004), p. 588.
[158] Ibid., p. 590.
[159] Schmidt (2004), p. 1569.
[160] Voigt & Schmidt (2004), p. 589; See the discussion on soft-law instruments in Section 1.2 above.
[161] Voigt & Schmidt (2004), p. 588.

4 Current legal certainty issues

This chapter seeks to answer the first research question as posed in the beginning of the paper. Thus, the chapter discusses current issues with the SIEC test and its application by the Commission with regards to legal certainty. Firstly, the scope of the SIEC test will be discussed from a legal certainty point of view (Section 4.1), followed by a discussion on the role of the Guidelines and other legal certainty issues emanating from these (Section 4.2). Lastly, Section 4.3 discusses legal certainty issues related to or resulting from the Commission's applying the SIEC test.

4.1 Issues related to the widened scope of the substantive test and the uncertainty about its application

With the introduction of the SIEC test, the scope of the substantive test in merger control was widened. According to Recital 25 EUMR, the SIEC extends the scope of intervention beyond dominance, albeit only to the anti-competitive effects resulting from the non-coordinated behaviour of firms which would not have a dominant position on the concerned market. Concentrations between firms in oligopolistic markets which would give rise to unilateral effects without creating or strengthening a dominant position are thus undoubtedly covered by the test. Commission case work shows that the Commission is even able to intervene in oligopolistic markets where the merging parties have relatively low market shares.[162] Whereas the widening of the scope may be in and of itself problematic from a legal certainty point of view, the explicit inclusion of non-collusive oligopoly is fortunate; predictability is increased in this regard as there is no longer any doubt that situations of non-collusive oligopoly are covered by the substantive test.

[162] This was the case e.g. in *Hutchison 3G*, where the merging parties had a combined market share of less than 25 per cent.

Compared to the MD test, however, the SIEC test is much more open-ended. This makes the test flexible as it allows for more factors to be taken into account in the appraisal of a concentration. For instance, under the MD test, efficiencies resulting from the concentration were not considered.[163] In the EUMR, it is explicitly stated that efficiencies should be considered in merger assessments.[164] However, the introduction of new factors is not unproblematic; from a legal certainty point of view, the flexibility means decreased legal certainty, since the application of the SIEC test and the outcome of the appraisal will be less predictable. Furthermore, as regards efficiencies specifically, these are difficult to appreciate and, since they are expected to arise in the future, cannot be verified during the merger assessment. Their inclusion in the EUMR thus increases the Commission's discretionary leeway in merger assessments, which consequently decreases predictability and hence legal certainty.[165]

As previously discussed, the factors to be taken into account in applying the SIEC test are not clearly defined in the EUMR. Whereas the Guidelines list several factors to be considered, they explicitly state that not all factors listed need to be at hand, and they do not provide information as to the mutual importance of the factors. Furthermore, the fact that the lists of factors are non-exhaustive opens up for the Commission to also consider other factors. From a legal certainty point of view, this is problematic from on several levels.

Firstly, the open-ended lists of factors widen the Commission's discretionary leeway and make room for arbitrary decision-making. What are the other factors that the Commission may take into account when applying the SIEC test? What significance should be attached to these factors, compared to those that are actually included in the legislation and in the Guidelines? The fact that these questions are not clearly answered means that the degree of predictability is not satisfactory; market participants cannot reasonably

[163] See Section 2.1.
[164] Recital 29 EUMR.
[165] Voigt & Schmidt (2004), p. 589; Kokkoris (2011), p. 47.

predict the outcome of the Commission's appraisal of a concentration if the Commission has leeway to take unexpected factors into account.

Secondly, the fact that the Commission takes into account other factors than the ones listed in the EUMR and in the Guidelines raises questions with respect to the requirement of subsumption of legal decisions. Any other factor could, at least theoretically, serve as a decisive reason to declare a concentration incompatible with the internal market. Would a decision based on such other considerations be seen as an application of the legal rules? And if not, would the decision be rational and reasonable, i.e. predictable and acceptable, from a legal certainty point of view? Probably not, considering that it would have been impossible for the merging parties of the case to make a motivated prediction of the outcome of the Commission's assessment, and that it would arguably violate their legitimate expectations. Such a non-subsumed decision is not likely to be approved of.[166]

4.2 Issues emanating from the Guidelines

As discussed above, the Guidelines are a soft-law instrument and as such not legally binding.[167] However, they play an important role in merger control and to the way the SIEC test is applied by the Commission. Cook and Kerse suggest that although the Guidelines are not legally binding, merging parties are entitled to expect that the Commission follows them, and that in case of any departure from its own guidance it explains the reasons thereto. Furthermore, the merging parties can rely on the Guidelines against the Commission itself.[168] However, as Cook and Kerse also point out, merger decisions do not always follow the framework set out in the substantive guidance,[169] nor do they have to; according to case-law from the CFI, the Commission is not obliged to comprehensively evaluate issues which are

[166] See Aarnio (2008), p. 4.
[167] See Section 1.2.
[168] Cook & Kerse (2009), p. 201.
[169] See e.g. *Travelsport/Worldspan.*

irrelevant or insignificant for the assessment of the concentration in question simply because the issues are covered in the Guidelines.[170]

Moreover, the CFI has held that whereas the Guidelines may indeed be a useful point of reference in merger cases, they cannot on their own guide the EU Courts in their analytical work; the EU Courts have exclusive jurisdiction to interpret EU law and are not bound by the Guidelines, which merely describe the Commission's way of interpreting and applying the EUMR. By this, however, is not understood that the EU Courts may not adopt the guidance contained in the Guidelines in their interpreting EU law.[171] The somewhat vague normative value of the Guidelines is unfortunate from a legal certainty point of view, as it reduces merging parties' possibilities to foresee the importance attached to the Guidelines in the Commission's assessment of their concentration, and thus the outcome of the assessment.

Apart from the uncertainty about the role of the Guidelines as such, the instrument contains quite a few ambiguities and indications as to the substantive assessment of concentrations which also can be seen as problematic from a legal certainty point of view.

Firstly, in adopting the Guidelines, the Commission somewhat constrained its own discretionary leeway.[172] However, in the same way, since the factors listed in paragraphs 27 to 38 are explicitly non-exhaustive, the Guidelines in fact seem to not constrain the Commission, but rather, they unchain it, by opening up for the possibility to consider an indefinite amount of factors. This, as previously discussed, makes room for arbitrary decision-making and reduces predictability.[173] Additionally, some of the factors listed actually seem not to limit the Commission's discretionary leeway. For instance, paragraph 37 declaring that some firms 'have more of an influence on the competitive process than their market shares or similar measures would

[170] *Sun Chemical*, paras. 58–61.
[171] *CK Telecoms*, paras. 100–101.
[172] See Section 3.4.
[173] See Section 4.1.

suggest' rather seem to widen the leeway.[174] This was the case in *T-Mobile/tele.ring*, where the Commission concluded that the acquisition of tele.ring by T-Mobile would give rise to unilateral effects in an oligopolistic market, considering that tele.ring may have had a particularly strong effect on the market as a low price provider with a continuously growing market share.[175]

Secondly, the Guidelines explain that in its assessment of a concentration, the Commission compares two different scenarios of the future: with the concentration and without the concentration.[176] The counterfactual allows for the Commission to identify the precise and probable effects of the concentration and to isolate these effects from other changes that would be likely to occur in any of the two scenarios. It should be noted that the counterfactual is not a comparison between the past and the future, but rather, the past will provide a foundation with which the Commission may substantiate its conclusion as to future probabilities.[177] Needless to say, the past may be an unreliable guide for the future.[178]

Thirdly, there is uncertainty as regards market concentration levels and the role of calculations thereof in examining the possible competition concerns of a concentration. The Guidelines explain that in its assessment of a concentration, the Commission uses concentration levels as one indicator of the competitive significance of the concentration under review. In order to measure the concentration level in a market, the Commission usually applies the Herfindahl-Hirschman Index (HHI),[179] which was introduced with the EUMR as a new feature of EU merger policy.[180] The HHI is calculated by

[174] See the reasoning in Voigt & Schmidt (2004), p. 590.
[175] *T-Mobile/Tele.ring*, esp. paras. 40–43 and 72-73.
[176] See Section 2.2.
[177] Cook & Kerse (2009), pp. 212–213.
[178] This has also been emphasized by the Commission in e.g. *Mannesmann/Hoesch*, where it said that '[h]igh market shares represent an important factor as evidence of a dominant position *provided they not only reflect current conditions but are also a reliable indicator of future conditions*. If no other structural factors are identifiable which are liable in due course to change the existing conditions of competition, market shares have to be viewed as a reliable indicator of future conditions.' (para. 91) (emphasis added).
[179] Guidelines, para. 16.
[180] Voigt & Schmidt (2004), p. 589.

summing the squares of the individual market shares of all the market participants. The absolute level of the HHI provides an initial indication of the post-merger market pressure, whereas the *change* in the HHI, the so-called delta, acts as a proxy for the change in the level of concentration resulting directly from the concentration.[181]

The Guidelines present HHI levels which in combination with the relevant deltas[182] may be used as initial indicators of the absence of horizontal competition concerns, without, for that matter, giving rise to any presumption of either the existence or the absence of such concerns.[183] On the one hand, with the HHI levels, market participants are offered a yardstick indicating market shares that are compatible with the internal market. Arguably, this is a measure which increases predictability and thus legal certainty.[184] On the other hand, the fact that the Guidelines are merely guidelines and not law means that the Commission is not bound by the HHI in its merger assessments[185] and that the attention given to HHI figures may vary from case to case. It is not sure that merging parties can fully rely on their concentration being declared compatible with the internal market even if the HHI indicates it would be. This is problematic from a legal certainty point of view since it reduces the merging parties' capacity to predict the outcome of the Commission's assessment.

4.3 Issues related to Commission practice

As discussed above, both the EUMR and the Guidelines provide for a quite wide discretionary leeway of the Commission in its applying the SIEC test. The wide leeway gives the Commission the possibility to take into account several different factors and to give the factors considered different weight in different cases. In and of itself, this reduces predictability and thus the legal

[181] Guidelines, para. 16.
[182] Ibid., paras. 19–20.
[183] Ibid., para. 21.
[184] See e.g. Voigt & Schmidt (2004), p. 589.
[185] The Guidelines even explicitly provides for the possibility for the Commission to also use other concentration measures such as e.g. concentration ratios (note 17).

certainty of merger assessments, but it has also opened up for additional legal certainty issues as regards the Commission's decisional practice, which will be discussed in the following.

4.3.1 Inconsistent decisional practice

The Commission's opportunity to consider or not to consider certain factors in its merger assessments has contributed to inconsistencies in decisional practice.[186] For instance, decisional practice shows that the Commission is inconsistent in the weight it gives to HHI figures.[187] The Commission has also expressed that the HHI and delta values provided in the Guidelines are '*defined as not giving rise to concern*',[188] whereas the Guidelines merely provide they are 'unlikely' to give rise to concerns.[189] Decisional practice further shows that the Commission indeed takes advantage of the opportunity to take into account factors other than those listed in the EUMR and in the Guidelines. For instance, the amount of spare capacity in the market and the arrival of new capacity are not listed as factors to be taken into account in the assessment, but capacity has nonetheless figured in the Commission's assessment of the possible effects of a concentration in several cases.[190]

The fact that Commission practice is in some regards inconsistent is problematic from a legal certainty point of view. Merging parties should be able to somewhat rely on existing decisional practice when making predictions as to the Commission's attitude about a concentration. If the parties believe that their concentration will be declared compatible with the internal market, they might invest in the entity to be created as a result of the concentration and, if their expectations were based on decisional practice

[186] See e.g. *CK Telecoms*, paras. 168–174, 183 and 186.
[187] In some cases, the Commission has drawn particular attention to the HHI levels and deltas, see e.g. *Fortis/ABN* and *Metso/Aker Kvaerner*. In *T-Mobile/Tele.ring*, the Commission held that the high HHI and delta values showed that the market was a highly concentrated one and that in view of the high delta value, the proposed concentration would bring about a significant change in market structures (para. 45). In e.g. *Apple/Shazam*, on the other hand, HHI figures are not mentioned at all.
[188] See *T-Mobile/Tele.ring*, para. 45 (emphasis added).
[189] Guidelines, para. 19.
[190] See e.g. *Johnson & Johnson/Guidant* and *T-Mobile/Tele.ring.*

from the Commission, prohibition of the concentration can be seen as a case of unpredictability of the application of the SIEC test.[191]

4.3.2 Information gathering and selection in merger cases

The leeway has, as seen above, opened up the possibility for the Commission to consider an indefinite amount of factors in the appraisal of a concentration, and the Commission has indeed shown a tendency to seize this opportunity and include a wide range of factors in its assessment activities. This approach seems to have contributed to an ever-broadening application of the SIEC test,[192] which is problematic from a legal certainty point of view.

Firstly, it has led to an excessive information gathering. The information on which the Commission bases its appraisal of a concentration's compatibility with the internal market is to a great extent that requested by the merging parties in the so-called Form CO.[193] The Form CO specifies the information that must be provided by the parties when they submit a notification of a proposed concentration to the Commission.[194] The information requested include e.g. information about the markets concerned[195], annual reports and accounts of the parties[196] and the structure of supply and demand in the affected markets.[197]

However, there is a discrepancy between the information required by the Form CO and the information required in practice, in that the Commission requests more information than what is stated in the Form CO.[198] For instance, paragraph 5.4 requires the parties to provide documents, mainly those

[191] See Voigt & Schmidt (2004), p. 586.
[192] See e.g. Powell et al. (2020).
[193] Bernitz (2015), p. 174.
[194] See Form CO.
[195] Form CO, para. 1.1.
[196] Ibid., para. 5.3.
[197] Ibid., paras. 8.1–8.7.
[198] Dethmers (2016), p. 445.

presented to the board regarding the concentration, analyses, reports, studies, surveys and any comparable documents from the last two years with respect to the relevant markets.[199] In some cases susceptible to give rise to substantive issues, however, the Commission seems to have taken a wide understanding of this so as to comprise all relevant internal documents, including e.g. email correspondence.[200] Thus, it seems as though merging parties cannot be sure that the information requested from them in the Form CO will suffice. The discrepancy makes it hard for merging parties to determine what information is in fact required from them, and what information will be taken into account in the Commission's assessment of the concentration. This, of course, reduces the parties' capacity to predict the outcome of the assessment.

Secondly, the excessive information gathering makes it hard to get an overview over and to consider all the information provided. In *Hutchison/Telefonica*, for instance, the merging parties had submitted over 300.000 documents,[201] which is a practically unmanageable amount of documents. The Commission has held that it has the discretion to be selective in its referring to the internal documents provided by the parties.[202] This further lowers the degree of predictability, by making it even harder for the merging parties to foresee which information will be taken into account in the Commission's assessment and which will not. In *Ineos/Solvay*, the merging parties had submitted over 14.000 internal documents.[203] Concerns were expressed about the Commission being selective in its using the documents,[204] which obviously, considering the amount of documents obtained, it had to be. All the more concerning, however, is the alleged focus of the Commission on documents being to the detriment of the merging parties, and its disregard of advantageous (in the eyes of the merging parties) documents.[205]

[199] See Form CO, para. 5.4.
[200] See e.g. *Staples/Office Depot.*
[201] *Hutchison/Telefonica,* para. 42.
[202] *Ineos/Solvay*, paras. 57–60.
[203] Ibid., para. 54.
[204] Ibid., para. 55.
[205] See ibid., para. 55.

Whether this allegation was true or not, the issue remains that with such an excessive amount of documents, the Commission must, for practical reasons, be selective, and this makes it harder to control that it does not merely consider documents which are to the detriment of the parties. Hence, it opens up for arbitrary decision-making which is detrimental to legal certainty. It has been argued that the Commission's approach to internal documents is especially problematic as regards unilateral effects; internal documents would be likely to confirm that any market participant in a concentrated market is an important competitor.[206]

Furthermore, the case work shows signs of tendencies of a rather litigious mentality, both on the part of the Commission and on the part of the merging parties. This mentality appears, in the first place, in that the Commission requests such a huge amount of documents. It is as if the Commission expects the merging parties to 'present their case', which in one way is what they do, but at the same time it should be kept in mind that a merger case is not a trial, but an entirely administrative procedure. In the second place, the litigious mentality appears in that the merging parties, on their hand, sometimes use rather litigious rhetoric. For instance, in *Ineos/Solvay*, when the parties complained about the Commission being selective in their using the documents provided, the parties referred to 'negative' documents as 'inculpatory evidence' and to 'positive' documents as 'exculpatory evidence'.[207] This rhetoric was considered inappropriate by the Commission,[208] but it nonetheless confirms the existence of a litigious mentality in merger cases, or at least the perception of undertakings that such a mentality prevails. This could explain the merging parties' compliance with the Commission's excessive information requests.

Apart from information obtained through the Form CO, the Commission also bases its merger appraisals on market surveys, which may be used to assess customer preferences for particular product characteristics. The fact that the

[206] See Dethmers (2016), p. 446.
[207] See *Ineos/Solvay*, para. 55.
[208] Ibid., para. 56.

characteristics which the customers find most important are common to the products supplied by a group of market participants indicates that there is intense competition between these latter, and reversely, if the most important characteristics are only attributable to certain products, competition between these products and products without the important characteristics may be less intense.[209] Survey evidence may also include feedback from competitors to the merging parties.[210]

Surveys carried out on behalf of the merging parties may be considered biased and less reliable by the Commission.[211] Merging parties may indeed have an incentive to present their intentions in an advantageous manner so as to increase their possibilities of getting a positive decision from the Commission, all the more so in the light of the litigious mentality discussed above. On the other hand, feedback from competitors may also be biased,[212] since these latter are likely to benefit from unilateral effects resulting from a concentration. Furthermore, if the response rate is low, feedback may be biased towards negative respondents, if these be customers or competitors, since these respondents may be most likely to take the time to reply.[213] In terms of legal certainty, too much weight attached to survey evidence may thus impact the merger assessment in a negative way, making it arbitrary and unpredictable.

4.3.3 Opaque legal reasoning

One of the purposes for adopting the SIEC test was to render the Commission's assessment of concentrations more predictable and more transparent.[214] The realization of this objective would be beneficial from a legal certainty point of view, as it would allow for control of the Commission's reasoning and thus contribute to the protection of undertakings from arbitrary decision-making. Transparent legal reasoning would also

[209] Lindsay & Berridge (2017), pp. 299–300.
[210] See e.g. *Hutchison/Telefonica* and *Siemens/VA Tech*.
[211] *Ineos/Solvay*, paras. 65–71.
[212] See e.g. *Orange/Jazztel*, para. 367; *CK Telecoms*, para. 103.
[213] See Dethmers (2016), p. 443.
[214] *CK Telecoms,* para. 89.

increase market participants' possibilities to predict the outcome of merger assessments. Furthermore, since the assessment of a concentration is prospective and the chains of cause and evidence may be difficult to establish, the quality of the evidence is highly important in merger cases.[215] The Commission must present sufficient evidence to demonstrate, with a strong probability, the existence of a SIEC following a concentration.[216] This does not oblige the Commission to take a stand on all the information provided to it, but requires it to set out in a clear, concise and logical manner the decisive facts and considerations of the case.[217]

Unfortunately, however, the purpose of transparent merger assessments does not appear to have been achieved in practice. In fact, the Commission has been criticized for not being specific and clear enough in its reasoning, and for not in a satisfactory manner presenting evidence to support its decisions.[218] In *CK Telecoms,* the CFI was critical as to the Commission's reasoning on a number of points. For instance, the Commission had failed to state, in its decision, both on what grounds it had concluded that the alleged constraints removed by the concentration were 'important' within the meaning of paragraph 25 of the Guidelines, and on what basis it had concluded that the alleged impediment to competition resulting from the concentration would be 'significant'.[219]

The request on the Commission to present sufficient evidence may have contributed to the excessive information gathering previously discussed.[220] Both of these factors may have contributed to rendering merger decisions rather lengthy. The length of a merger decision does not, however, imply thorough decision-making or good legal reasoning. Rather, excessively long decisions may render the legal reasoning less transparent, if containing a lot

[215] Ibid., para. 111.
[216] Ibid., para. 118.
[217] Ibid., paras. 120–121.
[218] See e.g. *CK Telecoms*, paras. 288–289.
[219] *CK Telecoms*, paras. 284–289.
[220] See Section 4.3.2.

of irrelevant information which makes it difficult to discern the core issues and the relevant parts of the Commission's reasoning.[221]

The transparency of the legal reasoning seems even more important considering the great leeway that the Commission has in applying the SIEC test, and considering the inconsistency in its decisional practice. From a legal certainty point of view, the leeway would be more acceptable if the Commission explained its decisions in a clear way, logically stating its reasons, and the inconsistency might become more understandable (and maybe even consistent). Opaque legal reasoning both decreases predictability, in that it makes it hard for market participants to decipher the relevant information and thus to foresee what information the Commission considers important in deciding, and blurs the crux of the reasoning, which makes it hard to oversee if the decision is in fact justified by reasons that fit the law. Hence, not only is legal certainty in the formal sense undermined, but it also becomes hard to establish whether legal certainty in the material sense is secured. Arguably, parties may not consider a decision fair which does not seem to be based on clear legal reasoning.[222]

Furthermore, opaque legal reasoning may reduce the likelihood of the decision being appealed to the CFI, considering that it makes it difficult for third parties to discern the crux of the reasoning.[223] Indeed, challenges by third parties are rare, and the vast majority of Commission decisions applying the SIEC test is not subject to independent legal scrutiny.[224] As previously stated, *CK Telecoms* is the first case in which the CFI has pronounced on the application of the SIEC test to concentrations in oligopolistic markets which do not result in the creation or strengthening of an individual or collective dominant position. These circumstances are also problematic from a legal certainty point of view, as they raise the question of whether undertakings are *de facto* in a satisfactory manner ensured legal guarantees to mitigate unfair

[221] See Dethmers (2016), p. 445.
[222] See Sections 3.2 and 3.3.
[223] See e.g. Dethmers (2016), p. 445.
[224] Furse (2020), p. 432.

decisions.[225] The importance of legal scrutiny becomes even more apparent considering the CFI's heavy critique in *CK Telecoms* of the Commission's assessment of the proposed merger.[226]

4.4 Conclusive remarks

It seems as though the judgment in *CK Telecoms* has somewhat locked down the scope of the SIEC test. In accordance with what is provided in Recital 25 EUMR, the test would cover concentrations between firms in oligopolistic markets which, without creating or strengthening a dominant position, would give rise to unilateral effects, which may, under certain circumstances, result in a SIEC, if the concentration involves the elimination of important competitive constraints that the merging parties had exerted upon each other *and* a reduction of competitive pressure on the remaining competitors.[227]

However, it has been suggested that this elucidation needs further clarification.[228] As I see it, uncertainty remains on two points. Firstly, the 'certain circumstances' under which unilateral effects may give rise to a SIEC are not clearly defined. In *CK Telecoms*, the CFI held that the Commission had erred in law and in assessment by finding that an important competitive force need not stand out from its competitors in terms of impact on competition.[229] Indeed, such a position would allow the Commission to consider any undertaking in an oligopolistic market exerting competitive pressure as an important competitive force, and thus to prohibit horizontal concentrations in oligopolistic markets by that fact alone, which would, the CFI held, infringe the principle of legal certainty.[230] Whereas this statement by the CFI is to a certain extent clarifying, questions such as when an undertaking is actually considered to 'stand out' as an important competitive force which exerts important competitive constraints on the other participants

[225] See Raitio (2010), p. 127.
[226] See also Wardhaugh (2020).
[227] *CK Telecoms*, paras. 90–97.
[228] See Bunworth (2021,) p. 291.
[229] Ibid., para. 174.
[230] Ibid., paras. 174–175.

in an oligopolistic market seem to be still open[231] and thus contributing to uncertainty. Secondly, on 7 August 2020, the CFI's judgment was appealed by the Commission before the CJEU.[232] In the appeal, the Commission claims that the CJEU should set aside the CFI's judgment in *CK Telecoms* and refer the case back to the CFI for reconsideration. Allegedly, the CFI applied a test which is not supported by the EUMR and, in setting out a two-criterion test for establishing a SIEC resulting from unilateral effects, erred in law.[233] The appealed case is still in progress, which means that the final say is yet to be expected at the time of writing this paper. However, the CFI's judgment stands for now, and provides a roadmap for merging parties and somewhat an increase in predictability, although its exact implications remain to be seen.

As regards the application of the SIEC test, the analysis has shown that there are several cooperating factors contributing to the uncertainty, including the open-ended character of the test, the non-exhaustiveness of the lists providing factors to be taken into account in applying the test, the role of the Guidelines and the extent to which undertakings may be sure to rely on these, the rather great leeway of the Commission and the fact that the Commission indeed uses the latter, the excessive information gathering in which the Commission engages, the selection of information on which to base the decision, and the inconsistent decisional practice and opaque legal reasoning of the Commission. According to the analysis, the main legal certainty issue with the SIEC test and its application by the Commission seems to be the lack of predictability in merger appraisals that it causes. Other legal certainty issues that have emerged in the analysis relate to arbitrariness, subsumption, transparency of the legal reasoning and legal guarantees against Commission decisions. Evidently, the concerns voiced around the time of the adoption of the SIEC[234] test appear to have been justified[235] and the feared effects on legal certainty of a lasting nature.

[231] See e.g. *CK Telecoms*, paras. 171–176 and 195; Sullivan & Cromwell LLP (2020), p. 7.
[232] Case C-376/20 P.
[233] See ibid. for all the pleas in law and main arguments brought forth by the Commission.
[234] See Section 3.4.
[235] Apart perhaps from the fear that previous case-law would become irrelevant under the new regime, as this has not been the case (see e.g. *CK Telecoms*, paras. 113, 116 and 144; *Ryanair v Commission*, paras. 126 and 127).

5 Ways to increase legal certainty in the future

Up until now, the analysis has been focused on identifying and discussing factors and elements contributing to the legal uncertainty surrounding the SIEC test. As seen and discussed above, legal certainty is not to a satisfactory degree ensured in the application of the test. The remainder of the analysis is aiming at identifying ways to increase legal certainty going forward. Thus, this section suggests and discusses solutions which would remedy the issues identified so as to increase legal certainty regarding the SIEC test and its application. The structure somewhat corresponds to that of the previous section. Hence, Section 5.1 focuses on the widened scope of the substantive test and the non-exhaustive lists of factors to be taken into account when applying the test. Section 5.2 suggests some improvements with regard to the Guidelines. Lastly, Section 5.3 presents and discusses ways to improve, from a legal certainty point of view, the Commission's decisional practice in merger assessments.

The adoption of the SIEC test has been described as the removal of a straitjacket from the substantive test in EU merger control, in the sense that the SIEC test, compared to the former MD test, allows for much more flexible and realistic merger assessments.[236] It should have become apparent from the previous section that the SIEC test is indeed flexible and that it opens up for the Commission to be so in its applying the test. It has also previously been held that flexibility is a necessary element to the development of the society.[237] Hence, whereas the perspective adopted in this study is that of legal certainty, and the aim to suggest solutions which would increase legal certainty, it would not be reasonable to argue for solutions which would put the straitjacket back on in merger control. Indeed, this would arguably

[236] See Schmidt (2004), p. 1582.
[237] See Section 3.2.

increase predictability, but as previously discussed, predictability is not the only element of legal certainty, albeit a primordial one.

For it to be possible to consider the practical reality of the EU's complex and ever-developing internal market as well as moral values other than predictability, and thus to ensure legal certainty in the material sense, a certain measure of flexibility would be needed.[238] In presenting solutions to remedy the legal uncertainty, this section will consider that flexibility and legal certainty are not exclusive, and that it is not impossible to have both as regards the application of the SIEC test.

5.1 Mitigating the effects on legal certainty of the widened scope and the open-ended character of the SIEC test

Considering the scepticism and critique of which the SIEC test has been and is still subject, the question naturally arises if it would be best to abandon the SIEC test and change back to the MD test. This would indeed remedy the widened scope of the substantive test. I will however argue that this is not a suitable solution, for several reasons.

A change in legislation which would so to say change the rules of the game for the participants of the EU's internal market would inevitably imply a new transition period during which uncertainty would prevail in the market, not least as regards undertakings operating in oligopolistic markets. Whereas this transition period of uncertainty would arguably last only a limited period of time after which legal certainty would possibly be increased, other factors suggest that a return to the MD test is not the best solution.

Firstly, a return to the MD test would re-open the oligopoly gap. Keeping the gap closed would require either some kind of special legislation specifically

[238] See also Westin (2007), p. 227.

regarding concentrations between undertakings in oligopolistic markets, or some kind of exception included in the EUMR for this type of concentration. Either way, legal certainty would be decreased for the same reasons as discussed in the previous paragraph, and possibly on a more lasting basis.

Secondly, a reintroduction of the MD test would put the previously presented straitjacket back on in merger assessments. From a legal certainty point of view which equates legal certainty with predictability, this would be desirable. Considering the material aspect of legal certainty, however, it would not, as the flexibility of merger appraisals would be annihilated. This would hinder the Commission to consider the practical reality of the internal market and thus risk leading to unfair decisions.

Also, around the time of the introduction in EU law of the SIEC test, the hope of the EU was that the Member States would follow the new course set by the EU and change their national merger regimes accordingly. In fact, the EU considered it likely that they would do so.[239] At the adoption of the EUMR, however, this vision did not seem as likely to be realized as the EU wished, considering both the strong indications by Germany that they would stick with the MD test in their national legislation[240] and all the concerns and skepticism voiced both prior to and post the adoption of the SIEC test. It is interesting to note, however, that Germany, which maintained that it would stick with its MD test in its national legislation and which was also the one Member State that probably expressed the most criticism of the SIEC test, has since replaced its MD test in merger control for a test focused on significant impediment to effective competition phrased very similarly to that of the EUMR.[241] If the perks of the SIEC test has been recognized by the skeptics, and if the hope of the EU to have Member States align their national merger legislations with the EU's is becoming reality, a change back to the MD test does not seem a serious suggestion to get to grips with the legal uncertainty.

[239] See Lowe (2004), p. 3.
[240] See Schmidt (2004), pp. 1565–1566.
[241] See the German Act against Restraints of Competition para. 36(1).

For the reasons discussed above, it is suggested that the SIEC test be kept as the substantive test in EU merger control. Other measures than a return to the MD test seem more appropriate solutions to mitigate the effects of the widened scope and the open-ended character of the SIEC test. These relate to the Commission's decisional practice and are discussed below.[242] The remainder of the present section is devoted to the issues related to the lists of factors included in the EUMR and in the Guidelines.

The non-exhaustive lists of factors might not be possible to make completely exhaustive, and this might not even be desirable as it would result in a more stagnated control regime which would maybe not allow for the practical reality to be considered. However, it would be possible to make them at least a bit more exhaustive than they are at present. An update of the lists based on the experiences from the past 17 years of applying the SIEC test would be welcomed from a legal certainty point of view. Specific criteria or factors that the Commission has frequently taken into account in applying the test to concentrations between undertakings in oligopolistic markets could be explicitly added to the lists. This would clarify to undertakings that these factors are likely to be considered in the assessment of a concentration. If possible, it would also be good to somewhat rank the different factors according to their importance.

It is of course possible for undertakings to, to some extent, read out these factors from Commission case work. However, considering the amount of decisions made by the Commission since the adoption of the SIEC test,[243] as well as the rather lengthy and somewhat tangled character of many of these decisions, it is hard to get an overview of the relevant factors. Legal certainty requires exact legal rules in order for decisions to be predictable, and this cannot be said to be ensured to a satisfactory extent by the Commission's case work. An explicit introduction in the EUMR of the relevant factors considered in decisional practice would therefore be welcomed, as it would make it clearer to undertakings what factors will be taken into account by the

[242] See Section 5.3.
[243] See Commission merger statistics.

Commission. This way, the outcome of merger appraisals would be more predictable and legal certainty would thus be increased. Furthermore, the inclusion of these factors should preferably be accompanied by references to the relevant case work and case-law, most importantly to the expectedly guiding and clarifying final outcome of the *CK Telecoms* case.

5.2 Let the Guidelines be guidelines (or make them law)

As the title of this section suggests, the role of the Guidelines would need to be locked down. At present, it is not clear to what extent undertakings can *de facto* be sure to rely on the Guidelines, nor what importance the Commission will attach to the latter in the assessment of a specific concentration.

Whereas merging parties should be able to count on that they can rely on the Guidelines against the Commission itself, they cannot be sure that the CFI will make the same considerations should the Commission's decision be appealed, as the CFI is not bound by the Guidelines.[244] When the Commission has taken a decision on the compatibility of a concentration with the internal market, market participants must be able to act accordingly. It is not legally certain that different rules apply in practice depending on whether it is the Commission or the EU Courts who decide. Hence, it would be desirable to either let the Guidelines be just guidelines, which merely describe the way the Commission will look at a concentration without playing a lead role, or to make them more binding or even include them (or at least some parts of them) in the EUMR so that they can effectively be relied upon.

Furthermore, it would be desirable, from a legal certainty point of view, to include in the EUMR some of the criteria stated in the Guidelines. This would clarify the normative value of these criteria. For instance, if some of the paragraphs regarding the HHI levels were made law (as a suggestion in a

[244] See Section 4.2.

reformulated wording considering the present ones being rather vague[245]), the yardstick offered by them would be more reliable and as such more efficient; undertakings would in that case to a greater extent be able to appreciate whether their concentration would be considered compatible with the internal market or not.

5.3 Ways to improve the Commission's decisional practice

Following the above analysis, the main part of the legal certainty problems seems to be related to the Commission's behaviour when applying the SIEC test.[246] The problems of inconsistent decisional practice, excessive information gathering and information selection, and opaque legal reasoning are all intertwined. Remedying one will hopefully contribute to solving the other issues, as argued below. Furthermore, this section will argue that by remedying the above mentioned issues, even the effects on legal certainty of the widened scope of the substantive test, which does not originate from the Commission's decisional practice, will be mitigated.

Considering that the Commission in fact has the leeway to give different factors different weight in different cases, the inconsistent decisional practice seems at first glance hard to get around without thwarting the flexibility of the SIEC test. Furthermore, one would have to assume that the weight given to each factor in each individual case is motivated, in the sense 'based on reasoning', even if this reasoning is not always clear. Hence, it might not be desirable to establish a hierarchy of the factors in order that they always be given the same weight in relation to one another. Rather, it is suggested that the Commission explain and motivate, in a clear and concise manner, the importance attached to the factors taken into account in each merger

[245] See e.g. paragraph 21 of the Guidelines, which provides that the HHI levels '*may* be used as an *initial indicator* of the absence of competition concerns' but that they 'do not give rise to a presumption of either the existence or the absence of such concerns' (emphasis added).
[246] See Section 4.

assessment. This would contribute to the development of a clear and guiding case work for undertakings to consider when making predictions about the outcome of a merger assessment. Hopefully, the case work would also show that the inconsistency is in fact consistent; that the Commission gives special importance to a certain factor only under certain circumstances and not under others, and that where it gives little weight to a certain factor, it does so in all cases where the same relevant circumstances are at hand. Making this apparent in case work would increase predictability.

Whereas a solution including a hierarchy of the factors is rejected, it is however suggested that some kind of explanation as to the importance of the factors be included in the EUMR or, if more appropriate, in the Guidelines, preferably with special regard to concentrations between undertakings in oligopolistic markets, considering the distinctiveness of such concentrations. Such an explanation should be based on case work and case-law from the past 17 years. An inclusion in the legislation of the importance of certain factors under certain circumstances would have the effect that merging parties be entitled to expect that the Commission sticks to these explanations, or, in case of departure therefrom, that it explains the reasons for this.[247] This would increase predictability and thereby legal certainty.

Remedying the inconsistency of the decisional practice in the way described above would arguably reduce the discretionary leeway of the Commission. This, in its turn, ought to contribute to some extent to solve the problem of excessive information gathering. For the problems go hand in hand, and the great leeway is what permits the Commission to take an indefinite number of factors into account when applying the SIEC test.[248] Reducing the leeway would somewhat restrain the Commission, but is not in itself enough to remedy the legal certainty problems related to information gathering and selection.

[247] See Section 4.2.
[248] See Section 4.3.2.

Firstly, the analysis has shown that the Commission shows tendencies of turning the Form CO into an insatiable Moloch swallowing an enormous amount of documents.[249] Evidently, the Form CO needs to be set in stone or, in other words, the discrepancy between the information requested by the Form CO and that actually requested by the Commission must be thwarted. It is not acceptable, from a legal certainty point of view, that merging parties are expected and/or required to present documents which are not required by the Form CO. The Commission thus should not request more or other information than what is requested by the Form CO. As mentioned above, a merger case is an administrative procedure, not a litigious one. A change in mentality of the Commission would thus also be welcomed in order to reduce the amount of information requested. For the sake of predictability, merging parties should be able to rely on that the information requested by the Form CO is the one that will be relevant to the appraisal of their concentration.

Secondly, the analysis has revealed allegations of the Commission being selective when choosing the documents on which to base its decision, to the detriment of the merging parties. The analysis has not been able to show whether these allegations are actually true. Either way, it seems appropriate to highlight the importance of the Commission retaining, throughout its assessment, an objective approach to the internal documents presented by the parties. It should take into account both documents that are to the detriment of the merging parties and those which are to their advantage. Objectiveness, which should be prominent in the decision, would contribute to ensuring the fairness of merger decisions.

On the same note, it would be preferable that merger decisions be based mostly on internal documents and less on market surveys and feedback which, whether presented by the merging parties, their competitors or by customers, may be biased.[250] Of course, internal documents may also provide biased information if the merging parties do not apply full disclosure, so as to put their case in an advantageous light before the Commission. However, if the

[249] Ibid.
[250] See Section 4.3.2.

litigious mentality was remedied and the parties were sure of the Commission's objectiveness, they probably would not feel the need to do so.

We have seen that remedying the inconsistency of the decisional practice in a way that reduces the Commission's discretionary leeway would contribute to solve the problem of excessive information gathering which, in order to be resolved, would however require further remedies including setting the Form CO in stone, applying objectivity and changing mentality as discussed above. Remedying the legal certainty problems related to information gathering and selection would, in its turn, contribute to the resolving of the last issue identified in the analysis, i.e. that of the opaque legal reasoning.

As seen in the analysis, the excessive information gathering may have contributed to rendering merger decisions quite lengthy and the legal reasoning opaque.[251] Making the information gathering and selection more focused and concentrated thus should have the effect of making the legal reasoning and the decision more concentrated as well. In its decisions, the Commission should focus on the core issues of the case, and instead of presenting as much information as possible to support its findings, it should present relevant evidence in a concise manner. In this way, there would be no need to try and decipher the crux of the legal reasoning, as this would be clear. Transparency would thus be ensured which would both increase predictability, as it would allow for undertakings to see what information was important to the decision, and ensure that the decision was fair and subsumed under legal rules, since it would be easy to follow the Commission's reasoning and establish whether this was justified by reasons that fit the law.

Furthermore, more concise merger decisions would facilitate judicial overview. Should a decision not be based on reasons that fit the law or should it be otherwise unfair, this would be easier to reveal if the legal reasoning was transparent. Undertakings would thus to a greater extent be ensured legal

[251] See Section 4.3.3.

guarantees to mitigate the effects of the unfair decision.[252] Both formal and material legal certainty would be increased.

Lastly, let's return to the scope of the SIEC test. The remedies proposed as regards the Commission's decisional practice ought to remedy the effects of the widened scope in the following ways. A reduced discretionary leeway of the Commission would balance the widened scope of the test. A more concise and clear-cut case work would provide guidance as to the exact scope of the SIEC test and the certain circumstances under which concentrations between firms in oligopolistic markets may give rise to a SIEC; expressions and concepts that the Commission uses and considers in applying the test but which are not defined in the EUMR or in the Guidelines, such as e.g. an undertaking which 'stands out' as an 'important competitive force' which exerts 'important competitive constraints' on the other participants in an oligopolistic market, could advantageously be defined in practice.

[252] See the reasoning in Section 4.3.3 above.

6 Conclusion

The purpose of this study has been to discuss legal certainty issues with the SIEC test and its application by the Commission, with special regard to concentrations between undertakings in oligopolistic markets. By exposing and examining current issues, the study has further been intended to identify points of improvement in merger assessments and to suggest solutions to remedy the problems identified and increase legal certainty.

The analysis has shown that legal certainty issues emanate both from the SIEC test itself as designed in the EUMR, from the Guidelines and from the Commission's approach in applying the test. The main problem is the lack of predictability in merger assessments, but the legal certainty issues identified also include arbitrariness and opacity of the legal reasoning, as well as an unsatisfactory assurance of subsumption and of legal guarantees against Commission decisions.

As regards the remedying of the legal certainty issues related to the scope of the SIEC test and the factors to be considered in applying it, the final outcome of the *CK Telecoms* case is much awaited. Hopefully the judgment will provide further guidance for practitioners and merging parties and thus increase legal certainty in EU merger control. However, the judgment is not expected to solve all problems identified in this study. An increase of legal certainty in merger assessments would also require an update of the legal instruments at the Commission's disposal based on practice and experiences therefrom, as well as a change of mentality in merger control and changes in the practical application of the SIEC test. Expectedly, the remedies would create a positive chain reaction which would increase legal certainty in merger assessments all while permitting for the practical reality of the EU's internal market to be considered.

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