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Merger Control in the EU

When is an Impediment to Effective Competition Significant?

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Summary

Merger control is an important component of competition law in the EU. There are two levels of merger control in the EU. The first level is EU merger control for transactions that have an EU dimension, which fall within the jurisdiction of the Commission under the EU Merger Regulation. The second level is national merger control for transactions which do not meet the criteria of the EU Merger Regulation, but nonetheless qualify for investigation under the national laws of a Member State. This thesis is concerned with the first level, hence those mergers which have an EU dimension.

Mergers which have an EU dimension must face the scrutiny of the Commission which has exclusive jurisdiction over such mergers. The Commission assesses the proposed merger under a substantive assessment based on the so-called Significant Impediment to Effective Competition ('SIEC') test. It is this test that the thesis is concerned with. Particular attention is paid to the fact that the impact on competition needs to be substantial. According to the test, a concentration only passes the scrutiny of the Commission if it does not significantly impede effective competition in the internal market. In assessing the impact on competition, particularly in oligopolistic markets where the merger does not necessarily result in the creation or strengthening of a dominant position, the test requires the Commission to carry out highly complex legal and economic assessments.

In recent years, legal scholars and practitioners have criticized the Commission for its arbitrary application of the SIEC test. In 2020, the General Court for the first time handed down a judgment which clarified the test, especially for the analysis of unilateral effects in oligopoly cases.

This thesis will analyze the SIEC test and its application with the help of case law. It will also critically look at the approach taken by the General Court in its recent decision from the perspective of law and economics. Ultimately, the

thesis finds that the General Court has significantly raised the bar for the Commission before it can prohibit a merger, thus setting much needed boundaries for the Commission's substantive assessment. On the other hand, the thesis finds that the General Court created even more legal and economic uncertainty surrounding the SIEC test because of its arbitrary argumentation on points of law and its review of economic evidence. Finally, the thesis concludes that there is no complete answer to when an impediment to effective competition is 'significant'. It remains to be seen in the coming years, whether we will receive even more clarification on the substantive assessment and the application of the SIEC test, notably on the notion of 'significance'.

Abbreviations

CJEU	Court of Justice of the European Union
Commission	European Commission
ECMR	Old EC Merger Regulation
EUMR	European Union Merger Regulation
EU	European Union
General Court	General Court of the European Union
GUPPI	Gross Upward Pricing Pressure Index
HMG	Horizontal Merger Guidelines
MNO	Mobile Network Operator
SIEC	Significant Impediment to Effective Competition
SLC	Substantial Lessening of Competition
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
UPP	Upward Pricing Pressure

1. Introduction

1.1 Background

Merger control is one of the three pillars of the European Union's ('EU') competition law practice. The purpose of merger control is to prevent mergers leading to the creation or reinforcement of a dominant position on a specific market and as a result depriving consumers of benefits resulting from effective competition. Classic examples of mergers which may impede effective competition are on the one hand those that alter the market structure in a way that companies on a relevant market are more likely to coordinate and raise their prices and on the other hand those that reduce companies' abilities to compete leading to high prices or a lack of innovation.¹ In response to mergers that would negatively affect competition, the most important goal of merger policy is to avoid the creation of a market structure that would essentially promote the coordination of market behavior between different market players.²

The regulatory framework for the assessment of mergers is provided in Regulation (EC) 139/2009, also known as the EU Merger Regulation ('EUMR').³ The EUMR contains the legal basis for the assessment of concentrations that have an EU dimension and that meet the prescribed turnover thresholds. The European Commission ('Commission') plays a key role in the control of concentrations at EU level. Subject to judicial review by the General Court of the European Union ('General Court') and the Court of Justice of the European Union ('CJEU'), the Commission has the discretion to determine whether a merger may be completed. In its assessment of the

¹ Moritz Lorenz, *An Introduction to EU Competition Law* (Cambridge University Press, 2013) p. 242–308.

² *ibid.*

³ Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 024.

compatibility of concentrations with the internal market, the Commission depends on a substantive test which was introduced in the EUMR in 2004. The test, enshrined in Article 2 of the EUMR, is called the Significant Impediment to Effective Competition ('SIEC') test.⁴ According to the test, a concentration is only allowed if it does not significantly impede effective competition in the internal market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.

The SIEC test replaced its predecessor, the 'dominance test', which was enshrined in the old EC Merger Regulation⁵ ('ECMR') dating back to 1990. According to the dominance test, the assessment of the compatibility of concentrations with the internal market relied on whether the concentrations would lead to the creation or the strengthening of a single or collective dominant position.⁶ The test was the source of a potentially major enforcement gap of EU merger policy. It was questioned for its ability to deal with so-called 'gap cases' which were mergers in oligopolistic markets that would cause unilateral effects without strengthening or creating a single or collective dominant position, but where changes to the market structure brought about by the merger could negatively impact competitive dynamics. 'Gap cases' particularly concerned horizontal mergers which involve actual or potential competitors that operate at the same level of the supply chain. Horizontal mergers often give rise to competition concerns as they typically remove a competitor from the market. Due to the doubts expressed against the dominance test, the substantive test was changed to the SIEC test in order to address the issue of 'gap cases'.

It was not until May 2020, that the General Court gave a judgment clarifying for the first time its interpretation of the "new" substantive test and the standard of proof that the Commission is required to meet when establishing

⁴ *ibid*, Article 2.

⁵ Council Regulation (EEC) 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] OJ L 395/1.

⁶ *ibid*, Article 2(3).

it. The case, known as *CK Telecoms*⁷, concerned a merger between mobile operators in the United Kingdom ('UK'). Such mergers - telecoms mergers - and particularly those that have culminated in the reduction of the number of mobile network operators ('MNOs') on the market from four-to-three, as was the case in the decision, have come under the harsh scrutiny of the Commission after the introduction of the SIEC test. The reason for this harsh scrutiny is that telecoms mergers, firstly, involve horizontal mergers which already often lead to competition concerns and, secondly, bring about more the unilateral theory of harm, described earlier as 'gap cases'. Telecoms mergers therefore provide an interesting point of reflection in connection to the application of the SIEC test as it is an illustration of the sorts of mergers that the dominance test could not properly catch as they did not necessarily lead to a position of dominance.

The *CK Telecoms* decision is a significant case in light of the unilateral effects theory in 'gap cases' with its introduction of a stricter legal standard for the Commission when establishing that a concentration may result in a SIEC. This approach taken by the General Court signifies a raising of the bar for the Commission before it can prohibit a merger. The new frame of reference established in the judgment has been criticized by some senior Commission officials⁸ and scholars⁹, but also praised by commentators and European telecoms companies,¹⁰ who have long argued that the Commission has encroached upon in-country market mergers with a forceful hand.

⁷ Case T-399/16 *CK Telecoms UK Investments Ltd v European Commission* [2020] ECLI:EU:T:2020:217.

⁸ Guillaume Lorient, 'The Future of EU and UK Merger Control' (*Concurrences*, 17 September 2020) < <https://www.concurrences.com/en/conferences/the-future-of-eu-and-uk-merger-control-enforcement> > accessed 14 April 2022; LinkedIn post from Tommaso Valletti (2021).

⁹ Elias Deutscher, 'Prometheus Bound? – The Uncertain Future of the Unilateral Effects Analysis in EU Merger Control After *CK Telecoms*' (2021) 0 *Journal of Competition Law & Economics* 1, p 69-77.

¹⁰ Katarzyna Czapracka, 'No magic number' means 'no magic number': will the EU Court turn the tide on four-to-three mobile mergers in Europe?' (2021) 20 *Competition Law Journal* 65, p 65.

1.2 Purpose and Research Questions

The purpose of this paper is to explore the substantive assessment carried out by the Commission when assessing the compatibility of mergers, particularly by scrutinizing when an impediment to effective competition is significant. To prohibit a merger, it is not only necessary to establish an impediment to effective competition, but also to find that it is truly a significant one.

To achieve this purpose, the following research questions will be answered:

1. When is an impediment to effective competition significant?
2. How has the substantive assessment of mergers evolved over time?
3. What is the analytical framework of the SIEC test?
4. What are the benefits and disadvantages of the new frame of reference established in *CK Telecoms*?

1.3 Methodology and Material

The main methods used to conduct the research for this paper include the legal dogmatic method and the law and economics method. I chose the legal dogmatic method as it goes further than a simple description of the law.¹¹ It mainly focuses on the interpretation and systematization of legislation and court decisions. It also allows for analysis by legal scholars and legislators on the law and its application. This method will be used to investigate how the SIEC test is applied and can be expected to be applied in the future. This thesis will also employ the law and economics method. This method was chosen because it allows for an application of economic theory and method to the practice of law. In exploring an area of law, namely competition law

¹¹ Jan M. Smits, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' (September 2015) Maastricht European Private Law Institute Working Paper, p 6.

that is heavily influenced by economic theories, I found this method an appropriate one.

The material utilized for this thesis includes both primary and secondary sources. Regarding primary sources, the relevant case law of the General Court and CJEU will be used, as well as relevant EU legal instruments concerning competition law, especially the EUMR. The cases discussed in this paper will be presented either because of their general significance or because they specifically deal with the researched topic. To supplement the primary sources, academic articles, books, and soft law instruments will be used as secondary sources. Soft law instruments, mainly the Horizontal Mergers Guidelines ('HMG')¹², will be given weight throughout this thesis because it provides support to the EUMR as regards the interpretation that should be given to the SIEC test.

1.4 Delimitations

The regulation of mergers within EU competition law will be the focus of this thesis. The other pillars of EU competition law which include the prohibition of anti-competitive agreements and the prohibition of abuse of market power will not be considered.

This thesis will focus on horizontal mergers in oligopolistic markets which lead to a unilateral effects theory of harm. Horizontal mergers are defined in Article 5 of the HMG as “concentrations when the undertakings concerned are actual or potential competitors on the same relevant market”.¹³ An oligopolistic market refers to a market structure which is characterized by a limited number of firms, who together have substantial influence over a

¹² Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/5.

¹³ *ibid*, Article 5.

certain industry or market. Unilateral effects refer to the ability of companies to raise prices post-merger due to the removal of competitive constraints resulting from the merger. Other theories of harm such as the horizontal coordinated effects and non-horizontal unilateral effects theories will only be briefly mentioned so that the reader is aware of their existence, but they will not be considered in the thesis further than that.

To prevent ambiguity, within this paper the words ‘merger’, ‘concentration’, ‘consolidation’ and ‘transaction’ will be used interchangeably; all refer to a concentration as defined in Article 3 of the EUMR which states that a concentration occurs if: two independent undertakings merge; one or more undertakings acquire control over another; there is a change of control in an undertaking; or a full-function joint venture is formed.¹⁴ Moreover, the words ‘unilateral’ and ‘non-coordinated’ will also be used interchangeably to mean one of the theories of harm that results from horizontal mergers in oligopolistic markets.

A few of the older EU cases discussed within this paper were decided by the Court of First Instance which has later transferred into the General Court. Despite some of the cases being ruled by the Court of First Instance, I will only mention the General Court in this context as the legal authority to avoid confusion, since ultimately, they are the same Court, albeit the name changed over time.

1.5 Outline

The thesis is divided into five chapters.

¹⁴ Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 024, Article 3.

In this first introductory chapter, the paper has introduced the problem that will be addressed.

The second chapter presents the SIEC test used by the Commission to assess the compatibility of concentrations with the internal market. It discusses the basic legal framework of the test as well as the evolution of the substantive test under the EUMR between 1990 and 2004. Thereafter, the chapter explains the significance of the telecoms sector within the context of EU merger control and its relevance in the application of the SIEC test in ‘gap cases’.

The third chapter explores the application of the SIEC test’s framework by means of relevant EU case law and Commission decisions that have shaped the scope and application of the test to what it is today. The chapter discusses in turn the most important parts of the test in relation to unilateral effects ‘gap cases’. It begins by discussing the term ‘significant’ in the test. After that, the chapter considers the concepts of ‘closeness of competition’ and ‘important competitive force’. Then, it discusses quantitative economic analysis and efficiencies that are a part of the Commission’s assessment. The last part of the chapter reviews the requisite burden and standard of proof.

The fourth chapter explores the practical significance of the approach taken by the General Court in the recent *CK Telecoms* judgment that concerns the interpretation of the SIEC test in unilateral effects cases in non-collusive oligopolies. The chapter begins by looking at the drawbacks of the General Court’s argumentation and thereafter shifts to discussing the benefits of the judgment. The approach taken by the General Court is examined through the lens of law and economics.

Finally, the fifth chapter concludes the thesis by synthesizing what has been put forth in the previous chapters and provides the reader with final comments on the topic.

2. The SIEC Test

In this chapter, an overview of the SIEC test as established in the EUMR and the HMG will be given. First, the chapter will begin by providing the basic legal framework of the test. Thereafter, the evolution of the substantive test from 1990 until 2004 will be explored. Finally, the relevance of the telecoms sector in the context of the SIEC test will be explained.

2.1 Basic Legal Framework of the Test

The substantive test on the assessment of the compatibility of concentrations with the internal market enshrined in the EUMR revolves around whether the concentration in question would ‘significantly impede effective competition’.¹⁵ Article 2(3) of the EUMR, which incorporates the core of the SIEC test, reads as follows:

“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.”¹⁶

Based on a reading of the Article, a merger can be banned based on the SIEC test if it fulfills all cumulative elements. Firstly, there must be a ‘concentration’.¹⁷ Secondly, the concentration should ‘significantly impede effective competition’. To find out whether a concentration would fulfil the second criterion, the Commission carries out an overall competitive

¹⁵ Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 024, Articles 2(2) and 2(3).

¹⁶ *ibid*, Article 2(3).

¹⁷ *ibid*, Article 3.

assessment of the merger which will be examined in Chapter 3. In performing the assessment, the Commission must consider the competitive effects of the merger in a scenario where the concentration is allowed and, in a scenario, where the concentration is prohibited. Thirdly, the concentration must have an EU dimension, affecting either the ‘common market’ or ‘a substantial part of it’. The Article also points out that the significant impediment to effective competition can ‘in particular’ result from the ‘creation or strengthening of a dominant position’. The words ‘in particular’ suggest that the creation or strengthening of a dominant position is not in itself sufficient to ban a merger, rather that such a result is an incriminating circumstance. Hence, dominance is only one possible cause of a significant impediment to effective competition.¹⁸ A brief read of Article 2(3) of the EUMR does not reveal the true complexity of the substantive assessment. In fact, the Article is so important in EU merger control that a whole thesis can be written about it.

Article 2(3) of the EUMR exhibits that the substantive analysis is structured around three theories of harm: horizontal non-coordinated (or unilateral) effects, horizontal coordinated effects, and non-horizontal unilateral effects. The most prevalent area of enforcement concerns the horizontal unilateral effects which captures both ‘gap case’ situations - where the market share of a merger undertaking does not lead to a dominant position nonetheless other competition concerns are raised due to the unilateral effects - and single dominance situations. Furthermore, the consequences of the adoption of the SIEC test are substantiated more noticeably in the context of unilateral effects in relation to horizontal mergers – concentrations involving actual or potential competitors.¹⁹ Within this theory of harm, dominance can strengthen the

¹⁸ OECD, ‘Standard for Merger Review 2009: The Standard for Merger Review, with a Particular Emphasis on Country Experience with the Change of Merger Review Standard from the Dominance Test to the SLC/SICE Test’ (2010), p 60.

¹⁹ Pablo Ibáñez Colomo, ‘EU Merger Control Between Law and Discretion: When Is an Impediment to Effective Competition Significant?’ (2021) 44 *World Competition* 347, p 352.

likelihood of anti-competitive effects, but it is not a decisive condition to create a SIEC.²⁰

The HMG provides the Commission with assistance on the application of the SIEC test by listing a set of factors against which the likelihood of unilateral effects is to be evaluated. The HMG provides the analytical approach used by the Commission in its assessment of horizontal mergers in the form of three steps. Firstly, the Commission assesses the competitive pressure to which the merged undertaking would be subject to following the finalization of the merger. This is done by defining the relevant market and assessing market shares²¹ and concentration thresholds. The Commission also looks at factors such as, the closeness of competition between the parties,²² the potential status of one of the parties to the merger as a ‘maverick’²³ or as an important competitive force and potential competition.²⁴ Secondly, the Commission evaluates the possibility of the proposed merger having anti-competitive effects in the market considered. At this stage, the Commission does not take into account countervailing factors.²⁵ It does this by assessing the customers’ and/or rivals’ ability to respond if the conditions of competition were to be affected.²⁶ The form of response can be switching supplies and/or by increasing supply.²⁷ Thirdly, the Commission takes countervailing factors into consideration.²⁸ Such countervailing factors can include the purchasing power of customers and/or rivals, entry barriers and possible efficiencies

²⁰ Giulio Federico, ‘Theory of harm in unilateral effects cases in oligopolistic markets’ (*European Commission*, 3-4 April 2014) slide 17 <https://www.studienvereinigung-kartellrecht.de/sites/default/files/2014_giulio-federico.pdf> accessed 5 May 2022.

²¹ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/5, para 27.

²² *ibid*, paras 28–30.

²³ *ibid*, paras 37–38.

²⁴ *ibid*, paras 36 and 68.

²⁵ *ibid*, paras 31–35.

²⁶ *ibid*.

²⁷ *ibid*.

²⁸ *ibid*, paras 64–67.

resulting from the concentration that would neutralize the anti-competitive effects.²⁹

All steps in the application of the SIEC test require a balancing exercise. The balancing exercise involves weighing the harms to competition with benefits to consumers. The burden of proof is on the Commission to establish that harms outweigh the benefits.³⁰ The standard of proof, which relies heavily on economic assessment, has – until recently – typically concerned a balance of probabilities.³¹ The idea behind the balance of probabilities approach stems from the case law of the CJEU which has held that there is no general presumption that the merger is either compatible or incompatible with the internal market.³² Such a standard of proof has, however, been slightly altered by the General Court in its recent *CK Telecoms* decision which will be discussed later in this thesis.

2.2 The Evolution of the Substantive Test under the EUMR between 1990 and 2004

The substantive assessment of concentrations under the EUMR has developed since merger control was introduced at the EU level by way of the ECMR in 1990. The first test pursuant to Article 2(2) and (3) of the ECMR was the ‘dominance’ test which assessed whether the merger created or reinforced a dominant position. It was a two-limb test requiring that the Commission show first, a dominant position was established or strengthened and second, that

²⁹ *ibid.*

³⁰ Alison Jones, Brenda Sufrin, Niamh Dunne, *Jones & Sufrin’s EU Competition Law: Text, Cases, and Materials* (7th edition Oxford University Press, 2019) p 1110.

³¹ Case C-12/03 P *Commission of the European Communities v Tetra Laval BV* [2005] ECLI:EU:C:2004:318, Opinion of AG Tizzano, paras 76–77.

³² Case C-413/06 P *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)* [2008] ECLI:EU:C:2008:392, paras 46–48; Case T-87/05, *Energias de Portugal, SA v Commission of the European Communities* ECLI:EU:T:2005:333, para 61; Case C-12/03 P *Commission of the European Communities v Tetra Laval BV* [2005] ECLI:EU:C:2005:87.

this resulted in a significant impediment to competition. The dominance test came under scrutiny whereby commentators began to question the ECMR's ability to deal with anti-competitive concentrations that do not result in the creation or strengthening of a dominant position, suggesting there was a 'gap' in coverage in horizontal mergers taking place in oligopolistic markets which lead to non-coordinated effects.³³ The test was also generally recognized by many as incapable of meeting the goals of merger control.³⁴ The CJEU has recognized the purpose of merger control is "to ensure that the restructuring of undertakings does not result in the creation of positions of economic power which may significantly impede effective competition in the common market".³⁵ Focusing exclusively on dominance is therefore not sufficient to meet this goal as the idea of merger control is not solely to prevent future abuses of dominance.³⁶ To address this issue, the Commission published its Green Paper in 2001,³⁷ where it commenced a debate as to whether there should be a move to the 'substantial lessening of competition' ('SLC') test applicable in other jurisdictions such as in the United States and the UK. The SLC test, in comparison to the dominance test, focuses on the effects of the merger on the market and on the loss of competition among firms rather than on threshold structural issues such as market shares.³⁸ The debate on the differences between the dominance and SLC tests focused on several questions, one being, whether there was a 'gap' between the concepts of dominance and SLC?³⁹

³³ Neil Horner, 'Unilateral Effects and the EC Merger Regulation – How the Commission Had Its Cake and Ate It Too' (2006) 2 *Hanse Law Review* 23, p 24.

³⁴ *ibid.*

³⁵ Case T-102/96 *Gencor Ltd v Commission of the European Communities* [1999] ECLI:EU:T:1999:65, para 106.

³⁶ Kyriakos Fountoukakos, Stephen Ryan, 'A New Substantive Test for EU Merger Control' (2005) 26 *European Competition Law Review* 277, p 280.

³⁷ Commission of the European Communities, 'Green Paper on the Review of Council Regulation (EEC) No 4064/89' (2001) COM(2001) 745, paras 160–167.

³⁸ Nicholas Levy, 'The EU's SIEC Test Five Years On: Has It Made a Difference?' (2010) 6 *European Competition Journal* 211, p 231.

³⁹ *ibid.*, p 228.

The Commission recognized that it needed to apply the concept of dominance more flexibly to address the ‘gap’.⁴⁰ In its decisional practice, the Commission extended the substantive test to capture not only single-firm but also collective dominance cases.⁴¹ This development was confirmed in *Gencor*⁴² and *Kali and Salz*,⁴³ allowing the Commission to prohibit mergers leading to coordinated effects using the dominance test, even if they did not result in especially high market shares. This was a significant change in the mindset of the Commission as prior to the recognition of the concept of collective dominance, such abuse was only thought to affect undertakings which held a dominant position due to their considerable market shares. The role of structural issues, such as that of market definition and market shares played a key role in the dominance assessment. Later, the *Airtours*⁴⁴ case became prominent as it gave clarity to the circumstances in which collective dominance may be established as a legal matter. The General Court recognized economic theory by defining collective dominance by reference to tacit collusion.⁴⁵ Tacit collusion is an economic concept that refers to a market conduct that enables undertakings to obtain supra-normal profits.⁴⁶ Such collusion can arise when firms cooperate repeatedly.⁴⁷ The decision in *Airtours* confirmed the existence of a ‘gap’ in the merger control regime which arises in markets that are not favorable for tacit collusion and do not involve the creation or strengthening of a dominant player, but where anti-competitive effects may occur from the unilateral behavior of companies that

⁴⁰ *ibid*, p 237.

⁴¹ *Nestle/Perrier* (Case IV/M.190) Commission Decision 92/553/EEC [1992] OJ L 356/1.

⁴² Case T-102/96 *Gencor Ltd v Commission of the European Communities* [1999] ECLI:EU:T:1999:65, para 106.

⁴³ Joined cases C-68/94 and C-30/95, *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission of the European Communities* [1998] ECLI:EU:C:1998:148, para 170.

⁴⁴ Case T-342/99 *Airtours plc v Commission of the European Communities* [2002] ECLI:EU:T:2002:146.

⁴⁵ *ibid*, para 62.

⁴⁶ Marc Ivaldi, Bruno Jullien, Patrick Rey, Paul Seabright, Jean Tirole, ‘The Economics of Tacit Collusion’ (2003) Institut d’Economie Industrielle Working Paper, p 5.

⁴⁷ *ibid*.

are not dominant.⁴⁸ The Commission acknowledged that the substantive test as it stood was unable to deal with such situations.⁴⁹

Ultimately, the debate led to a compromise whereby the substantive test was changed. However, the SLC test was not adopted. The SLC was met by strong opposition from the likes of the Commission and the German Federal Cartel Office.⁵⁰ Both were concerned that the test would weaken legal certainty and make the existing body of precedent established under the dominance test extraneous.⁵¹ Therefore, the SIEC test was adopted instead. The test was adopted in order to explicitly cover non-coordinated in addition to coordinated effects and single-firm dominance. The EUMR states that “a significant impediment to effective competition will generally result from the creation or strengthening of a dominant position”.⁵² Nonetheless, it also recognized that the creation or strengthening of a dominant position is only one possible theory of harm under which a concentration may be prohibited.⁵³ Hence, the assessment allows for additional competitive distortions to be considered.⁵⁴ This means that under the SIEC test, a merger may be prohibited even if it does not create or strengthen a dominant position if it would lead to a significant impediment of effective competition. Overall, the adoption of

⁴⁸ Neil Horner, 'Unilateral Effects and the EC Merger Regulation – How the Commission Had Its Cake and Ate It Too' (2006) 2 *Hanse Law Review* 23, p 30.

⁴⁹ Nicholas Levy, 'The EU's SIEC Test Five Years On: Has It Made a Difference?' (2010) 6 *European Competition Journal* 211, p 236.

⁵⁰ Green Paper on the Review of Council Regulation (EEC) No 4064/89 2001. COM (2001) 745 final paras 159-170; Elias Deutscher, 'Prometheus Bound? – The Uncertain Future of the Unilateral Effects Analysis in EU Merger Control After CK Telecoms' (2021) 0 *Journal of Competition Law & Economics* 1, p 9.

⁵¹ Ioannis Kokkoris, *Merger Control in Europe: The Gap in the ECMR and National Merger Legislations* (Routledge 2011) p 38; Ulf Böge, Markus Müller 'From the market dominance test to the SLC test: are there any reasons for a change?' (2003) 10 *European Competition Law Review* 495, p 496; Vincent Verouden, Claes Bengtsson, Svend Albaek, 'The Draft EU Notice on Horizontal Mergers: A Further Step towards Convergence' (2004) 46 *The Antitrust Bulletin* 243, p 248.

⁵² Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 024, Recital 26.

⁵³ *ibid.*

⁵⁴ Richard Whish, David Bailey, *Competition Law* (9th edition Oxford University Press, 2018) p 301.

the SIEC test has expressed more clearly the objectives of merger control by shifting to a more flexible, effects-based, and less structuralist approach.⁵⁵ Additionally, it brought the standard for substantive assessment closer in line with that adopted in Article 101 of the Treaty on the Functioning of the European Union ('TFEU'),⁵⁶ and closed the enforcement gap,⁵⁷ particularly as regards situations leading to non-coordinated effects in oligopolies.⁵⁸

2.3 A Case Study of the Telecoms Sector

The EU telecoms sector has experienced an increase in the number of consolidations on two fronts. The first front involves four-to-three mobile network mergers and the other front concerns the integration of fixed and mobile networks.⁵⁹ The development in the sector towards higher-speed and denser mobile networks has led undertakings to merge with one another in order to continue to effectively compete on the market and share efforts. After auctions for the 4G spectrum, the involvement of a fourth or fifth operator in telecom mergers has increased.⁶⁰ This development, which has been taking place approximately since 2006, has left 15 mobile markets in Europe with three MNOs. While most countries have three operators, there are still 10 countries with at least four operators. In half of those, the latest entrants to the market have not yet achieved a scale comparable with the other competitors on the market. The EU countries which still have four MNOs, may see a change in the number of players on the market within the next few years. This

⁵⁵ Nicholas Levy, 'The EU's SIEC Test Five Years On: Has It Made a Difference?' (2010) 6 European Competition Journal 211, p 239.

⁵⁶ Alison Jones, Brenda Sufrin, Niamh Dunne, *Jones & Sufrin's EU Competition Law: Text, Cases, and Materials* (7th edition Oxford University Press, 2019) p 1109.

⁵⁷ Nicholas Levy, 'The EU's SIEC Test Five Years On: Has It Made a Difference?' (2010) 6 European Competition Journal 211, p 239.

⁵⁸ *ibid.*

⁵⁹ Kalpana Tyagi, 'Four-to-Three Telecoms Mergers: Substantial Issues in EU Merger Control in the Mobile Telecommunications Sector' (2018) 49 International Review of Intellectual Property and Competition Law 185, p 185-186.

⁶⁰ Tuomas Haanperä, Serafino Abate, Bruno Basalisco, 'Key Points For Mobile Merger Assessments in the 5G Era' (June 2021) Copenhagen Economics, p 1.

is because with the move toward 5G networks, operators will need to invest significant amounts in the upcoming years to keep up with 5G's potential for innovation.⁶¹ The possibility to combine efforts with another player on the market may particularly seem appealing to relatively new entrants. With a merger, players can benefit from scale and/or gain ground in adjacent markets.⁶² A popular type of merger lately has been one that unites complementary assets to increase the appeal to consumers.⁶³

However, mergers in this sector are not always easy. Since the outset of the SIEC test, mergers in the telecoms sector throughout the EU have become vulnerable to scrutiny by the Commission. Particularly four-to-three mergers have seemingly become an obsession of the Commission. As of 2006 Europe has seen ten in-country telecom mergers that were viewed by the Commission.⁶⁴ Eight of these mergers were approved with remedies, one was blocked and in one the parties to the merger withdrew.⁶⁵ The increasing presence of only three players on the telecoms market is illustrated in these ten mergers that the Commission has assessed since 2006. Out of the ten mergers, only two involved a five-to-four merger and the other eight involved a four-to-three merger. In assessing these mergers, the Commission primarily relied on the unilateral effects theory of harm covering mergers in non-collusive oligopolies.⁶⁶

The reason for the Commission's intensified surveillance of mergers in the telecoms sector is that such mergers fall within the category of the so-called 'gap cases' known to be the main drawback of the previous dominance test,

⁶¹ European Telecommunications Network Operators' Association, 'Connectivity & Beyond: How Telcos Can Accelerate a Digital Future for All' (March 2021) p 3, 10, 16.

⁶² Tuomas Haanperä, Serafino Abate, Bruno Basalisco, 'Key Points For Mobile Merger Assessments in the 5G Era' (June 2021) Copenhagen Economics, p 2.

⁶³ *ibid.*

⁶⁴ *ibid.*, p 1.

⁶⁵ *ibid.*

⁶⁶ Katarzyna Czapracka, 'No magic number' means 'no magic number': will the EU Court turn the tide on four-to-three mobile mergers in Europe?' (2021) 20 Competition Law Journal 65, p 67.

as we have seen above. In the telecoms sector, it can be observed based on experience so far, that the undertaking that has typically emerged as a result of a merger between MNOs, does not create or strengthen a dominant position. Hence, as no dominant position is created, such mergers were not considered of importance under the previous dominance test. With the change of the substantive test to include ‘gap case’ situations, mergers that lead to a significant impediment to effective competition but not necessarily to a position of individual or collective dominance are now scrutinized by the Commission.

The recent *CK Telecoms* decision is the first case in which the SIEC test was relied on by the Commission in the assessment of telecom mergers. It was also the first time that a European Court scrutinized cases below the dominance threshold involving the ‘unilateral effects’ theory of harm. The case concerned a four-to-three merger in the UK’s telecoms sector. The General Court in May 2020 annulled the Commission’s 2016 decision, *H3G UK/Telefonica UK*, to block the proposed four-to-three merger between two competitors on the UK’s mobile market. The Commission had blocked the planned merger as it believed that with a reduction from four-to-three players on the oligopolistic market, this would have given rise to a SIEC. The *CK Telecoms* judgment is significant in the sense that the Court set boundaries to non-coordinated effects analysis, similarly as the Court did in *Airtours*. The points of dispute in the case were the following: (1) the standard of proof for finding a SIEC; (2) the concept of ‘important competitive force’; (3) the assessment of ‘closeness of competition’; and (4) quantitative economic analysis and efficiencies. In addressing these points of contention, the General Court clarified for the first time how to apply the SIEC test to mergers which do not create or strengthen a dominant or collective dominant position. As regards the substance of the decision, the judgment questions certain aspects of the HMG. On matters of procedure, the Court sets out the standard of proof in merger control. Aspects of the Court’s argumentation in *CK Telecoms* will be explored in the next section. Importantly, it must be kept in mind that the Commission has challenged the General Court’s decision and therefore there

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may still be developments to the interpretation of the SIEC test in the near future once the CJEU rules on the case. Whether the General Court's decision will be upheld remains to be seen.

3. Application of the SIEC Framework in the Case Law

Within this chapter, the application of the SIEC framework in ‘gap cases’ will be explored. The chapter will first discuss how case law has explored the meaning of a ‘significant’ impediment to effective competition. It will then move on to discuss the concepts of ‘closeness of competition’ and ‘important competitive force’ used as factors in the substantive assessment. Thirdly, the chapter will consider how the Commission has engaged in quantitative economic analysis and employed efficiencies in its analysis. Thereafter, the burden and standard of proof required by the SIEC test will be construed.

3.1 The ‘S’ in the SIEC Test

Whether an impediment to effective competition is significant or insignificant is difficult to determine. This is due to the nature of the SIEC test being primarily an economic evaluation where there exists an increasing continuing scale of potential unilateral effects.⁶⁷ Therefore, the significance threshold is not as determinative in unilateral effects cases because there are other more important thresholds to be taken into consideration according to established doctrine.

In the HMG, the Commission states that a horizontal merger eliminates competition and that this could lead to “significant price increases in the relevant market”,⁶⁸ yet nowhere in the HMG does the Commission establish

⁶⁷ Stefan Thomas, ‘The Known Unknown: In Search of a Legal Structure for the Significance Criterion of the SIEC Test’ (2017) 13 *Journal of Competition Law and Economics* 346, p 346–347.

⁶⁸ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/5, para 25.

how a significant price increase can be distinguished from an insignificant one. The Commission adds in the HMG that “a number of factors, which taken separately are not necessarily decisive, may influence whether significant non-coordinated effects are likely to result from a merger. Not all these factors need to be present for such effects to be diagnosed. Nor should this be considered an exhaustive list.”⁶⁹ This does not make the determination of significance any easier. As regards horizontal mergers, the HMG mentions that the closer the competition between the merging parties, the more likely it is that a subsequent price increase will be significant.⁷⁰ As there is no clear guidance as to the meaning of a ‘significant’ impediment to effective competition, the Commission has had a wide discretion to interpret it in the manner it wishes. It has interpreted Article 2 of the EUMR to such a degree that any loss of competitive pressure could be treated as a significant impediment to effective competition. Such a broad understanding of the test is based on two grounds.⁷¹ The first one entails that the loss of an ‘important competitive force’ is sufficient to establish a significant impediment to effective competition.⁷² The second one is that a firm acting as an ‘important competitive force’ need not stand out from rivals.⁷³ However, none of these statements in the HMG nor the Commission’s decisional practice provide guidance on the legal standard for the notion of ‘significance’ nor do they provide information on when a price increase starts being significant.⁷⁴

The ambiguous notion of ‘significance’ is reflected in the econometric methods used by the Commission for substantive merger analysis. The methods are unable to define whether a particular result is significant in terms of the law or not. The reason for this is that the Commission has preferred to

⁶⁹ *ibid*, para 26.

⁷⁰ *ibid*, para 28.

⁷¹ Pablo Ibáñez Colomo, ‘EU Merger Control Between Law and Discretion: When Is an Impediment to Effective Competition Significant?’ (2021) 44 *World Competition* 347, p 366.

⁷² *ibid*.

⁷³ *ibid*.

⁷⁴ *ibid*, para 28.

use quantitative analysis as an additional element of the assessment.⁷⁵ Since the analysis is economic, the continuum of effects cannot be completely avoided. Quantification helps in determining the significance standard even though it is not determinative. Thus, when relying on quantitative analysis, the Commission does not have a clear criterion for the notion of significance. In *Telefonica Deutschland/E-Plus*⁷⁶, in hopes of getting some guidance, the parties asked the Commission to provide a threshold for when post-merger prices would be considered significant, but the Commission refused to do so.⁷⁷ The problem is that if the significance threshold is unknown, then it is impossible to know how large efficiencies must be in order to offset the competitive harm. In *Ryanair/Aer Lingus*,⁷⁸ the General Court mentioned that a price increase of 7 to 8 percent appeared ‘significant at first sight’ without giving reasons for it.⁷⁹ In *Unilever/Sara Lee*,⁸⁰ a price increase of 1 to 2 percent for male deodorants on the Belgian market was not considered a significant impediment, however a price increase from 5 to 6 percent for non-male deodorants was considered a significant impediment.⁸¹ On the Spanish market, price increases below 3 percent were anticipated, and this was considered a significant impediment.⁸²

These cases demonstrate that the Commission has been unwilling to provide a clear definition for the notion of significance in the SIEC test. It has not set a precise figure or method of calculation for the finding of a SIEC. It has also been unwilling to commit to an economic or legal reason for the assumption

⁷⁵ Stefan Thomas, ‘The Known Unknown: In Search of a Legal Structure for the Significance Criterion of the SIEC Test’ (2017) 13 *Journal of Competition Law and Economics* 346, p 353–354.

⁷⁶ *Telefonica Deutschland/E-Plus* (Case COMP/M.7018) Commission Decision C(2014) 4443 [2015] OJ C 086/07

⁷⁷ *ibid*, para 138.

⁷⁸ Case T-342/07 *Ryanair Holdings plc v European Commission* [2010] ECLI:EU:T:2010:280.

⁷⁹ *ibid*, para 162.

⁸⁰ *Unilever/Sara Lee* (Case COMP/M.5658) Commission Decision C(2010) 7934 [2010] OJ C 23/10.

⁸¹ *ibid*, paras 187, 397, 454, 460.

⁸² *ibid*, paras 686, 754, 784, 807.

that such price increases appear to be significant and why increases below that should be insignificant.⁸³ The Commission seems to want to keep the significance threshold case-specific as the threshold can vary from case-to-case depending on numerous factors.

What the Commission has tried to make clear, that is written down in its HMG, is that price increases should not be considered a factor on its own for a finding of a significant impediment. Therefore, price increases are only one tool among other relevant tools in the toolbox. The downside of this is that the value of the analysis of unilateral price increases is called into question. If it is unknown what percentage of price increases is considered problematic by the Commission, there is no reason to go about the merger screening tools, such as calculating the Upward Pricing Pressure ('UPP') nor determining the Gross Upward Pricing Pressure Index ('GUPPI'). These economic assessments will be further elaborated on in section 3.3. If one does not know when a UPP or GUPPI figure starts to become critical, it is impossible to be able to find this out by applying additional criteria. These additional criteria may bring certain value, but not to the extent whether a merger will be a significant impediment or not. Therefore, if all we know is that price increases should not be considered an isolated factor for a significant impediment, it does not aid in bringing clarity to the notion of significance.

There is however some hope as regards receiving clarity on the notion of significance. In 2020, the Commission's interpretation of the concept was called into question in the *CK Telecoms* decision. The General Court called out the Commission's interpretation of 'significant' as an error of law. It disagreed with the Commission's view that the mere decline in competitive pressure was sufficient in itself to prove a SIEC.⁸⁴ It also stated that for a

⁸³ Stefan Thomas, 'The Known Unknown: In Search of a Legal Structure for the Significance Criterion of the SIEC Test' (2017) 13 *Journal of Competition Law and Economics* 346, p 354.

⁸⁴ Case T-399/16 *CK Telecoms UK Investments Ltd v European Commission* [2020] ECLI:EU:T:2020:217, para 171.

market player to be regarded as an important competitive force, it must ‘stand out from its competitors in terms of impact on competition’.⁸⁵ Otherwise any entity in an oligopolistic market would be regarded as an important competitive force.⁸⁶ With these findings, the General Court squashed the Commission’s broad understanding of the test and its interpretation of significance. The General Court did not develop its arguments to the extent that it would itself give a concrete definition for the notion of significance, but it did urge the Commission to do this which is already a positive development.⁸⁷

3.2 The Concepts of Closeness of Competition and Important Competitive Force

To establish that unilateral effects arising from a concentration may result in a SIEC, two cumulative conditions must be satisfied. The concentration must result in (1) the elimination of important competitive constraints that the parties had exerted upon each other and (2) a reduction of competitive pressure on the remaining competitors.⁸⁸ In assessing whether these conditions can be fulfilled by a proposed merger, the assessment of ‘closeness of competition’ between the merging parties and the determination of a market player potentially being an ‘important competitive force’ play a key role in finding out whether a SIEC can be established or not. Since the introduction of the SIEC test, the manner in which the Commission has applied the concepts to its substantive assessment of mergers has evolved and

⁸⁵ *ibid*, paras 168, 169, 174.

⁸⁶ *ibid*, para 174.

⁸⁷ Stefan Thomas, ‘The Known Unknown: In Search of a Legal Structure for the Significance Criterion of the SIEC Test’ (2017) 13 *Journal of Competition Law and Economics* 346, p 346–387.

⁸⁸ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/5, Recital 25.

somewhat departed from the way in which the HMG initially discusses them.⁸⁹ The way the Commission departs from its own HMG will be explained in the following sub-sections.

3.2.1 Closeness of Competition

Regarding the assessment of ‘closeness of competition’, the HMG asserts the degree of closeness of competition between the merging parties is an important factor to determine whether a merger is likely to result in unilateral effects. ‘Closeness of competition’ describes the relationship between two merging companies’ products. If because of a price increase, customers of one of the parties to the merger are more likely to switch purchases to the other merging party, then these two companies are considered close competitors.⁹⁰ The reason why it matters that companies are close competitors from a merger control perspective is because economists assume that, post-merger, the merged undertaking is likely to raise prices significantly, even in the situation where the two parties to the merger are not each other’s closest competitors’.

The HMG sets forth that the probability of unilateral effects largely depends on the degree of substitutability between any differentiated products produced by the merging parties as well as their profit margins before the execution of the merger.⁹¹ Thus, ‘closeness of competition’ is a relevant factor in the substantive analysis when there are differentiated rather than homogenous products. Generally, the stronger the substitutability between the products of the merging parties, the higher the probability and consequence of unilateral

⁸⁹ Tilman Kuhn and Stefan Thomas, ‘The More Economic Judicature: How the General Court has Recalibrated the Merger Gauge’ (June 2020) p 4.

⁹⁰ Lars-Hendrik Röller, Miguel de la Mano, ‘The Impact of the New Substantive Test in European Merger Control’ (2006) 2 European Competition Journal 9, p 14–15.

⁹¹ *ibid*, para 28; Elias Deutscher, ‘Prometheus Bound? – The Uncertain Future of the Unilateral Effects Analysis in EU Merger Control After CK Telecoms’ (2021) 0 Journal of Competition Law & Economics 1, p 29.

effects.⁹² The HMG also states on the other hand that unilateral effects are unlikely when “there is a high degree of substitutability between the products of the merging firms and those supplied by rival producers”.⁹³

In its decisional practice, the Commission has confined its findings of unilateral effects on the fact that the merging parties were each other’s ‘closest’⁹⁴ or ‘particularly close’⁹⁵ competitors. In the *H3G Austria/Orange Austria* decision, the Commission departed from its HMG by stating that the reference in the HMG to “products which a substantial number of customers regard as their first and second choices”⁹⁶ does not necessarily mean that a majority of customers have to consider the merging parties’ products as closest substitutes for the latter to qualify as close competitors within the meaning of the HMG.⁹⁷ Moreover, since the *Telefonica Deutschland/Eplus* merger in 2014, the Commission has argued that the concept should be understood as a relative, rather than an absolute concept.⁹⁸ *CK Telecoms* questioned the Commission’s application of ‘closeness of competition’. The General Court disagreed with the Commission that the merging parties were ‘relatively close competitors’ in some segments whilst not competing in

⁹² *ibid.*

⁹³ *ibid.*

⁹⁴ *T-Mobile Austria/Tele.ring* (Case COMP/M.3916) Commission Decision C(2006) 1695 [2006] OJ C 239/04, para 51; *T-Mobile/Orange Netherlands* (Case COMP/M.4748) Commission Decision C(2007) D/205101 [2007] OJ C 169/11, para 35.

⁹⁵ *T-Mobile/Orange Netherlands* (Case COMP/M.4748) Commission Decision C(2007) D/205101 [2007] OJ C 169/11, paras 41–42; *T-Mobile/Orange UK* (Case COMP/M.5650) Commission Decision C(2010) 1274 [2010] OJ C 108/03, paras 56, 58.

⁹⁶ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/5, para 28.

⁹⁷ *T-Mobile/Orange UK* (Case COMP/M.5650) Commission Decision C(2010) 1274 [2010] OJ C 108/03, paras 176–178.

⁹⁸ *Telefonica Deutschland/E-Plus* (Case COMP/M.7018) Commission Decision C(2014) 4443 [2015] OJ C 086/07, paras 277–280; *Liberty Global/BASE Belgium* (Case COMP/M.7637) Commission Decision C(2016) 531 [2016] OJ C281/07, paras 215–216; *Hutchinson 3G Italy/Wind/JV* (Case COMP/M.7758) Commission Decision C(2016) 5487 [2016] OJ C391/05, paras 781–783; *Hutchison 3G UK/Telefónica UK* (Case COMP/M.7612) Commission Decision C(2016) 2796 [2016] OJ C357/08, paras 323–324, 407–463.

others.⁹⁹ According to the General Court, the Commission should have demonstrated that the parties are ‘particularly close MNOs’ since in fact all operators on this oligopolistic market are ‘close to a greater or lesser extent’.¹⁰⁰ The evidence produced showed that all companies on the market were somehow ‘close’, which is not considered sufficient as this would mean that any concentration of this type would be prohibited.¹⁰¹ *CK Telecoms* thus sets a more demanding standard for finding closeness of competition making it more difficult for the Commission to rely simply on the fact that the parties are only close competitors.¹⁰²

3.2.2 Important Competitive Force

The HMG states that an ‘important competitive force’ is a firm that has “more of an influence on the competitive process than their market shares or similar measures would suggest”.¹⁰³ It goes on to assert that a merger involving the so-called ‘important competitive force’ can negatively alter competitive dynamics on a market.¹⁰⁴ The notion is often used interchangeably with that of a maverick which disrupts the stability of tacit collusion.¹⁰⁵

Since the merger of *T-Mobile Austria/tele.ring*, the Commission has perceived the elimination of an important competitive force as a channel through which mergers and particularly telecom mergers, may lead to unilateral effects. At first the Commission applied the concept to aggressive

⁹⁹ Case T-399/16 *CK Telecoms UK Investments Ltd v European Commission* [2020] ECLI:EU:T:2020:217, paras 246-250.

¹⁰⁰ *ibid*, para 247.

¹⁰¹ *ibid*, para 245.

¹⁰² Elias Deutscher, ‘Prometheus Bound? – The Uncertain Future of the Unilateral Effects Analysis in EU Merger Control After *CK Telecoms*’ (2021) 0 *Journal of Competition Law & Economics* 1, p 33.

¹⁰³ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/5, para 37.

¹⁰⁴ *ibid*, para 37.

¹⁰⁵ *ibid*; Joseph Bromfield and Matthew Olczak, ‘The Role of the Maverick Firm Concept in European Commission Merger Decisions’ (2018) 14 *Journal of Competition Law and Economics* 179, p 179–180.

competitors.¹⁰⁶ More recently though, it has applied the concept more broadly, according to which a firm does not have to stand out amongst its competitors to be treated as an important competitive force.¹⁰⁷ The Commission has interpreted the concept to extend to any undertaking that has a greater influence on the competitive process than its market shares suggest.¹⁰⁸ The Commission has downplayed its own assertion of an important competitive force by announcing that the depiction of the concept in the HMG as a maverick or innovator,¹⁰⁹ was only an illustrative example for an important competitive force.¹¹⁰ Such an assertion by the Commission suggests that it wishes to disassociate the concept from that of a maverick firm.¹¹¹

The General Court in *CK Telecoms* questioned the Commission's understanding of an 'important competitive force' which seemed to be that a SIEC could occur from a simple decline in competitive pressure which would result particularly from a loss of an important competitive force from the market.¹¹² The General Court found that with such an understanding the

¹⁰⁶ *T-Mobile Austria/Tele.ring* (Case COMP/M.3916) Commission Decision C(2006) 1695 [2006] OJ C 239/04, paras 51, 72, 126.

¹⁰⁷ *Hutchinson 3G UK / Telefonica Ireland* (Case COMP/M.6992) Commission Decision C(2014) 3561 [2014] OJ C 264/04, paras 206, 208, 451-456; *Hutchinson 3G UK/Telefónica UK* (Case COMP/M.7612) Commission Decision C(2016) 2796 [2016] OJ C357/08, para 326.

¹⁰⁸ *Telefonica Deutschland/E-Plus* (Case COMP/M.7018) Commission Decision C(2014) 4443 [2015] OJ C 086/07, para 348; *T-Mobile Austria/Tele.ring* (Case COMP/M.3916) Commission Decision C(2006) 1695 [2006] OJ C 239/04, para 126; *T-Mobile/Orange UK* (Case COMP/M.5650) Commission Decision C(2010) 1274 [2010] OJ C 108/03, para 62; *Hutchinson 3G Austria/Orange Austria* (Case COMP/M.6497) Commission Decision C(2012) 9198 [2013] OJ C 224/06, para 265.

¹⁰⁹ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/5, paras 37-38.

¹¹⁰ *Telefonica Deutschland/E-Plus* (Case COMP/M.7018) Commission Decision C(2014) 4443 [2015] OJ C 086/07, paras 121-122; *Hutchinson 3G Italy/Wind/JV* (Case COMP/M.7758) Commission Decision C(2016) 5487 [2016] OJ C391/05, para 432.

¹¹¹ Elias Deutscher, 'Prometheus Bound? – The Uncertain Future of the Unilateral Effects Analysis in EU Merger Control After CK Telecoms' (2021) 0 Journal of Competition Law & Economics 1, p 40.

¹¹² Case T-399/16 *CK Telecoms UK Investments Ltd v European Commission* [2020] ECLI:EU:T:2020:217, para 171.

Commission had broadened the scope of the SIEC test since “any elimination of an important competitive force would amount to the elimination of an important competitive constraint” and thus to a finding of a SIEC.¹¹³ It also was concerned that the Commission, based on its interpretation of the concept, could find a SIEC without analyzing the possible elimination of the important competitive constraints that the merging parties exert upon each other.¹¹⁴ It also argued that the existence of an important competitive force cannot be established based on the mere fact that the firm’s competitive role is more important than its market shares hint at.¹¹⁵ Instead, the status of an important competitive force has to be determined by way of comparison with its other competitors and having regard to the latter’s reactions.¹¹⁶ Finally, the General Court criticized the Commission for departing from its own precedent regarding the thresholds at which it had previously found an oligopolist to be an important competitive force.¹¹⁷ All in all, *CK Telecoms* makes it more difficult for the Commission to rely on the removal of a disruptive player to maintain a finding of unilateral effects.

3.3 Quantitative Economic Analysis and Efficiencies

The application of economic analysis in EU merger control has reached high levels of sophistication.¹¹⁸ One of the most important methods used by the Commission in the assessment of unilateral effects is the UPP method. Interestingly, this method has been increasingly integrated in the

¹¹³ *ibid*, paras 172-173.

¹¹⁴ *ibid*, para 175.

¹¹⁵ *ibid*, para 160.

¹¹⁶ *ibid*, paras 170, 215–216.

¹¹⁷ *ibid*, paras 183, 186, 187.

¹¹⁸ Hans W Friederiszick, Rainer Nitsche, Theon van Dijk, Vincent Verouden, ‘Recent Economic Applications in EU Merger Control: UPP and Beyond’ (June 2018) p 1.

¹¹⁸ Tilman Kuhn and Stefan Thomas, ‘The More Economic Judicature: How the General Court has Recalibrated the Merger Gauge’ (June 2020) p 4.

Commission's assessment of mergers in the telecoms sector. The aim of the method is to assess how, as well as to what extent, pricing incentives of companies change when they merge.¹¹⁹ In order to better understand the method's application in practice, it is helpful to understand the basic economic principles underlying it.

The rationale of the method is as follows. Prior to the merger, if one of the two merging companies planned to increase its sales through a price reduction, this company would take into account the value of the sales lost due to customers switching to other companies in the market, including that of the merging party.¹²⁰ After the merger, the merged parties internalize the price increase since they are both one company post-merger. The value of lost sales can be seen as an opportunity cost which is internalized by the new management post-merger. The new management may take the opportunity cost into account when deciding whether and in which manner they will increase prices, while at the same time losing consumers.¹²¹ In theory, any merger as a result of two companies combining is likely to result in some UPP unless there are efficiencies. The closer the two products are in terms of being substitutes and the higher the gross profit margin, the greater the anticompetitive effect is likely to be. The UPP method in its simplest form compares the increased marginal opportunity cost with the efficiency improvements resulting from the merger to see whether there is a UPP on prices.¹²² In merger control, potential efficiency gains are typically only assessed at a later stage, once it has been established that the merger is likely to have significant anticompetitive effects. Hence, the GUPPI is used first. This index gives the opportunity costs expressed as a percentage of the price of its product before the merger.¹²³ The GUPPI then represents the predicted

¹¹⁹ *ibid.*

¹²⁰ Hans W Friederiszick, Rainer Nitsche, Theon van Dijk, Vincent Verouden, 'Recent Economic Applications in EU Merger Control: UPP and Beyond' (June 2018) p 1.

¹²¹ *ibid.*

¹²² *ibid.*

¹²³ *ibid.*

price increase of the merger, whilst not yet considering potential efficiencies. To sum up, the GUPPI index is a representation of one potential application of the UPP method, which as explained, uses diversion ratios and pre-merger margins to calculate the value of sidetracked sales as an indicator of the magnitude of the merging parties' incentive to raise prices post-merger.¹²⁴ If the calculations suggest that the merger will lead to UPP, efficiency claims can then be explored and balanced against the GUPPI to examine whether they are high enough to offset UPP.

Now that we understand the economic principles underlying the UPP method, we can take a look at how it has been used and applied by the Commission in its assessment of mergers. The first case where the Commission used the GUPPI test and a UPP-based estimation of indicative price rises to support its finding of unilateral effects with quantitative evidence¹²⁵ was *H3G Austria/Orange Austria*.¹²⁶ In *H3G UK/Telefonica Ireland* and *Telefonica Deutschland/Eplus* the Commission used, in addition to the GUPPI test, a merger simulation model to quantify the expected price increases.¹²⁷ Since *H3G UK/Telefonica Ireland* the Commission has also calculated indicative price rises which expands the GUPPI model to take price reactions of competitors to potential price increases by the merged firm into consideration.¹²⁸ The Commission has occasionally even taken it further by adding a compensating marginal cost reduction analysis that evaluates the

¹²⁴ Elias Deutscher, 'Prometheus Bound? – The Uncertain Future of the Unilateral Effects Analysis in EU Merger Control After CK Telecoms' (2021) 0 *Journal of Competition Law & Economics* 1, p 52.

¹²⁵ Elias Deutscher, 'Prometheus Bound? – The Uncertain Future of the Unilateral Effects Analysis in EU Merger Control After CK Telecoms' (2021) 0 *Journal of Competition Law & Economics* 1, p 52.

¹²⁶ *Hutchinson 3G Austria/Orange Austria* (Case COMP/M.6497) Commission Decision C(2012) 9198 [2013] OJ C 224/06, paras 308–364.

¹²⁷ *Hutchinson 3G UK / Telefonica Ireland* (Case COMP/M.6992) Commission Decision C(2014) 3561 [2014] OJ C 264/04, paras 615–628; *Telefonica Deutschland/E-Plus* (Case COMP/M.7018) Commission Decision C(2014) 4443 [2015] OJ C 086/07, paras 753–757.

¹²⁸ Elias Deutscher, 'Prometheus Bound? – The Uncertain Future of the Unilateral Effects Analysis in EU Merger Control After CK Telecoms' (2021) 0 *Journal of Competition Law & Economics* 1, p 53.

marginal cost reductions that efficiencies resulting from a merger would have to create in order to offset the merged entity's incentive to raise prices.¹²⁹

The General Court in *CK Telecoms* criticized the Commission's UPP analysis, attempted to give guidance on when indicative price rises of a merger should be considered 'significant' and how the significance threshold should be determined. In *Hutchinson 3G UK/Telefonica UK* the Commission found that the concentration is likely to generate an incentive for the merged entity to significantly increase prices. The General Court disagreed, stating that the Commission had failed to recognize two important factors. First, in horizontal mergers in oligopolistic markets there is always a short-term increase in prices¹³⁰ and if the Commission does indeed find an increase in prices, it must show that the increase is significant¹³¹ to find a SIEC. Second, in conducting the UPP analysis, the Commission failed to consider 'standard efficiencies' which the concentration would have created.¹³²

Regarding the second factor, the General Court found that 'standard efficiencies' must be included in the Commission's quantitative analysis of the transaction's price effects.¹³³ The General Court argued that any concentration will lead to some standard efficiencies stemming from the rationalization and integration of the assets of the concentration and could ultimately lead to lower prices.¹³⁴ It emphasized that when quantitative economic analysis is used, it must take into account all the relevant factors which may affect the price level, including these standard efficiencies. The General Court separates the notion of 'standard efficiencies' from the

¹²⁹ *Hutchinson 3G UK/Telefónica UK* (Case COMP/M.7612) Commission Decision C(2016) 2796 [2016] OJ C357/08, para 1222; *Hutchinson 3G Italy/Wind/JV* (Case COMP/M.7758) Commission Decision C(2016) 5487 [2016] OJ C391/05, Annex A, paras 26–29.

¹³⁰ *ibid*, para 276.

¹³¹ *ibid* para 274.

¹³² *ibid*, para 277.

¹³³ Case T-399/16 *CK Telecoms UK Investments Ltd v European Commission* [2020] ECLI:EU:T:2020:217, para 278.

¹³⁴ *ibid*.

efficiencies referred to in the HMG.¹³⁵ Ultimately, by refusing to rely on these standard efficiencies in its UPP analysis, the General Court found that the Commission had confused the two types of efficiencies, to the detriment of the merging parties.¹³⁶

3.4 Burden and Standard of Proof

Under the EUMR, the Commission bears the full burden of proof to produce convincing evidence that a merger is incompatible with the internal market.¹³⁷ The CJEU has held that there is no presumption that a merger is either compatible or incompatible with the internal market.¹³⁸ Instead, the Commission must adopt a decision “in accordance with its assessment of the economic outcome attributable to the merger which is most likely to ensue”.¹³⁹ The standard of proof on the other hand distinguishes between alleging or reasonably suspecting that something is going to happen and actually proving that, as a matter of law, it will happen. The Commission must put evidence before the Court that meets the required standard of proof and establish whether an event did or is likely to occur. The issue with the standard of proof is that unlike with the burden of proof, the standard of proof the Commission must fulfil to satisfy this burden is not that clear. It is this standard that the Courts have wrestled with over the years and once again in *CK Telecoms*.

¹³⁵ *ibid*, para 279.

¹³⁶ *ibid*.

¹³⁷ Case C-12/03 P Commission of the European Communities v Tetra Laval BV [2005] ECLI:EU:C:2005:87, paras 37–51.

¹³⁸ Case C-413/06 P Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala) [2008] ECLI:EU:C:2008:392, para 48; Case T-210/01 General Electric Company v Commission of the European Communities [2005] ECLI:EU:T:2005:456, para 61.

¹³⁹ Case C-413/06 P Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala) [2008] ECLI:EU:C:2008:392, para 52.

In the early 2000s the General Court gave three prohibition decisions, namely, *Airtours*, *Schneider Electric*,¹⁴⁰ and *Tetra Laval*¹⁴¹ where it clarified the standard of proof required in merger cases. These were the first cases which received thorough attention from a European Court regarding the burden and standard of proof in merger analysis.¹⁴² First, in *Airtours*, the General Court found that the Commission's decision lacked persuasive evidence and included errors of assessment. The General Court criticized the Commission for finding that the proposed merger would create a collective dominance position "without having provided to the requisite legal standard" that effective competition on the market would be significantly impeded by the transaction.¹⁴³ Similarly, in *Schneider Electric* and *Tetra Laval*, the General Court annulled the decisions since they had failed to provide 'sufficiently convincing evidence' for the alleged effects of the merger.¹⁴⁴ The General Court considered the 'errors, omissions and inconsistencies' it had found in the Commission's analysis to be 'of undoubted gravity'.¹⁴⁵ The General Court, just like in *Airtours*, concluded that the Commission had committed manifest errors of assessment by prohibiting the notified mergers. In *Tetra Laval*, the General Court did not accept the Commission's understanding that it was sufficient to demonstrate a 'possibility' of competitive harm. The General Court insisted that it is the Commission who bears the burden of showing convincing evidence that is sufficiently clear, rigorous, and coherent

¹⁴⁰ Case T-310/01 *Schneider Electric SA v Commission of the European Communities* ECLI:EU:T:2002:254.

¹⁴¹ Case C-12/03 P *Commission of the European Communities v Tetra Laval BV* [2005] ECLI:EU:C:2005:87.

¹⁴² Ben Van Rompuy, Caroline Pauwels, 'Is the standard of proof imposed by the Community Courts undermining the efficiency of EC merger control? The Sony BMG joint venture case in perspective' (2007), p 3.

¹⁴³ Case T-342/99 *Airtours plc v Commission of the European Communities* [2002] ECLI:EU:T:2002:146, para 294.

¹⁴⁴ Case T-310/01 *Schneider Electric SA v Commission of the European Communities* ECLI:EU:T:2002:254, para 394; Case T-5/02 *Tetra Laval BV v Commission of the European Communities* ECLI:EU:T:2002:264, para 336.

¹⁴⁵ Case T-310/01 *Schneider Electric SA v Commission of the European Communities* ECLI:EU:T:2002:254, para 404.

in order to prove that a merger is likely to cause a SIEC.¹⁴⁶ This standard of proof applies to each of the factors relevant to the assessment of whether effective competition will be significantly impeded. In *Schneider Electric*, one of the multiple errors found by the General Court in the Commission's argumentation was that the Commission's conclusions were abstract in nature, its findings were insufficiently demonstrated in law and there was a lack of evidence.¹⁴⁷ The General Court found that due to the faulty assessment of the Commission, it has an undoubted gravity that ultimately deprived the Commission's economic analysis of probative value.¹⁴⁸ In *GE/Honeywell*, the Court recalled the 'relatively strict terms' required for the standard of proof established particularly in *Tetra Laval*.¹⁴⁹ The decision recalled that the Commission has to demonstrate to a sufficient degree of probability that the merged entity would engage in unilateral effects after the merger.¹⁵⁰

Many years later, the General Court was given the opportunity to reassess the burden and standard of proof required by the SIEC test when applying it to unilateral effects cases. In *CK Telecoms*, after recalling that the burden of proof to prove a SIEC is on the Commission, the General Court broke new ground when it discussed the standard of proof. It set out that, when establishing the SIEC test, if the Commission relies on several theories of harm, it must demonstrate this with 'strong probability' of harmful non-coordinated effects.¹⁵¹ The General Court therefore altered the course of the standard of proof to being between the 'balance of probabilities' and 'beyond all reasonable doubt'.¹⁵² This is different from before, as prior to *CK*

¹⁴⁶ Case T-5/02 *Tetra Laval BV v Commission of the European Communities* ECLI:EU:T:2002:264, para 153-155.

¹⁴⁷ *ibid*, paras 209, 343, 349, and 398.

¹⁴⁸ *ibid*, paras 404 and 411.

¹⁴⁹ Case T-210/01 *General Electric Company v Commission of the European Communities* [2005] ECLI:EU:T:2005:456, para 433.

¹⁵⁰ *ibid*, para 463.

¹⁵¹ *ibid*, para 118.

¹⁵² Veronica Roberts, Kyriakos Fountoukakos, Christon Shenolikar, Kristien Geurickx, 'General Court Landmark Ruling in Three/O2 Commission Prohibition' (*Herbert Smith Freehills*, 2 June 2020) < <https://www.herbertsmithfreehills.com/latest-thinking/general-court-landmark-ruling-in-threeo2-commission-prohibition> > accessed 5 May 2022.

Telecoms, the standard of proof – based on the cases explored above - seemed to involve the balance of probabilities approach. Requiring the Commission to demonstrate with a ‘strong probability’ the existence of a SIEC following the merger limits the analysis on non-coordinated effects by creating a higher burden for the Commission.

4. Legal and Economic Evaluation of the Approach to the SIEC Test Introduced in CK Telecoms

This section explores the approach of the SIEC test taken by the General Court in the recent *CK Telecoms* decision. The significance of the new approach will be examined by looking at the drawbacks and benefits of the General Court's argumentation from the perspective of law and economics.

4.1 Drawbacks

Some have praised the *CK Telecoms* decision for finally bringing some clarity to the Commission's SIEC test and others have condemned the General Court for creating even more legal and even economic uncertainty surrounding the substantive test. The *CK Telecoms* decision has been criticized for (1) creating a more demanding standard for finding 'closeness of competition' and making the definition of 'important competitive force' narrower; (2) misunderstanding economic theory underlying the quantitative analysis conducted as part of the UPP test and going against its own precedent by introducing a new category of 'standard efficiencies' into price analysis; and (3) making the standard of proof for the Commission much stricter and harder to achieve. These drawbacks of the decision will be discussed in turn.

4.1.1 A More Demanding Standard for Finding Closeness of Competition and A Narrower Definition of Important Competitive Force

The General Court argued for a more demanding standard for finding ‘closeness of competition’ between the parties and created a narrower standard as to whether the concentration removes an ‘important competitive force’. The General Court held that the Commission had confused the concepts.¹⁵³ For the sake of clarity, the concepts will be discussed in separate sections.

4.1.1.1 From Close Competitors to Particularly Close Competitors

Regarding the ‘closeness of competition’, the General Court made the definition narrower by requiring that the merging parties are ‘particularly close competitors’.¹⁵⁴ The fact that the merging parties in the case were relatively, but not particularly close competitors was in the General Court’s opinion, not sufficient to find that the merger eliminated competitive constraints.¹⁵⁵ It supported this argumentation by emphasizing that otherwise any four-to-three merger would be blocked by the Commission.¹⁵⁶ What the General Court did not do, was give guidance on how the strict standard of ‘particularly close competitors’ should be operated in practice. The notion does not give clarity as to the degree of substitution between the merging parties that would indicate unilateral effects. To have created legal certainty, the General Court could have given a threshold of substitutability, for

¹⁵³ Case T-399/16 *CK Telecoms UK Investments Ltd v European Commission* [2020] ECLI:EU:T:2020:217, para 173; Tilman Kuhn and Stefan Thomas, ‘The More Economic Judicature: How the General Court has Recalibrated the Merger Gauge’ (June 2020), p 5.

¹⁵⁴ Case T-399/16 *CK Telecoms UK Investments Ltd v European Commission* [2020] ECLI:EU:T:2020:217, paras 242, 245.

¹⁵⁵ Tilman Kuhn and Stefan Thomas, ‘The More Economic Judicature: How the General Court has Recalibrated the Merger Gauge’ (June 2020), p 5.

¹⁵⁶ Case T-399/16 *CK Telecoms UK Investments Ltd v European Commission* [2020] ECLI:EU:T:2020:217, para 249.

example, in terms of diversion ratios, below which the merging firms cannot be considered particularly close competitors, but it did not do this, leaving a looming uncertainty about how it is to be applied.

An economic evaluation of the standard reveals three issues. The first issue concerns the new standard not being in line with the economic theory underpinning the analysis of unilateral effects. According to this economic theory, merging parties do not have to be each other's 'closest competitors' or 'particularly close competitors' for their combination to give rise to material anticompetitive effects.¹⁵⁷ Instead, it is sufficient that a substantial number of customers perceive both parties' products as their first and second choice.¹⁵⁸ The second issue has to do with the fact that the 'particularly close competitors' standard fails to acknowledge that the degree of closeness of competition between merging parties is not the only factor that directly affects merging firms' incentives to raise prices unilaterally. Pre-merger margins and diversion ratios - a measure of differentiation - act together in creating UPP.¹⁵⁹ In this sense, in the pre-merger situation where there are high margins, mergers may give rise to significant unilateral effects despite the degree of substitution between the merging parties not indicating that they would be each other closest or particularly close competitors. The third issue is that the standard assumes symmetric patterns of substitution between the merging firms, although in differentiated product markets, substitution and switching patterns are not always symmetric, but rather asymmetric.¹⁶⁰

¹⁵⁷ Elias Deutscher, 'Prometheus Bound? – The Uncertain Future of the Unilateral Effects Analysis in EU Merger Control After CK Telecoms' (2021) 0 *Journal of Competition Law & Economics* 1, p 35.

¹⁵⁸ Carl Shapiro, 'The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years' (2010) 77 *Antitrust Law Journal* 77 *Antitrust Law Journal* 49, p 68.

¹⁵⁹ Elias Deutscher, 'Prometheus Bound? – The Uncertain Future of the Unilateral Effects Analysis in EU Merger Control After CK Telecoms' (2021) 0 *Journal of Competition Law & Economics* 1, p 37.

¹⁶⁰ *ibid*, p 37.

4.1.1.2 Important Competitive Force as an Aggressive Competitor Who Stands Out

Likewise, the concept of an ‘important competitive force’ in *CK Telecoms* produced legal and economic concerns. The General Court found that the Commission had misapplied the concept and thus significantly broadened the scope of the SIEC test, because any elimination of an important competitive force and the mere decline in the competitive pressures would amount to the elimination of an important competitive constraint. The General Court stated that the concept of an ‘important competitive force’ is meant to mean that the merging party must stand out from its competitors in terms of impact on competition.¹⁶¹ From a legal perspective, it is left unclear as to what does it take for a competitor to actually stand out as an important competitive force, advancing important competitive constraints in an oligopolistic market? The General Court did not provide guidance on how this more demanding standard of ‘particularly aggressive competitor’ is to be applied in practice. It only stated that modest gross subscriber additions,¹⁶² sustained, but modest market share growth,¹⁶³ the charging of lower prices for some, but not all services,¹⁶⁴ and the evidence of the firm’s historic role as a disruptive force¹⁶⁵ would be insufficient to support a finding of an ‘important competitive force’.¹⁶⁶ It did not provide clarity as to which levels of gross adds, market share growth or pricing performance would indicate the existence of an important competitive force.¹⁶⁷

¹⁶¹ Case T-399/16 *CK Telecoms UK Investments Ltd v European Commission* [2020] ECLI:EU:T:2020:217, paras 168, 169, 174.

¹⁶² *ibid*, paras 182–187.

¹⁶³ *ibid*, paras 192–196.

¹⁶⁴ *ibid*, paras 214–216.

¹⁶⁵ *ibid*, paras 219–224.

¹⁶⁶ Elias Deutscher, ‘Prometheus Bound? – The Uncertain Future of the Unilateral Effects Analysis in EU Merger Control After CK Telecoms’ (2021) 0 *Journal of Competition Law & Economics* 1, p 48.

¹⁶⁷ Elias Deutscher, ‘Prometheus Bound? – The Uncertain Future of the Unilateral Effects Analysis in EU Merger Control After CK Telecoms’ (2021) 0 *Journal of Competition Law & Economics* 1, p 48–49.

From an economic perspective, the interpretation of the General Court of an ‘important competitive force’ is focused on price. According to the Court, an important competitive force is a market player “competing particularly aggressively in terms of prices”.¹⁶⁸ This very narrow definition makes it applicable only to certain types of firms. It is difficult for the Commission to apply the concept, under such a narrow definition, to a firm that is not necessarily the most aggressive price competitor.¹⁶⁹ This approach is unsuccessful at taking into consideration other important limits to competition in differentiated product markets, such as quality and innovation. For example, innovation is typically met with more innovation. It is very likely that a firm who makes an innovative offering will force competitors to react and innovate without being the most aggressive price competitors.¹⁷⁰ By having an exclusive focus on aggressive price competition as the essential feature of an ‘important competitive force’, it can be argued that the General Court did not fully understand competitive dynamics in differentiated product markets.

As regards the General Court’s criticism that by assuming unilateral effects and a SIEC from the elimination of an important competitive force, the Commission would be in a position where it could deny a merger without analyzing the “possible elimination of the important competitive constraints that the merging parties exert upon each other”¹⁷¹ fails to acknowledge that mergers can result in considerable price increases even if the merging parties are not close competitors. This is due to a coined term by Kenneth Arrow and

¹⁶⁸ Case T-399/16, *CK Telecoms UK Investments Ltd v European Commission* [2020] ECLI:EU:T:2020:217, para 216.

¹⁶⁹ Case T-399/16, *CK Telecoms UK Investments Ltd v European Commission* [2020] ECLI:EU:T:2020:217, paras 214–216; Elias Deutscher, ‘Prometheus Bound? – The Uncertain Future of the Unilateral Effects Analysis in EU Merger Control After CK Telecoms’ (2021) 0 *Journal of Competition Law & Economics* 1, p 50.

¹⁷⁰ Elias Deutscher, ‘Prometheus Bound? – The Uncertain Future of the Unilateral Effects Analysis in EU Merger Control After CK Telecoms’ (2021) 0 *Journal of Competition Law & Economics* 1, p 50.

¹⁷¹ Case T-399/16, *CK Telecoms UK Investments Ltd v European Commission* [2020] ECLI:EU:T:2020:217, para 175.

other scholars in his tradition known as the cannibalization effect.¹⁷² Arrow and other scholars argued that mere product market competition leads to innovation. According to the effect, firms under competitive pressure will strive to produce better or more cost-efficient products and services than their competitors to outperform them.¹⁷³ In a competitive environment, a newly invented product will not cannibalize the firm's own profit as much as it would under a less competitive market structure.¹⁷⁴ In a competitive market, an invention will allow the inventor to gain sales from competitors and will thus be applied to a higher output.¹⁷⁵ Therefore, innovation on its own merit can cause prices to rise in each market, without the merging parties being close competitors.

To sum up, the General Court raised the threshold as regards the criterion of 'closeness of competition' to requiring merging entities to be 'particularly close' in order to arrive to finding a SIEC. At the same time, to establish an 'important competitive force', the entity has to stand out by being a particularly aggressive player in a given market. Interestingly, the Court set out these new restrictive definitions, but did not provide guidance as to how the new standards are to be satisfied in practice creating considerable legal uncertainty.

4.1.2 A Misunderstanding of Economic Theory and Going Against Precedent

The General Court's criticism of the Commission's assessment of quantitative evidence and the changes to the UPP test that it puts forward in

¹⁷² Kenneth J Arrow, 'Economic Welfare and the Allocation of Resources for Invention' in National Bureau Committee for Economic Research (eds), *The Rate and Direction of Inventive Activity: Economic and Social Factors* (Princeton University Press 1962), p 619-622.

¹⁷³ *ibid.*

¹⁷⁴ *ibid.*

¹⁷⁵ *ibid.*

the decision is arguably where the most significant changes to the SIEC test would be occurring if the General Court's decision is accepted by the CJEU.¹⁷⁶

The General Court puts forward arguments which make the use of the UPP method more challenging for the Commission.¹⁷⁷ The General Court makes it more difficult for the Commission, in the sense that it requires the Commission to expand its analysis beyond the restriction of competition between merging parties by also taking into account an assessment of whether and to what extent the merger will bring about efficiencies.¹⁷⁸ The General Court's criticism towards the Commission's use of the UPP method and its evident need to introduce a new category of standard efficiencies stems from its belief that an unlimited use of the quantitative UPP analysis may lead to a situation where practically every horizontal merger would be liable to fall amiss of the EUMR. According to the same thought process, any horizontal merger will result in positive UPP values because the analysis leaves aside offsetting factors such as entry, repositioning, and efficiencies.¹⁷⁹ It is based on these arguments, that the General Court in *CK Telecoms* requires the Commission to consider a new category of 'standard efficiencies' into its quantitative analysis.

By introducing the category of 'standard efficiencies' to the pricing analysis, the General Court also introduced an adjustment to the burden and standard of proof for efficiencies.¹⁸⁰ It proposed the efficiency credit as a burden-

¹⁷⁶ Elias Deutscher, 'Prometheus Bound? – The Uncertain Future of the Unilateral Effects Analysis in EU Merger Control After CK Telecoms' (2021) 0 *Journal of Competition Law & Economics* 1, p 56.

¹⁷⁷ Tilman Kuhn and Stefan Thomas, 'The More Economic Judicature: How the General Court has Recalibrated the Merger Gauge' (June 2020), p 6.

¹⁷⁸ *ibid.*

¹⁷⁹ Case T-399/16 *CK Telecoms UK Investments Ltd v European Commission* [2020] ECLI:EU:T:2020:217, paras 263, 270, 256-258, 263-265.

¹⁸⁰ Katarzyna Czapracka, 'No magic number' means 'no magic number': will the EU Court turn the tide on four-to-three mobile mergers in Europe?' (2021) 20 *Competition Law Journal* 65, p 76.

shifting device that determines when the burden of proving efficiencies shifts on the merging parties. The burden shift supposedly occurs after the Commission discharges its initial burden of proof by showing that the price effects arising from the merger cancel out the assumed standard efficiencies. This suggested burden and standard of proof for efficiencies raises a latitude of legal issues as it conflicts with the EUMR, the HMG as well as existing case law. The General Court introduced the new category of ‘standard efficiencies’ without having a legal basis for it.¹⁸¹ There is no basis for it in the EUMR nor in the HMG. Moreover, the General Court did not explicitly state the types of efficiencies that ‘standard efficiencies’ would cover. The new category is also not in line with the General Court’s own case law. In *Ryanair*¹⁸² and *Deutsche Börse*¹⁸³, the General Court endorsed both the allocation of the burden of proof and the evidentiary requirements for efficiencies set out in the Guidelines, which place the burden of proving efficiencies on the merging parties and require that the efficiencies claims “be verifiable such that the Commission can be reasonably certain that the efficiencies are likely to materialize”.¹⁸⁴ *Deutsche Börse* went further by preventing any association of the assessment of anticompetitive effects and efficiencies. The General Court supported a separate, two-stage analysis of anticompetitive effects and efficiencies brought about by a merger. In contrast to *Deutsche Börse*, the General Court in *CK Telecoms* overturns its previous precedents in order to link the assessment of anticompetitive effects with efficiencies.

¹⁸¹ Elias Deutscher, ‘Prometheus Bound? – The Uncertain Future of the Unilateral Effects Analysis in EU Merger Control After CK Telecoms’ (2021) 0 Journal of Competition Law & Economics 1, p 64.

¹⁸² Case T-342/07 *Ryanair Holdings plc v European Commission* [2010] ECLI:EU:T:2010:280.

¹⁸³ Case T-175/12 *Deutsche Börse AG v European Commission* [2015] ECLI:EU:T:2015:148.

¹⁸⁴ Case T-342/07 *Ryanair Holdings plc v European Commission* [2010] ECLI:EU:T:2010:280, paras 406, 427, 434; Case T-175/12 *Deutsche Börse AG v European Commission* [2015] ECLI:EU:T:2015:148, para 275; Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C 31/5, para 86.

The General Court's review of the Commission's quantitative evidence disregards that the UPP analysis has been developed to assess mergers in differentiated and not homogenous product markets.¹⁸⁵ The General Court's objection against the Commission's UPP analysis and the requirement of an efficiency credit are supposedly grounded in a misunderstanding of the economic theory underpinning the unilateral effects analysis and the UPP methodology.¹⁸⁶ Whilst it is true that any horizontal merger can produce positive UPP values, it does not mean that the use of the GUPPI will recognize all horizontal mergers as problematic.

Furthermore, the General Court found that the Commission had wrongly deemed segment-wide price increases between 5.7 percent and 7.3 percent as sufficiently significant to block the merger in question because this did not align with the Commission's previous clearance of mergers where it cleared mergers that gave rise to even greater price increases.¹⁸⁷ By referring to previous cases in order to question the Commission's finding of significant price increases, the General Court went against its own precedent. Previously, the General Court has held that "an applicant is not entitled to call the Commission's findings into question on the ground that they differ from those made previously in a different case, on the basis of a different notification and a different file, even where the markets at issue in the two cases are similar, or even identical".¹⁸⁸ Thus, the General Court was initially of the opinion that case decisions can come to altering results even where the markets are the same. The same way of thinking would have been useful in this case as well, because if one begins to compare indicative price rises between cases, the task becomes exceedingly difficult since the results of the UPP calculations are

¹⁸⁵ Elias Deutscher, 'Prometheus Bound? – The Uncertain Future of the Unilateral Effects Analysis in EU Merger Control After CK Telecoms' (2021) 0 *Journal of Competition Law & Economics* 1, p 57.

¹⁸⁶ *ibid.*

¹⁸⁷ *ibid.*, p 58.

¹⁸⁸ Case T-210/01 *General Electric Company v Commission of the European Communities* [2005] ECLI:EU:T:2005:456, para 118; Case T-158/00 *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland (ARD) v Commission of the European Communities* [2003] ECLI:EU:T:2003:246, paras 169–171.

specific to each case. Importantly, each merger should be assessed based on its own merits.

The introduction of a category of ‘standard efficiencies’ into the Commission’s price analysis as well as the assumptions made by the General Court regarding the Commission’s UPP methodology, and the significance of price increases illustrate major shortcomings by the General Court to clarify the SIEC test. The General Court did not back-up its arguments for the necessity of a category of ‘standard efficiencies’ for the use of the UPP test, nor did it back up its other assumptions and arguments with a legal basis.

4.1.3 Stricter Standard of Proof

The General Court tightens the standard of proof by stressing that the Commission is required to produce sufficient evidence to demonstrate with a ‘strong probability’ the existence of a SIEC following the concentration.¹⁸⁹ From a legal perspective, the stricter standard of proof is problematic as the General Court does not have a legal basis for it, similarly as the case with ‘standard efficiencies’ as we saw above. The General Court references AG Tizzano¹⁹⁰ and AG Jääskinen¹⁹¹ to support its argument for the stricter standard, but does not give any weight to AG Kokott’s interpretation of the standard of proof which emphasized the balance of probabilities standard in the *Bertelmann* decision.¹⁹² By making the standard of proof stricter than in the case where a SIEC is “more likely than not to give rise to anticompetitive

¹⁸⁹ Case T-399/16 *CK Telecoms UK Investments Ltd v European Commission* [2020] ECLI:EU:T:2020:217, para 118.

¹⁹⁰ Case C-12/03 P *Commission of the European Communities v Tetra Laval BV* [2005] ECLI:EU:C:2004:318, Opinion of AG Tizzano, paras 72–77.

¹⁹¹ Case C-559/12 P *French Republic v European Commission* [2014] ECLI:EU:C:2013:766, Opinion of AG Jääskinen, paras 34–35.

¹⁹² Case C-413/06 P *Bertelsmann AG and Sony Corporation of America v Independent Music Publishers and Labels Association (Impala)* [2008] ECLI:EU:C:2007:790, Opinion of AG Kokott, paras 209–211; Elias Deutscher, ‘Prometheus Bound? – The Uncertain Future of the Unilateral Effects Analysis in EU Merger Control After CK Telecoms’ (2021) 0 *Journal of Competition Law & Economics* 1, p 25.

effects”¹⁹³ on the basis of a ‘balance of probabilities’, but is less strict than a standard of proof based on “being beyond all reasonable doubt”,¹⁹⁴ the General Court departs from the standard of proof it has previously advocated for.

Legal certainty is also called into question as to the scope of the new ‘strong probability’ standard of proof. The General Court does not determine whether the new standard of proof is meant to apply to all mergers or only to certain types of mergers. For example, it is left to be seen whether the new standard of proof is meant to apply to horizontal mergers or only to mergers in which the Commission relies on several theories of harm.¹⁹⁵

From an economic perspective, the requirement of a stricter standard of proof is also questionable as regards to the percentage at which a SIEC is likely to materialize. Establishing the standard of proof is already tricky in the sense that the assessment of potential anticompetitive effects of mergers requires making estimations about future scenarios, hence making the setting of the evidence threshold evidently a difficult task. The General Court explains in the decision that in order to denounce a merger, the Commission must show that a SIEC will occur with a probability in the range between a ‘balance of probabilities’ and ‘beyond all reasonable doubt’.¹⁹⁶ Such an indication of the requisite standard of proof does not help in determining the actual percentage at which a SIEC can be found to substantiate.

Without a strong legal and economic backing, the standard of proof is left vague. The shortcomings of the General Court’s argumentation are not difficult to overcome if the General Court would simply develop its

¹⁹³ Richard Whish, David Bailey, *Competition Law* (9th edition Oxford University Press, 2018) p 938.

¹⁹⁴ Case T-399/16 CK Telecoms UK Investments Ltd v European Commission [2020] ECLI:EU:T:2020:217, para 118.

¹⁹⁵ *ibid.*

¹⁹⁶ *ibid.*

argumentation a little further. As it stands now however, there is some lingering uncertainty as to the actual thresholds that must be achieved.

4.2 Benefits

Despite the numerous legal and economic drawbacks of the *CK Telecoms* decision, the decision is still a welcome reaction from the General Court to provide some guidance on the application and interpretation of the SIEC test. There are two main benefits of the decision: (1) clarity on aspects of the SIEC test and (2) the creation of a more favorable environment for further concentration.

If one does not scrutinize the argumentation of the General Court to the very core, the first benefit of the decision on a general level, is the manner in which it “clarified” a number of the concepts part of the SIEC test that were discussed in Chapter 3. For example, it clarified the standard of proof required for finding a SIEC and reformulated the concepts of an ‘important competitive force’ and ‘closeness of competition’. It is true that the Court in attempting to clarify the various parts of the test did not always correctly back up its arguments. Mentioning clarity as a benefit of the *CK Telecoms* judgment may therefore seem a contradictory statement, considering the above-mentioned drawbacks largely focused on the *unclarity* that the General Court’s arguments produced. Nonetheless, it can be argued that in its attempt to help clarify the numerous concepts, *CK Telecoms* in fact pushed the Commission a step closer towards resolving the notions left unclear. Like two sides of a coin, the drawbacks mentioned in the previous section can also be relatively seen as benefits to a certain extent.

The second benefit of the decision is that it creates a favorable environment for further concentration. The General Court’s attempt to raise the bar for the Commission before it can prohibit a merger has been seen as a positive development taking into consideration the negatively toned discussions

surrounding the Commission's allegedly arbitrary discretion and interventionist approach. The discussion was led by lawyers practicing in the field of merger control who have been concerned for several years that the manner in which the Commission has applied key economic concepts in its use of the SIEC test as well as the approach to evidence the Commission has taken, has conferred too much discretion to its being. Many believed that the Commission's approach made it impossible to distinguish a clear test as it became impossible to know whether a merger would give rise to competition concerns or not.¹⁹⁷ Therefore, in light of the Commission's enforcement becoming stronger and gaining momentum, a Court decision providing some kind of clarity as to the application of the test and one that would potentially restrict the Commission's ever-growing power over mergers was very much needed. Hence, even though the General Court's decision can be criticized for its lack of guidance, detail and reference to literature, some indication of the direction in which future merger control in the EU would be going was necessary.

CK Telecoms has created a favorable environment for further concentration which it did by severely limiting the Commission's ability to easily prohibit mergers by making the standard in the SIEC test more restrictive. Most certainly, the telecoms sector will benefit from the General Court's argumentation if the decision is upheld by the CJEU. The sector throughout Europe continues to explore the possibilities of concentration in the face of 5G networks. With the *CK Telecoms* decision, firms wishing to merge within the telecoms sector can be relieved that there is an actual possibility that their merger will be cleared since it will be much harder for the Commission to prove a SIEC. Moreover, prior to the decision, it seemed as if the Commission preferred Member States to have four MNOs in a market structure as this would supposedly deliver the most optimal competitive outcomes. The

¹⁹⁷ Amaryllis Müller, Thomas Wessely, James Aitken, Michele Davis, Onno Brouwer, Koo Asakura, 'CK Telecoms judgment – a watershed for European merger control' (*Freshfields Bruckhaus Deringer*, 29 May 2020) < <https://transactions.freshfields.com/post/102g8hg/ck-telecoms-judgment-a-watershed-for-european-merger-control> > accessed 5 May 2022.

General Court however assured that this was not the case.¹⁹⁸ It also reinforced that the telecoms sector would have motivations to invest as an outcome of consolidation, rather than using consolidation as a tool to engage in less ambitious development plans. Now with the backing of the General Court, undertakings in the telecoms sector throughout the EU have a greater possibility of achieving scale at pan-European level.¹⁹⁹ Importantly, the *CK Telecoms* decision is not only limited in application to the telecoms sector rather it has a reach to other sectors as well. If the General Court's judgment is upheld by the CJEU, it has the potential to clarify the SIEC tests application to many EU mergers assessed by the Commission.

¹⁹⁸ *ibid.*

¹⁹⁹ Peter Alexiadis, David Wood, Iseult Derème, 'General Court Dismantles European Commission's Tough Approach to Mobile Mergers' (*Gibson Dunn*, 28 May 2020) <<https://www.gibsondunn.com/general-court-dismantles-european-commissions-tough-approach-to-mobile-mergers/>> accessed 10 May 2022.

5. Conclusion

The aim of this thesis was to explore when an impediment to effective competition in EU merger control is significant. It has been found that the answer to this question is not so simple and in fact there is no complete answer to this question at all. Since the introduction of the SIEC test in 2004, the Commission has been widely criticized by scholars and practitioners for its broad application of the SIEC test in assessing proposed mergers in oligopolistic markets. It has been largely criticized for finding that all players are necessarily ‘close and important’ competitors and for not establishing limiting principles for finding a ‘significant’ impediment. To respond to the outcries against the Commission’s arbitrary discretion and increasingly interventionist approach, the General Court delivered a decision in *CK Telecoms* that provided some clarity as to the interpretation that is to be given to the SIEC test. This was the first time that the General Court reviewed a decision in what have been previously called ‘gap cases’.

The judgment of the General Court was met with supporters and opponents. The benefits of the new frame of reference established in *CK Telecoms* were two-fold. The decision was seen to provide at least some clarity as to certain aspects of the SIEC test and by making mergers more difficult to prohibit in the future, the decision created a more favorable environment for undertakings to continue to merge. The judgment was also met with criticism. It was condemned for creating even more legal and economic uncertainty surrounding the SIEC test than was the situation prior to the judgment. The main shortcomings of *CK Telecoms* were that the General Court created a more demanding standard for finding ‘closeness of competition’ and an ‘important competitive force’; for misunderstanding the economics that underlie the quantitative analysis conducted by the Commission; and made the standard of proof for the Commission much higher than was perhaps necessary. The General Court did not sufficiently back up its arguments on points of law and in its review of economic evidence which leads one to think

that it is only fair that the decision is criticized and that the Commission has challenged the decision. If the General Court expects the Commission to better reason its decisions, the same can be expected from the General Court.

It remains unclear as to whether the CJEU will uphold the General Court's decision. If it will, the decision will not only require a re-organization of the entire framework on which the SIEC test is based, for example the HMG, but it may also necessitate EU competition law enforcers and practitioners to reconsider the usefulness of the methods that are used in assessing anti-competitive effects.

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