EU merger control between law and discretion: when is an impediment to effective competition *significant*?

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1. Introduction

Since the adoption of Regulation 139/2004, the compatibility of a concentration with the internal market does not depend on a finding of dominance.[1] As the law stands, a transaction may lead to a significant impediment to effective competition below that threshold. The move away from a dominance-based test was, by and large, a response to the concern that such an approach would fail to capture some potential anticompetitive effects arising from merger activity.[2] It was argued, in particular, that requiring evidence of the creation or strengthening of an (individual or collective) dominant position would leave a 'gap' in some oligopolistic markets that are not conducive to collusion. It was also claimed, when Regulation 139/2004 was adopted, that the new test would bring the EU system in line with the US regime and mainstream economics.[3]

It did not take long for the European Commission (hereinafter, the 'Commission') to raise concerns in 'gap' cases in its administrative practice.[4] In subsequent years, these cases have become a part of the landscape in the field of merger control. Any new issues raised in them have been addressed, by and large, in a pragmatic and transactional way, that is, by means of negotiated commitments between the parties and the Commission. This reality is not surprising given the time-sensitive nature of mergers and acquisitions and firms' incentives to obtain clearance (even with conditions and obligations). As a result, there is still uncertainty around some of the legal questions arising in 'gap' cases, some of which have only recently come to the fore.

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[1] See Article 2 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1.
[2] Ibid, Recital 25. See also Green Paper on the Review of Council Regulation (EEC) No. 4064/89 COM(2001) 745.
[3] For a discussion, see Giorgio Monti, 'The New Substantive Test in the EC Merger Regulation – Bridging the Gap Between Economics and Law?' (2008) 10 *Cambridge Yearbook of European Legal Studies* 263.
[4] Commission Decision of 26 April 2006 (Case No COMP/M.3916 – *T-Mobile Austria/Tele.ring*).

The implications of the adoption of the new test – and the theoretical and practical challenges to which 'gap' cases give rise – are particularly apparent when a transaction involves actual or potential competitors. By definition, a horizontal merger results in a reduction (however modest) of the competitive pressure faced by firms.[5] To the extent that Regulation 139/2004 is concerned with the creation or strengthening of market power,[6] these concentrations necessarily lead to an 'impediment to effective competition' within the meaning of Article 2. By the same token, their compatibility with the internal market hinges on whether the impediment to effective competition is 'significant'. The appreciability of the effects of the concentration on the relevant markets becomes, in other words, the criterion that determines their lawfulness.

Drawing the line between significant and insignificant impediments to effective competition is a complex task. In real-world markets, all participants enjoy at least some degree of market power and thus the ability to affect, to a greater or lesser extent, the parameters of competition. The challenge, from a merger control perspective, is to define the point at which the creation or strengthening of market power is sufficiently important to lead to appreciable effects. Put differently, the challenge is to identify the instances in which the new entity's ability to influence the parameters of competition is significant enough to justify action. In this sense, it would be necessary to provide clarity about the instances in which the ability to influence, post-merger, the parameters of competition would warrant intervention and those in which it would not.

The difficulty of the task is compounded by a number of factors. The assessment of the impact of mergers must be conducted on a case-by-case basis and is context-specific. It is not obvious to define, ex ante, workable proxies that can be applied, across the board, to all markets

[5] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para 24.
[6] Ibid, para 8.

and industries. Regulation 139/2004 states, in its Preamble, that the relatively small market share of the parties is an indication that a transaction is presumptively compatible with the internal market and thus unlikely to yield significant effects.[7] In the same vein, the Preamble points to a (joint) market share of 25% as the threshold below which the parties' shares are in principle 'limited'.[8] The Commission's practice, however, shows that concentrations can give rise to concerns below the said 25% threshold.[9] This is not surprising, considering that market share thresholds are known to be relatively crude proxies for market power.

As a result of the case-by-case, context-specific nature of the assessment, the evaluation of the likely impact of transactions has so far been conducted in an unstructured way, and this, on the basis of the qualitative criteria defined by the Commission in its Guidelines[10] and, often, of quantitative tools.[11] In such circumstances, it may not be obvious for the parties to anticipate the outcome of an investigation or, more generally, the instances in which a merger can be expected to give rise to a finding of significant effects. What is more, assessing the impact of transaction is the privileged realm of the so-called 'complex economic assessments'.[12] The Court of Justice (hereinafter, the 'Court' or the 'ECJ') has consistently ruled that such assessments are only controlled for 'manifest errors'.[13] As a result, it may be difficult for undertakings to meaningfully challenge the findings of the Commission in practice.

This paper argues that the factors mentioned above – namely the case-by-case, unstructured nature of the assessment and the inherent complexity of some of the aspects of

[7] Regulation 139/2004 (n 1), Recital 32.
[8] Ibid.
[9] Commission Decision of 12 December 2012 (Case COMP/M.6497 – *Hutchison 3G Austria/Orange Austria*).
[10] Horizontal Merger Guidelines (n 5), paras 24-38.
[11] Thomas Buettner, Giulio Federico and Szabolcs Lorincz, 'The Use of Quantitative Economic Techniques in EU Merger Control' (2016) 31 Antitrust Magazine 68; and Ioannis Lianos and Christos Genakos, 'Econometric Evidence in EU Competition Law: An Empirical and Theoretical Analysis (2012) CLES Working Paper Series 6/2012, available at https://ssrn.com/abstract=2184563.
[12] Andriani Kalintiri, 'What's in a name? The marginal standard of review of "complex economic evaluations" in EU competition enforcement' (2016) 53 Common Market Law Review 1283; and Marc van der Woude, 'Judicial Control in Complex Economic Matters' (2019) 10 Journal of European Competition Law & Practice 415.
[13] Case 42/84 *Remia BV and others v Commission*, EU:C:1985:327, para 34; Case C-12/03 P *Commission v Tetra Laval BV*, EU:C:2005:87, para 39.

the inquiry – has the potential to change (and has arguably changed) the nature of EU merger control. More precisely, they could make the regime revolve around discretion (even if only de facto). As a matter of principle, there should be little doubt that the question of whether a transaction is likely to lead to a significant impediment to effective competition within the meaning of Article 2 of Regulation 139/2004 is an issue of law and, as such, subject to full review before the EU courts. In practice, however, the nature of the assessment may give the Commission such leeway that it may be in a position to decide (subject to limited review for manifest errors) which operations are compatible with the internal market and which are not.

It would not be easy to reconcile a reality of de facto discretion with Regulation 139/2004, which was not designed to give such powers to the Commission. It would also be difficult to square, more broadly, with the EU legal order. This background helps explain the tensions that would lead to the judgment in *CK Telecoms*.[14] Administrative action failed to survive scrutiny in that case, it is submitted, because the Commission had construed Article 2 of Regulation 139/2004 in a way that gave it the power to declare the prima facie incompatibility with the internal market of any horizontal concentration. The judgment also exposed the difficulty of crafting clear and predictable criteria to define the instances in which a merger in a 'gap' case would significantly impede effective competition and to allow for the meaningful review of administrative action. The purpose of this piece is to explore the different approaches that can be followed to outline the scope of Article 2 of Regulation 139/2004 in 'gap' cases and to make sense of the interpretation offered by the General Court (hereinafter, 'GC') in *CK Telecoms*.

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

2. Market power and 'gap' cases under Regulation 139/2004

2.1. *The substantive test under Regulation 139/2004*

The substantive test enshrined in Regulation 139/2004 marked a departure from Regulation 4064/89.[15] The assessment of the compatibility of concentrations with the internal market no longer hinges on whether they would lead to the creation or the strengthening of a (single or collective) dominant position.[16] Instead, the evaluation must revolve around whether they would 'significantly impede effective competition'.[17] The abandonment of a dominance-based test was explained at the time by the limits of the notion, which would be unable to capture all potential scenarios in which concentrations could lead to anticompetitive effects. In this sense, it was argued that Regulation 4064/89 opened a 'gap' in the EU regime. Two factors explain the emergence of the said 'gap'.

First, the notion of single dominance as defined by the Court in *Hoffmann-La Roche* only captures instances in which the degree of market power is substantial.[18] As a result, harm to competition resulting from the strengthening of a lower degree of market power would go unscrutinised under that test. Second, the *Airtours* judgment defined the notion of collective dominance by reference to the economic concept of tacit collusion.[19] By choosing such an interpretation of the notion, the GC clarified that Regulation 4064/89 did not capture the strengthening of market power, absent single dominance, in a non-collusive oligopoly.[20]

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[15] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] OJ L395/1.
[16] Monti (n 3).
[17] Articles 2(2) and 2(3) of Regulation 139/2004 (n 1).
[18] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission*, EU:C:1979:36, para 38.
[19] Case T-342/99 *Airtours plc v Commission*, EU:T:2002:146, para 62. These same conditions were endorsed by the Court in Case C-413/06 P *Bertelsmann AG and Sony Corporation of America v Impala*, EU:C:2008:392, para 123.
[20] Luis Ortiz Blanco, *Market Power in EU Antitrust Law* (Hart Publishing 2011); and Nicolas Petit, *Oligopoles, collusion tacite et droit communautaire de la concurrence* (Bruylant, 2007).

Insofar as it did, it confirmed the existence of the so-called 'gap' in the regime. What is more, the conditions under which a concentration leads to the creation or strengthening of a collective dominant position are notoriously difficult to establish by the Commission.[21]

The test laid down in Article 2 of Regulation 139/2004 – the 'significant impediment to effective competition' or 'SIEC' test – allows the Commission to capture the so-called 'gap' cases. One of the practical consequences of the adoption of this test is that the assessment of the impact of transactions no longer depends on a finding of dominance. The creation or strengthening of a dominant position is just one of the scenarios that gives rise to intervention (albeit the default one[22]). The analysis under Regulation 139/2004 is structured around two potential concerns: coordinated and non-coordinated (or unilateral) effects.[23] The former corresponds to the criteria defined in *Airtours*.[24] The latter, in turn, captures both 'gap' and single dominance cases.

The assessment of non-coordinated effects amounts, in essence, to ascertaining whether, following the merger, one or more of the remaining players on the relevant market(s) would have, individually, the ability to negatively affect the relevant parameters of competition (including price, output, quality and innovation); that is, whether the transaction would lead to an increase in market power.[25] In practice, the qualitative evaluation of non-coordinated effects is undertaken in accordance with a number of factors, which are summarised by the Commission in its Guidelines on horizontal and non-horizontal mergers. These factors provide indications, by proxy, of the competitive constraints to which the new entity would be subject following the completion of the merger.

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[21] For an extensive discussion, see Nicolas Petit, 'The Oligopoly Problem in EU Competition Law' in Damien Geradin and Ioannis Lianos (eds), *Handbook on European Competition Law: Substantive Aspects* (Elgar 2013).
[22] Articles 2(2) and 2(3) of Regulation 139/2004 (n 1).
[23] Horizontal Merger Guidelines (n 5); and Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C265/6.
[24] See Horizontal Merger Guidelines (n 5), paras 39-57.
[25] Horizontal Merger Guidelines (n 5), para 8.

It makes sense to discuss, at greater length, the criteria for the assessment of non-coordinated concerns in relation to horizontal mergers (that is, concentrations involving actual or potential competitors). This is so because the consequences of the adoption of the SIEC test are manifested more obviously and immediately in the context of such transactions. As far as non-horizontal concentrations are concerned, the creation or strengthening of market power does not follow directly or inevitably from the amalgamation of the two firms' activities. In such scenarios, non-coordinated effects necessitate the implementation of a foreclosure strategy.[26] Accordingly, the Commission would need to establish the new entity's ability and incentive to engage in the strategy in question, and this, on the basis of a robust theory of harm.

Horizontal transactions, on the other hand, result, by their very nature, in the loss of a source of competitive pressure (by the firms involved in it and/or their rivals). Considering that, in real-world markets, all firms enjoy at least some degree of market power, any loss of competitive pressure inevitably leads to the strengthening of market power of (at least) the merging parties. By the same token, any transaction involving actual or potential competitors can be said to lead to an 'impediment to effective competition' within the meaning of Article 2 of Regulation 139/2004. To the extent that this is the case, the SIEC test potentially has a limitless scope of application. In principle, any horizontal merger can be seen as prima facie incompatible with the internal market. For the same reason, the definition of clear criteria, particularly concerning 'gap' cases, becomes necessary.

The Horizontal Merger Guidelines identify an unstructured set of factors against which the likelihood of non-coordinated effects is to be evaluated by proxy. Some of these factors concern the competitive pressure to which the new entity (and/or other market players) would be subject following the completion of the transaction. These include not only market shares[27]

[26] Non-Horizontal Merger Guidelines (n 23), para 18.
[27] Horizontal Merger Guidelines (n 5), para 27.

and the closeness of competition between the parties,[28] but also the status of one of them as a 'maverick'[29] and potential competition.[30] Other proxies relate to customers' and/or rivals' ability to respond (by switching suppliers and/or by increasing supply) if the conditions of competition were to be affected (for instance, by means of quality degradation or a price increase).[31] A final set of criteria concerns the countervailing power of buyers and/or sellers.[32]

2.2. *The challenge of defining boundaries in 'gap' cases*

The application of the factors defined in the Horizontal Merger Guidelines is relatively straightforward when the analysis focuses on whether a transaction creates or strengthens a position of single dominance. The contours of this notion have been defined over the years by the Court when interpreting Article 102 TFEU. In addition, the single most reliable proxy – a market share of 50% or more[33] – is easy to administer. As a result, it is possible to gain a reasonably clear idea, in theory and practice, of the instances in which a merger is likely to give rise to anticompetitive outcomes. By the same token, the boundaries of administrative action are relatively well defined when the notion of dominance is at stake. Controversies would typically focus on the definition of the relevant market and about whether the features of the relevant market have been sufficiently taken into consideration.

The assessment is far less straightforward in relation to 'gap' cases. Three main reasons explain this reality. The first and primary one has already been mentioned above. All firms enjoy some degree of market power in real-world markets. As a result, any merger between actual or potential competitors leads, in principle, to an 'impediment to effective competition'.

[28] Ibid, paras 28-30.
[29] Ibid, paras 37-38.
[30] Ibid, paras 36 and 68.
[31] Ibid, paras 31-35.
[32] Ibid, paras 64-67.
[33] Case C-62/86 *AKZO Chemie BV v Commission*, EU:C:1991:286, para 60.

A second reason is the paucity of the case law outlining the scope of the SIEC test in 'gap' cases. Contrary to what is true of dominance, there is no body of precedents defining the notion of 'significant impediment to effective competition' in such instances (in fact, the *CK Telecoms* case is the first in which the EU courts were presented with the opportunity to engage with it). In addition, the Guidelines on horizontal and non-horizontal mergers do not lay down a structured and administrable set of criteria that makes it possible to anticipate the instances in which 'gap' cases give rise to concerns. The proxies described in these documents merely identify the factors that might (or might not) be relevant in a concrete case. The extent to which they are pertinent in particular scenarios, how they are applied and how they are weighed against one another is evaluated on a case-by-case basis by the Commission.

Third, economic analysis does not readily provide the basis for a structured framework against which the likely impact of transactions can be established. In this sense, 'gap' cases are different from collective dominance ones. The criteria to determine whether a transaction can be expected to create or strengthen a situation of tacit collusion were well established in the literature when the *Airtours* judgment was delivered. More importantly, the insights from economic theory can be converted, relatively easily, into an operational set of cumulative conditions.[34] The same is not true of 'gap' cases. Economic theory suggests that mergers in non-collusive oligopolies below the threshold of dominance can be both pro- and anticompetitive overall, and that and that a context-specific evaluation is necessary to decide which of the two effects is likely to prevail in a concrete scenario.[35]

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[34] Marc Ivaldi and others, *The Economics of Tacit Collusion*, Final Report for DG Competition (March 2003).

[35] Pascale Déchamps and Maurice de Valois Turk, 'Mixed signals? Where does the Hutchison Judgment Leave Economic Analysis of Non-Coordinated Effects?' (2020) 11 Journal of European Competition Law & Practice 531; and, more generally, Simon Bishop and Mike Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement* (Sweet & Maxwell 2010), 7-020-7-047.

2.3. *The elusive role of appreciability and efficiencies*

As can be seen, the boundaries of the SIEC test are not obvious to define in 'gap' cases. As a matter of principle – and insofar as all firms enjoy some degree of market power – its scope of application is potentially limitless. In theory, however, administrative action in 'gap' cases could be constrained in two main ways. First, Article 2 of Regulation 139/2004 demands that an impediment to effective competition be 'significant' for intervention to be justified under the EU regime. Accordingly, not all instances in which competitive pressure is reduced are caught by the provision (or at least not in principle). The question of whether the impact on competition is likely to be significant becomes, in 'gap' cases, a central aspect of the assessment. This is so, in particular, in relation to horizontal mergers. To the extent that a transaction between actual or potential rivals reduces competitive pressure and thus leads to an impediment of effective competition, the only remaining question, in theory, is whether such an impediment is an appreciable one.

The above said, it may not be easy to draw the line between significant and insignificant impediments in practice. Insofar as this is the case, the appreciability criterion is not necessarily helpful in the very borderline cases in which it would be at stake. The proxies on the basis of which significance is – and has been – typically established are relatively crude and, as such, of limited assistance in individual instances. The experience acquired in the context of the enforcement of Article 101 TFEU provides a helpful illustration of this point. As is true of merger control, an agreement between undertakings must have appreciable effects on competition for it to be caught by the prohibition.[36] Decades of experience suggest that it is far from easy to identify the circumstances in which the restrictive impact of a practice becomes

[36] Case 5/69 *Franz Völk v S.P.R.L. Ets J. Vervaecke*, EU:C:1969:35; and Case C-226/11 *Expedia Inc. v Autorité de la concurrence and others*, EU:C:2012:795.

significant and thus triggers the application of Article 101(1) TFEU. Typically, the Commission has defined, by proxy, the instances in which effects are unlikely to be appreciable. In the successive versions of its De Minimis Notice[37] and a series of regulatory and soft law instruments, the authority has set a market share threshold below which a restriction of competition cannot be expected (or at least not in principle).[38]

The limits of this crude proxy have become apparent in the context of merger control. Just like the regulatory and the soft law instruments described above, the Preamble to Regulation 139/2004 relies on market shares to rule out anticompetitive effects in certain instances. More precisely, it lays down a presumption whereby a concentration is not liable to have anticompetitive effects where the joint share of the merging parties is below 25%.[39] The Commission refers to a similar proxy in its Non-Horizontal Merger Guidelines. Thus, a vertical or conglomerate transaction is deemed unlikely to give rise to concerns where the share of the new entity in each of the relevant markets is below 30%.[40] This threshold is inspired from the one applying in the context of vertical restraints.[41] In addition, both sets of Guidelines rely on proxies based on market concentration (that is, the Herfindahl-Hirschman Index) and the degree to which the transaction adds to the said concentration.[42]

Even though they are useful to provide a rough indication of the instances in which a transaction is unlikely to give rise to significant effects, market share and HHI-based proxies, in and of themselves, do not shed sufficient light on when the impact of a merger is likely to be appreciable, in particular at the margin. By their very nature, they are incapable of taking into account the specificities of the relevant market and the industry in which the parties

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[37] Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union [2014] OJ C291/1.
[38] See also Guidelines on vertical restraints [2010] OJ C130/1; and Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1.
[39] Regulation 139/2004 (n 1), Recital 32.
[40] Non-Horizontal Merger Guidelines (n 23), para 25.
[41] Guidelines on vertical restraints (n 38), para 23.
[42] Horizontal Merger Guidelines (n 5), paras 19-21; and Non-Horizontal Merger Guidelines (n 23), para 25.

operate. In the field of merger control, moreover, there is no legislation comparable to block exemption regulations, whereby some broad categories of transactions are declared to be compatible with the internal market. Thus, market share-based tools are not dispositive – at least not in the field of EU merger control. In fact, the Commission has already concluded that a transaction may lead to a significant impediment to effective competition even where the joint market share of the merging parties remains below 25%.[43]

There is a second way in which the potentially boundless scope of the SIEC test could be limited, which is through the so-called 'efficiency defence'.[44] As acknowledged in the Preamble of the Regulation and the two sets of Guidelines, the efficiency gains are relevant when pondering the impact of a transaction on competition.[45] Accordingly, where the pro-competitive gains outweigh any likely anticompetitive effects, the said transaction is compatible with the internal market.[46] The burden of adducing evidence to this effect lies with the parties.[47] One would expect that the 'efficiency defence' would play a particularly prominent role in relation to 'gap' cases, considering that they create or strengthen a relatively modest degree of market power. In such scenarios, it is more likely that their net effect will be overall pro-competitive.

The reality of almost two decades of enforcement of Regulation 139/2004 reveals that the 'efficiency defence' has played no meaningful role in the Commission's decision-making practice. A careful analysis of administrative action reveals that there has not been a single

[43] *Hutchison 3G Austria/Orange Austria* (n 9), para 92.
[44] See Stefan Thomas, 'The Known Unknown: In Search for a Legal Structure of the Significance Criterion of the SIEC Test' (2017) 13 Journal of Competition Law & Economics 346; Lars-Hendrik Röller, 'Efficiencies in EU Merger Control: Do They Matter?', in Philip Lowe and Mel Marquis (eds) European Competition Law Annual 2010: Merger Control in European and Global Perspective (Hart Publishing 2013); and David Cardwell, 'The Role of the Efficiency Defence in EU Merger Control Proceedings Following UPS/TNT, FedEx/TNT and UPS v Commission' (2017) 8 Journal of European Competition Law & Practice 551.
Merger Control in European and Global Perspective
[45] Regulation 139/2004 (n 1), Recital 29; and Horizontal Merger Guidelines (n 5), paras 76-88.
[46] Regulation 139/2004 (n 1), Recital 29: '[…] It is possible that the efficiencies brought about by the concentration counteract the effects on competition, and in particular the potential harm to consumers, that it might otherwise have and that, as a consequence, the concentration would not significantly impede effective competition […]'.
[47] Ibid.

transaction that has been cleared solely on grounds that the pro-competitive gains resulting from it are sufficient to outweigh a prima facie significant impediment to effective competition.[48] Where efficiency gains have been acknowledged, they have not been deemed sufficient, alone, to justify a declaration of compatibility.[49] In practice, transactions are cleared either when they are found to be unlikely to have anticompetitive effects or because the parties offer remedies that are sufficient to address any potential concerns.

2.4. *A reality that is unique to merger control*

One could reasonably argue that the challenge of distinguishing between significant and insignificant effects in 'gap' cases is not unique to merger control. Article 101 TFEU is a provision comes to mind immediately. Just like Regulation 139/2004, a finding of anticompetitive effects within the meaning of Article 101(1) TFEU is not contingent on establishing that the agreement would create or strengthen a dominant position. The threshold of restrictive effects under the provision is known to be lower than that of dominance.[50] As is true of the evaluation of the impact of mergers under Regulation 139/2004, there is some uncertainty about how the analysis is conducted under Article 101(1) TFEU. Historically, the Commission had a tendency to define the notion of restriction of competition in an overly expansive manner, by equating (in contradiction with the case law) a restriction of a firm's freedom of action and an anticompetitive effect.[51]

[48] For a systematic overview see Pablo Ibáñez Colomo, *The Shaping of EU Competition Law* (Cambridge University Press 2018), Chapter 5.
[49] Commission Decision of 8 January 2016 (Case COMP/M.7630 – *Fedex/TNT*), paras 498-588; and Commission Decision of 27 November 2018 (Case M.8792 – *T-Mobile NL/Tele2 NL*), paras 887-910.
[50] Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97, para 26.
[51] Ibáñez Colomo (n 48), Chapter 3.

Following the adoption of Regulation 1/2003 and the modernisation of the EU competition law regime,[52] there is precious little guidance about how the impact of agreements is evaluated. Since 2004, the Commission has focused its resources on practices that it deems restrictive by object, and thus do not require an assessment of their effects.[53] The same can be said regarding the application of Article 101(3) TFEU. The Commission has not adopted a single 'finding of inapplicability' decision concluding that the pro-competitive gains resulting from an agreement outweigh any actual or likely anticompetitive effects.[54] As is true under Regulation 139/2004, a formal finding that an agreement amounts to a restriction of competition, whether by object or effect, leads, in practice, to the conclusion that Article 101(1) TFEU has been infringed.

In spite of the above, the situation under Regulation 139/2004 and Article 101 TFEU is not comparable. This is so, first, because of the differences concerning the enforcement model. Whereas the merger control regime demands the notification of transactions with an EU dimension (which are systematically assessed by the Commission),[55] the application of Article 101 TFEU relies, by and large, on the self-assessment of their practices by firms.[56] It is for firms to evaluate whether an agreement has restrictive effects and/or whether it fulfils the conditions set out in Article 101(3) TFEU. Accordingly, only a minuscule fraction of practices is ever subject to scrutiny by the Commission (or national competition authorities). The fact

[52] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L1/1.

[53] Damien Gerard, 'The Effects-Based Approach under Article 101 TFEU and Its Paradoxes: Modernisation at War with Itself?' in Jacques Bourgeois and Denis Waelbroeck (eds.), *Ten years of effects–based approach in EU competition law – State of play and perspectives* (Bruylant 2012); and Anne C. Witt, 'The enforcement of Article 101 TFEU: What has happened to the effects analysis?' (2018) 55 Common Market Law Review 417.

[54] See Article 10 of Regulation 1/2003 (n 52). The closest the Commission has come to adopting a finding of inapplicability is the Communication from the Commission Guidelines on the optimal and rational supply of medicines to avoid shortages during the COVID-19 outbreak [2020] OJ C116I/1. See also the comfort letters issued by the Commission, including Comfort letter: coordination in the pharmaceutical industry to increase production and to improve supply of urgently needed critical hospital medicines to treat COVID-19 patients COMP/OG – D(2020/044003).

[55] Article 4 of Regulation 139/2004 (n 1).

[56] Article 1 of Regulation 1/2003, which provides that no agreements that satisfy the conditions set out in Article 101(3) TFEU shall not be prohibited, with no prior decision being required to that effect.

that ‘by object’ conduct has been prioritised by competition law agencies only adds to this trend. A typical borderline case, which is routinely scrutinised under Regulation 139/2004, is exceedingly unlikely to be examined by European competition authorities.

Second, the Commission has issued a wealth of regulatory and soft law instruments that assist firms in the self-assessment of their behaviour and that shed light on the instances in which anticompetitive effects are likely to arise and/or in which Article 101(3) TFEU can be expected to come into play. The most obvious advantage of formal regulatory instruments is that they provide the legal certainty that a Recital in a Preamble cannot. An agreement that falls within the scope of a Block Exemption Regulation is compatible with Article 101 TFEU.[57] If the Commission is to take action against an agreement falling within the scope of a regulation, it would have to withdraw the exemption to the undertakings concerned, and this in accordance with the procedure set out in the instrument itself.[58]

Soft law instruments are also valuable, even though they are unable to provide the same degree of legal certainty. To begin with, these instruments are substantially more detailed than the merger Guidelines. The proxies for which the former provide are tailored to different types of arrangements (more precisely, the market share thresholds vary depending on the nature of the agreement and the level of the value chain involved[59]) and the various sets of guidelines offer concrete illustrations about how the assessment of the compatibility of the agreement with Article 101 TFEU is to be conducted based on, inter alia, the parties’ market power, the nature of the product and the features of the relevant product market.[60] In this sense, they offer meaningful information for firms to self-assess borderline practices.

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[57] See for instance Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1.

[58] Ibid, Article 6.

[59] See the various thresholds found in the Guidelines on horizontal co-operation agreements (n 38), which vary depending on the nature of the agreement and the level of the value chain.

[60] Ibid, for instance paras 147-149.

3. Horizontal merger control in 'gap' cases: a matter of law or discretion?

3.1. *The risk of de facto discretion in relation to 'gap' cases*

The analysis in the preceding section suggests that the administration of the SIEC test in 'gap' cases is far from straightforward. On the one hand, it is not possible to discern, from the Commission's soft law instruments and administrative practice, a structured set of conditions to evaluate the compatibility of transactions with the internal market. In this sense, 'gap' cases are different from those where the creation or strengthening of a (single or collective) dominant position is at stake. On the other hand, the scope of the SIEC test is virtually boundless in theory – or at least so in relation to horizontal transactions. As already pointed out, the factors that could have limited the reach of the SIEC test (that is, the evaluation of the significance of the impediment and the so-called 'efficiency defence') have failed to do so in the Commission's practice. These factors are either not easily administrable or have played a marginal role in individual cases.

The absence of a structured set of criteria, together with the lack of discernible boundaries to the SIEC test, affords the Commission substantial leeway over horizontal mergers under Regulation 139/2004. Under its interpretation of Article 2, the authority could simply point to the inevitable loss of competitive pressure and conclude, on that basis, to the prima facie incompatibility of the transaction with the internal market.[61] What is more, it may not be obvious to see how the merging parties can rebut such a prima facie finding. As a result, the framework within which administrative action has operated is not obvious to distinguish,

[61] This reality has been criticised by lawyers advising undertakings. See in particular James S Venit, 'Widening the "gap" – the substantial lessening of the Commission's evidentiary burden and the demise of coordinated effects under the SIEC test and §§24/25 of the Horizontal Merger Guidelines' (2015) 11 European Competition Journal 291.

in practice, from one in which the Commission would formally enjoy discretion over whether to authorise or prohibit horizontal transactions falling within the scope of the merge control regime.[62]

That the interpretation of Article 2 enshrined in the Guidelines affords de facto discretion to the authority is only confirmed when one pays attention to the manner in which transactions are evaluated in practice. The assessment of the likely effects of a concentration is the privileged realm of 'complex economic assessments', in relation to which the Commission enjoys a margin of appreciation and which are subject to limited judicial review.[63] Absent a structured framework – and thus of discernible legal constraints on administrative action – the analysis of the probable impact of mergers in 'gap' cases is strictly context-specific. As such, the Commission's administrative practice relies on the very qualitative and/or a quantitative tools that demand such 'complex economic assessments'. This means, in concrete terms, that the choice of the instruments on which the assessment rests is in principle not subject to judicial control absent manifest errors. The same can be said, by extension, of the conclusions drawn from such tools. Given the nature of judicial review in the EU legal order, the EU courts cannot substitute their assessment for that of the Commission.[64]

The limited involvement of the EU courts in relation to 'complex economic assessments' may not be obvious to square with the fact that predictions about the likely effects of transactions are, almost inevitably, contentious, and typically sensitive to the premises underpinning the analysis.[65] It is not unusual to see conflicting, but equally reasonable, forecasts in merger control proceedings. In accordance with the *Tetra Laval* line of case law,

[62] On the notion of discretion, see in particular Aude Bouveresse, *Le pouvoir discrétionnaire dans l'ordre juridique communautaire* (Bruylant 2010); and Paul Craig, EU Administrative Law (3rd edn, Oxford University Press 2018), Chapter 15.
[63] Kalintiri (n 12).
[64] van der Woude (n 12), who cites Case C-290/07 P *Commission v Scott SA*, EU:C:2010:480, para 66; and Case C-300/16 P *Commission v Frucona Košice a.s.*, EU:C:2017:706, para 63.
[65] Lianos and Genakos (n 11).

however, there should be little doubt that the control of the EU courts will be confined to whether the assessment is 'is factually accurate, reliable and consistent'[66] and relies on 'all the information which must be taken into account in order to assess a complex situation'.[67] As a result, it would not be sufficient for the merging parties to point to a discrepancy between their own analysis and that conducted by the Commission, or to claim that the former is at least as reasonable as the latter. Firms would need to show that the evaluation is manifestly incorrect (which would be the case, for instance, where the evidence on which such evaluation relies is incapable of substantiating the conclusions drawn from them or where it does not accurately and/or fully reflect the reality of the relevant market). It is difficult to escape the impression, against this background, that successfully challenging the Commission's analysis is a particularly high hurdle for the parties to overcome.

The substantial leeway (if not de facto discretion) under the framework crafted by the Commission allows it to raise concerns in virtually any transaction involving actual or potential competitors. There is, as a result of this reality, a risk of intervention where it would not have been justified. This risk is made more likely due to the interplay of the institutional setup and the very nature of merger activity. Starting with the former, there are two considerations to take into account. In the first place, the Commission – as opposed to a court – is the body that decides on the compatibility of notified transactions. In the second place, one should consider that, following a prima facie finding of incompatibility (that is, a finding that the transaction is, in principle, likely to lead to a significant impediment to effective competition), the burden of proof shifts to the parties. It would be for them to show that the concentration is, on balance, pro-competitive.

[66] *Tetra Laval* (n 13), para 39.
[67] Ibid.

The nature of merger control is a third factor. Typically, concentrations examined under Regulation 139/2004 are time-sensitive. Two consequences follow. To begin with, the parties may offer a remedy package even when it is unclear that the transaction would lead to a significant impediment to effective competition. In this sense, pragmatic outcomes tend to be prioritised, even when they involve divestitures. It is sufficient to take a look at the reality of enforcement to illustrate this point. Mergers are only declared to be incompatible with the internal market in very rare circumstances. At the time of writing, the Commission had only issued an incompatibility decision in 30 cases since 1990 (or 0.38% of all cases decided; and 12% of all cases decided in Phase II[68]). This figure stands in contrast with the 474 transactions cleared with remedies in Phase I and Phase II (or 6% of all cases decided); and 140 in Phase II (or just over 60% of all Phase II decisions).[69]

Another consequence of the time-sensitive nature of merger control is that Commission decisions are exceedingly unlikely to be challenged before the EU courts, whether by the undertakings concerned or by third parties.[70] Typically, there is little to be gained by bringing an action for annulment that, even under an expedited procedure,[71] may not be sufficiently timely and has limited chances of success in light of the leeway enjoyed by the Commission in relation to 'complex economic assessments'. The fact that declarations of incompatibility are scarce adds to the rarity of actions for annulment. As a result, merger cases have long been decided in a pragmatic and transactional manner, in the shadow of the law.[72] This institutional landscape allows the Commission, in effect, to prioritise some investigations and decide the

[68] See the statistics on EU merger control (updated to 31 May 2021) available in https://ec.europa.eu/competition-policy/mergers/statistics_en. The analysis comprises 7821 decisions ruling on the compatibility of the transactions with the internal market or whether they fall under the scope of the Regulation (Articles 6(1), 8(1), 8(2) and 8(3) in the case of Regulation 139/2004, n 1).
[69] By the end of May 2021, the Commission had adopted 233 decisions on the compatibility of transactions under the EU merger control regime (Articles 8(1), 8(2) and 8(3) as far as Regulation 139/2004 is concerned).
[70] For a systematic analysis, see Ibáñez Colomo (n 48), Chapter 5.
[71] See consolidated version of the Rules of Procedure of the General Court [2015] OJ L105/1, Articles 151-153.
[72] The expression is borrowed from Robert H. Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 Yale Law Journal 950.

ones on which to focus its resources. Where concerns are raised, the most likely outcome is a settlement whereby the parties propose remedies addressing them.

The Commission's approach to enforcement in 'gap' cases was considered by the GC in *CK Telecoms*. As mentioned above, the authority raised concerns in scenarios involving non-collusive oligopolies virtually since the beginning of the application of Regulation 139/2004.[73] For over a decade, all these transactions were addressed by means of a bargain between the merging parties and the Commission. Only in 2016, when the latter declared the incompatibility with the internal market of the acquisition of O2 by Three in the UK,[74] was the GC invited to define the legal boundaries to administrative action in 'gap' cases. The analysis in the judgment made it quickly apparent that the Commission had defined the substantive test in such a way that any concentration involving actual or potential competitors could be found to lead to a significant impediment to effective competition.

It makes sense to explain at greater length the way in which the Commission construed Article 2 of Regulation 139/2004 in that case. The starting premise of the decision is that a significant impediment to effective competition can be established by reference to the unstructured test enshrined in the Horizontal Merger Guidelines. In particular, the Commission argued – in line with the depiction above – that the criteria identified in the said instrument are 'potentially relevant'[75] in a given case, but that they need not all be present.[76] In this same vein, the Commission claimed that a merger between actual or potential competitors can give rise to a significant impediment to effective competition even when one of the merging parties is not an 'important competitive force' within the meaning of the Guidelines.[77] Moreover, the

[73] *T-Mobile Austria/Tele.ring* (n 4). For subsequent cases, see for instance *Hutchison 3G Austria/Orange Austria* (n 9) and Commission Decision of 19 May 2015 (Case M.7421 – *Orange/Jazztel*).
[74] Commission Decision of 11 May 2016 (Case M.7612 – *Hutchison 3G UK/ Telefónica UK*).
[75] *Hutchison 3G UK/ Telefónica UK* (n 74), para 322.
[76] Ibid, para 321.
[77] Ibid, para 325.

decision explains that an ‘important competitive force’ is not necessarily a firm that stands out from its rivals.[78]

In *CK Telecoms*, the GC noted that, were the Commission’s approach to be followed, no horizontal merger would fail to give rise to a prima facie finding of a significant impediment to effective competition. More precisely, it explained that the authority’s interpretation of Article 2 of Regulation 139/2004 would allow the Commission to treat as an ‘important competitive force’ any firm in an oligopolistic market, and this merely by virtue of the fact that it exercises competitive pressure on rivals.[79] Since, as already pointed out, horizontal mergers lead, by their very nature, to the elimination of a competitive constraint, this interpretation of the Regulation would allow the authority to declare the incompatibility of any such transaction with the internal market.[80] In substance, the GC appeared to express the same concerns about this interpretation of the SIEC test that have been outlined above.

3.2. *A mismatch between the law as declared and the law as applied?*

The preceding analysis and the *CK Telecoms* judgment reveal a degree of tension between the law as laid down in Article 2 of Regulation 139/2004 and the administrative practice (or, if one prefers, between the law as declared and the law as applied). The absence of definite boundaries to administrative action, coupled with the exceptionality of judicial involvement and the leeway enjoyed in relation to ‘complex economic assessments’ means that, in practice, the Commission has applied the Regulation in a way that affords it de facto discretion in relation to horizontal mergers. It is difficult to square this reality with the letter of Article 2, which laid

[78] Ibid, para 326.
[79] *CK Telecoms* (n 14), para 174.
[80] Ibid: ‘[…] such a position would allow it to treat as an “important competitive force” any undertaking in an oligopolistic market exerting competitive pressure […]’.

down a test governed by law. It is also difficult to reconcile it with Article 263 TFEU, pursuant to which it is for the Court to review the legality of primary and secondary legislation.

The fundamental question that arises, against this background, is whether an interpretation of Article 2 that would allow the administrative authority to raise prima facie concerns in relation to any horizontal merger has a place in the EU legal order. There are two factors to consider in this regard. In *CK Telecoms*, the GC noted that the Commission's approach to the substantive assessment of mergers could give rise to legal uncertainty.[81] A degree of leeway that amounts, in effect, to de facto discretion, may make it very difficult, if not impossible, for stakeholders to anticipate the outcome of administrative action. Where there are no clearly defined boundaries to intervention and the substantive test is not structured, any outcome is in principle plausible.

A second factor to consider in this regard is that the interpretation of Article 2 favoured by the Commission would not allow the EU courts to exercise judicial review in an effective and meaningful way – or at least not in a way that is compatible with the institutional setup within which the Regulation 139/2004 operates. To the extent that a loss of competitive pressure would be enough to raise concerns in any given case, judicial control of administrative action would, in effect, be confined to manifest errors of assessment. Such a reality would be at odds with well-established case law, pursuant to which issues of law and of fact are subject to full review.[82] In this sense, that it is an approach that would, by its very nature, prevent the EU courts from performing their core function.

Arguably, it is also an approach to the substantive test that upsets the delicate institutional balance underpinning the EU legal order. It is widely accepted that the cumulation of investigative and decision-making functions within the European Commission, and the

[81] Ibid, para 174.
[82] See inter alia Case C-67/13 P, *Groupement des cartes bancaires v Commission*, EU:C:2014:2204, paras 42-46.

potential cognitive biases to which it might give rise,[83] has a place in the system provided that administrative action can be effectively constrained by means of full judicial review of errors of law and fact.[84] Against this background, one could claim that an understanding of Article 2 that would allow de facto discretion to the authority might only be viable under a different institutional setup, whether it is through the reform of judicial review (whereby the EU courts would be substituting their own views for those of the authority) or a separation of the investigative and decision-making functions.

4. Towards a structured framework for the assessment of 'gap' cases

4.1. *Background: de facto discretion in* Airtours *and* CK Telecoms

The preceding section has described a reality in which the substantive test in merger control has been interpreted as giving de facto discretion to the administrative authority (with all the consequences that follow therefrom). This is not the first time the EU courts are confronted with a similar approach to the substantive test in merger control. It is worth discussing the background behind the *Airtours* judgment of 2002, which is the most relevant precedent.[85] As mentioned in Sections 2 and 3, that landmark case concerned the interpretation of Article 2 of Regulation 4064/89, and more precisely the scope of the notion of collective dominance.[86] The key question at stake before the GC (then Court of First Instance) was whether the boundaries of the said notion would be defined by the economic concept of tacit collusion and, ultimately, whether administrative action would be subject to a well-defined set of constraints.

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[83] Wouter P.J. Wils, 'The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis' (2004) 27 World Competition 201.
[84] Case C-389/10 P *KME Germany AG and others v Commission*, EU:C:2011:816, paras 91-111; and Case C-386/10 P Chalkor AE Epexergasias Metallon v Commission, EU:C:2011:815.
[85] *Airtours* (n 19).
[86] See in this sense Ortiz Blanco (n 20) and Petit (n 20).

In its decision in *Airtours*,[87] the Commission had interpreted the notion of collective dominance in a way that would have allowed it, in effect, to declare the incompatibility of any horizontal transaction with the internal market. As explained by leading commentators at the time, the authority concluded that a concentration is a source of concerns when it can be established that it is rational for the members of an oligopoly to adopt a common line of conduct.[88] In other words, the Commission claimed in its decision that it is sufficient to show that, following the transaction, the remaining firms on the relevant market would have an incentive to collude. To the extent that it is difficult to find instances in which such an incentive would fail to exist, the interpretation advanced by the authority not only greatly expanded the scope of Regulation 4064/89 but made it all but impossible for undertakings to challenge a prima facie finding of collective dominance.[89]

By relying on the economic concept of tacit collusion, the GC constrained administrative action around an operational and well-defined set of boundaries. Under the interpretation of Article 2 provided in the *Airtours* judgment, it is not sufficient to show that the members within an oligopoly would have the incentive to collude. The three criteria defined by the GC are designed to ensure that a finding of collective dominance only takes place when the Commission is in a position to show, in addition, that the features of the relevant market are such that the adoption of a common line of conduct by the members of the oligopoly is possible and sustainable over time.[90] A crucial criterion in this sense relates to the possibility for the members of the oligopoly to retaliate against those departing from the common course of action.[91]

[87] Commission Decision of 22 September 1999 (Case No IV/M.1524 – *Airtours/First Choice*) [2000] OJ L 91/1.
[88] Juan Briones and Jorge Padilla, 'The Complex Landscape of Oligopolies under EU Competition Policy – Is Collective Dominance Ripe for Guidelines?' (2001) 24 World Competition 307.
[89] Commission Decision in *Airtours* (n 87), para 54; and Briones and Padilla (n 88), 311.
[90] *Airtours* (n 19), para 62.
[91] Ibid, where the GC demanded evidence that 'the situation of tacit coordination must be sustainable over time'.

Following the GC's interpretation of Article 2 in *Airtours*, it was not possible for the Commission to construe the notion of collective dominance as encompassing 'gap' cases. As already pointed out, this is the background without which the adoption of the SIEC test cannot be understood. In *CK Telecoms*, the GC was confronted, as in *Airtours*, with an interpretation of Article 2 that lacked obvious boundaries and thus allowed the authority to raise concerns in relation to any horizontal merger. The substantive choices made by the first instance judges in *CK Telecoms* are best explained, it is submitted, as a reaction to the consequences of the consequences of the Commission's understanding of the substantive test. More precisely, the GC chose to define a definite set of boundaries limiting the instances in which concentrations in 'gap' cases would give rise to concerns.

4.2. *When is an impediment to effective competition significant?*

Under the Commission's interpretation of Article 2 of Regulation 139/2004, any loss of competitive pressure could be treated as a significant impediment to effective competition. This understanding of the SIEC test is based on two premises. The first is that the loss of an 'important competitive force' within the meaning of the Guidelines is sufficient to establish a significant impediment to effective competition. The second premise is that a firm acting as an 'important competitive force' need not stand out from rivals. The General Court found that this approach to the substantive assessment of concentrations amounts to an error of law. According to the *CK Telecoms* judgment, and contrary to the authority's understanding, a transaction in a 'gap' case would justify intervention in the EU system of merger control where two cumulative conditions, directly inspired from the Preamble to Regulation 139/2004,[92] are fulfilled. These conditions are found in Table 1.

[92] Regulation 139/2004 (n 1), para 25.

Thus, pursuant to the *CK Telecoms* judgment, it would be necessary to show, first, that the transaction would lead to the 'elimination' of 'important competitive constraints' that the parties had exercised upon each other prior to the transaction.[93] Second, the Commission would need to establish, to the requisite legal standard, that the concentration would likely result in a 'reduction of competitive pressure on the remaining competitors'.[94] In its review of the decision, the GC concluded that, by relying upon the concept of 'important competitive force' (directly drawn from its Horizontal Merger Guidelines), the Commission had introduced an autonomous legal criterion that substantially lowers the requisite threshold to establish a significant impediment to effective competition and thus unduly broadens the scope of Article 2 of Regulation 139/2004.[95]

In the same vein, the autonomous criterion crafted by the Commission in its decision was found to have been conflated with the first of the abovementioned conditions.[96] To the extent that this was the case, the first of the premises on which the decision is based was found to rely on an erroneous interpretation of the SIEC test. The conflation of the two concepts allowed the Commission to circumvent the legal boundaries deriving from Regulation 139/2004. More precisely, it would make it possible for the authority to avoid evaluating the 'competitive constraints' – within the meaning of the Preamble – that the parties exercised upon each other prior to the transaction. For the same reasons, any impediment to effective competition would be 'significant' under this understanding of Article 2 of Regulation 139/2004. The appreciability criterion, in other words, would fail to play any role in the assessment, as it would never fail to be established.

In its judgment, the GC construes the substantive test in a way that makes it possible to draw a clear and meaningful line between significant and insignificant impediments to effective

[93] *CK Telecoms* (n 14), para 96.
[94] Ibid.
[95] Ibid, para 172.
[96] Ibid, para 173.

competition in ‘gap’ cases. In accordance with the GC’s approach, the first condition (that is, the elimination of ‘important competitive constraints’ that the parties had exercised upon each other) would be met in a number of scenarios, two of which were defined by the Commission in the content1ious decision. Thus, the first condition would be fulfilled, to begin with, where the transaction would lead to the loss of a source of competitive pressure that stands out from the rest of rivals. It is a scenario typically associated with the status of a firm as a ‘maverick’.[97] In this case, the difference between significant and insignificant impediments to effective competition would hinge on whether the competitive constraints stand out relative to those placed by rivals. Under the second scenario, the condition would be met where the two firms are found to be particularly close competitors. By the same token, the impediment to effective competition would be insignificant where the parties are not distinctly close rivals.

SIEC test under Regulation 139/2004	**Conditions**
Single dominance (non-coordinated effects)	Dominant position as defined in *Hoffmann-La Roche*
Collective dominance (coordinated effects)	(i) ability to monitor rivals’ behaviour; *and*
	(ii) availability of deterrence mechanisms; *and*
	(iii) outsiders’ reaction unable to jeopardise common course of action
‘Gap’ cases (non-coordinated effects)	(i) elimination of important competitive constraints between the parties; *and*
	(ii) reduction of competitive pressure on remaining competitors

Table 1: Coordinated and non-coordinated effects under Regulation 139/2004

It is against the legal framework depicted in Table 1 that the GC evaluated whether the Commission had established that the concentration would lead to a significant impediment to effective competition. The review of the legality of the authority’s decision made apparent the

[97] Horizontal Merger Guidelines (n 5), paras 37-38.

tension between the two interpretations of the SIEC test. Because the authority's understanding of Article 2 was considerably more expansive (to the point of affording it de facto discretion), the annulment of the contentious decision looks like an inevitable consequence of its rejection by the GC. Under its first theory of harm, the Commission had argued that the transaction would lead to anticompetitive effects on the relevant retail market.[98] In this regard, the judgment concludes that the authority had failed to establish that one of the parties to the transaction was a 'maverick' the competitive pressure of which stood out from that placed by rivals.[99] As already pointed out, the GC rejected the idea that any competitor in an oligopoly places 'important competitive constraints' on rival firms. In addition, it found that the decision had failed to show, to the requisite legal standard, that the parties were particularly close competitors.[100] Again, the idea that all undertakings in an oligopolistic market qualify as close competitors was found to be at odds with a correct understanding of Article 2.

Similar conclusions can be drawn from the remaining theories of harm. The second theory focused on the fact that, prior to the transaction, each of the merging firms was a party to a network sharing arrangement.[101] As a result of the concentration, the Commission argued, the important competitive constraints to which the parties were subject by virtue of their participation in the said sharing arrangements would be significantly affected.[102] In line with what has already been explained, the GC ruled that a reduction in the number of players in a given market is insufficient, in and of itself, to establish a significant impediment to effective competition.[103] What is more, it concluded that the Commission had not established, to the requisite legal standard, that, in the post-merger scenario, the remaining players would not be

[98] *CK Telecoms* (n 14), paras 128-136.
[99] Ibid, paras 155-226.
[100] Ibid, paras 227-250.
[101] Ibid, paras 292-322.
[102] *Hutchison 3G UK/ Telefónica UK* (n 74), para 1777.
[103] *CK Telecoms* (n 14), paras 344-345 and 373.

in a position to exercise effective constraints on the parties.[104] The final theory of harm put forward by the Commission concerned a wholesale market for the supply of network access to third parties.[105] As is true of the first theory of harm, the GC annulled the decision as it found that the Commission had failed to show that one of the firms was an 'important competitive force' within the meaning of the judgment.[106]

4.3. *The limits of quantitative analysis*

A key conclusion to be drawn from *CK Telecoms* is that quantitative evidence is, as such, insufficient to establish, to the requisite legal standard, that a concentration is likely to lead to a significant impediment to effective competition.[107] Accordingly, an approach to merger control that relies on a pure case-by-case quantitative assessment of the (positive and negative) effects of the outcome of a transaction cannot replace (or be seen as an alternative to) the set of conditions defined by the GC in the judgment. As part of its assessment of the probable outcome of the transaction, the Commission had relied on a variation of the so-called upward pricing pressure (UPP)[108] analysis.[109] The purpose of this tool is to gain an understanding of the expected impact on prices of the combination of the two firms' activities, and, by extension, whether the predicted price increase is 'significant' within the meaning of Article 2 of

[104] Ibid, paras 379 and 396.
[105] Ibid, paras 419-423.
[106] Ibid, paras 439-453.
[107] See also, in this same vein, Case T-342/07 Ryanair Holdings plc v Commission, EU:T:2010:280, para 169 (where the GC points out the 'accessory role' of the quantitative evidence in support of its finding regarding the compatibility of the transaction with the internal market).
[108] Joseph Farrell and Carl Shapiro, 'Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition' (2010) 10 The B.E. Journal of Theoretical Economics, Article 9; and Steven C. Salop and Serge Moresi, 'Updating the Merger Guidelines: Comments' (2009), available at https://www.ftc.gov/sites/default/files/documents/public_comments/horizontal-merger-guidelines-review-project-545095-00032/545095-00032.pdf.
[109] *Hutchison 3G UK/ Telefónica UK* (n 74), Annex A.

Regulation 139/2004. According to this approach, the effects of a concentration would be found to be appreciable where the said price increase exceeds a certain level.

The GC advanced several reasons to explain why reliance on quantitative evidence is inconclusive and incapable of substantiating, alone, a finding of a significant impediment to effective competition. Each of these reasons is sufficient to rule out the probative value of such evidence. To begin with, tools like UPP analysis (and variations thereof) necessarily lead to a finding that the concentration under examination would lead to a price increase.[110] In this sense, quantitative evidence reinforces the idea, explained at length above, that any horizontal merger is presumptively a source of concerns. Accordingly, it fails to address the problems associated with the de facto discretion that the Commission would enjoy under its understanding of the SIEC test. In particular, quantitative evidence is incapable of tackling the fundamental question around 'gap' cases, which is the identification of the point at which reduced competitive pressure is significant enough to warrant action.[111]

A second reason – and arguably the single most important one – is that the predictions resulting from quantitative analysis are incapable of meeting the requisite standard of proof,[112] even when sophisticated and calibrated to assist beyond screening purposes.[113] Finally, these tools may provide an imperfect and crude picture of the likely effects of a concentration. In *CK Telecoms*, the GC noted that the evidence relied upon by the Commission only focused on the likely price increases resulting from the elimination of a source of competitive pressure but failed to take into account any potential efficiency gains capable of leading to lower prices

[110] *CK Telecoms* (n 14), para 263.
[111] Ibid, paras 271-275. As explained by the GC in the judgment, the quantitative analysis led to the conclusion that the predicted price increases would not go be more significant than those predicted in other transactions that were not declared to be incompatible with the internal market (see in this sense para 273).
[112] Ibid, para 268.
[113] Ibid, para 258. The GC noted, in line with the Commission, that the quantitative analysis had been adjusted and refined in light of the features of the relevant market.

(thereby excluding a finding of anticompetitive effects).[114] Insofar as this is the case, such evidence does not appear to incorporate all the necessary information to assess as complex situation, as required under the *Tetra Laval* line of case law.

5. Conclusions

In the EU legal order, tension may occasionally emerge between the law as declared and the law as applied. Pursuant to Article 2 of Regulation 139/2004, the Commission is under a legal duty to authorise transactions that do not lead to a significant impediment to effective competition and to declare the incompatibility with the internal market of concentrations that would have such effects. Thus, legislation does not grant any discretion to the authority. It is submitted that the administrative practice in the lead up to *CK Telecoms* was based on a legal interpretation that afforded the Commission, in effect, the power to decide which horizontal mergers to authorise and which to prohibit. This reality of de facto discretion is the result of several factors, and in particular the unstructured, case-by-case framework on which administrative action was based, the 'complex economic assessments' involved in the evaluation of concentrations and the paucity of judicial review in EU merger control.

This is the background against which the GC judgment in *CK Telecoms* must be understood. While the Commission's approach to Article 2 of Regulation 139/2004 gave it the power to declare the incompatibility with the internal market of any concentration involving actual or potential competitors, the review court crafted a legal framework that constrains administrative action in a meaningful way and makes it possible to draw a clear line between significant and insignificant impediments to effective competition. In accordance with the

[114] Ibid, paras 277-28. See in particular para 279, where the GC distinguishes between the efficiencies at the stage of the quantitative analysis and the efficiencies considered following a prima facie finding of a significant impediment to effective competition.

approach laid down in the judgment, the authority would need to show, to the requisite legal standard, that the concentration would lead to the 'elimination' of 'important competitive constraints' that the parties had exercised upon each other prior to the transaction and that it would likely result in a 'reduction of competitive pressure on the remaining competitors'.

The framework devised by the GC in *CK Telecoms* ensures that the interpretation of Article 2 of Regulation is consistent with the EU legal order and the institutional framework within which it operates. From this perspective, it comes across as a necessary corrective. Judicial review would not be meaningful if the substantive test were defined in a way that any horizontal merger would lead to a significant impediment to effective competition. In the same vein, an interpretation of the substantive test that gives discretion – even if only de facto – to the administrative authority is not consistent with the division of powers under the Treaties, pursuant to which it is for the EU courts to define the boundaries of primary and secondary legislation. As noted by the GC itself, such an interpretation would be difficult to reconcile with the principle of legal certainty.

Finally, *CK Telecoms* is valuable in that it exposes the limits of quantitative analysis in the assessment of concentrations, and this from several perspectives. First, the judgment reveals that the use of such tools cannot replace a robust legal framework defining a structured set of boundaries to intervention. If administrative action is to be meaningfully constrained, a strict case-by-case evaluation of the pro- and anticompetitive effects of a concentration seems insufficient. Second, there are limits as to the probative value of quantitative analysis. In this regard, the GC concluded that the tools upon which the Commission relied failed to meet the requisite standard of proof. More generally, quantitative analysis fails to assist authorities and stakeholders in the single most problematic issue in 'gap' cases, which is the distinction between significant and insignificant impediments to effective competition.