



CORE ANALYSIS

Judicial review in EU merger control: towards deference on issues of law?

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(Received 6 November 2024; revised 6 November 2024; accepted 9 March 2025)

Abstract

It is difficult to disentangle, in EU merger control, between issues of law (subject to full review by the EU courts) and complex economic assessments (controlled for manifest errors). This article discusses, and puts in context, the judgement of the Court of Justice in *CK Telecoms*. It explains why some of the interpretative choices made by the ECJ open the door to the transformation of the nature and intensity of judicial review in EU merger control. Where the meaning of an interpretation of a legal concept can only be figured out *ex post* (that is, after performing complex assessments), the control of administrative action may become, de facto, deferential and process-oriented (as opposed to substance-oriented). Leaving constitutional considerations aside, this shift would have the advantage of giving the European Commission the necessary policy space to test new doctrines and act nimbly in a changing economic and technological landscape. On the other hand, it may come at the expense of legal certainty and may not necessarily increase the quality of decision-making.

Keywords: Judicial review; EU merger control; deference; full review; complex assessments; Commission; EU courts

«il n'y a pas de lois, il n'y a que des circonstances»
Honoré de Balzac

1. Introduction

The European Commission (hereinafter, the ‘Commission’) does not enjoy deference on the interpretation of legal provisions. Under the Treaty on the Functioning of the European Union (hereinafter, ‘TFEU’), it is for the Court of Justice (hereinafter, the ‘Court’ or the ‘ECJ’) to state what the law is and to decide how it applies to the facts of a case.¹ While uncontroversial, this feature of the European Union (hereinafter, ‘EU’) legal order is more easily stated in the abstract than implemented in specific scenarios. The gap between theory and practice is likely to become apparent where complex technical and/or economic assessments are involved. In such instances, it may not be easy to disentangle the legal interpretation of a provision from the said complex assessments. The former and the latter, in other words, may be treated as one and the same issue. Establishing whether an undertaking holds a dominant position within the meaning of Article 102 TFEU, for instance, demands the definition of the relevant market and an analysis of its characteristics.² These exercises

¹P Craig, *EU Administrative Law* (3rd edn, Oxford University Press 2018) 441–3.

²Case C-62/86 *AKZO Chemie BV v Commission* ECLI:EU:C:1991:286, paras 35–62.

require, in turn, the use of economic tools to identify the constraints to which the undertaking is subject. As a result, the interpretation of the legal concept may be inseparable from such tools.

The intertwinement between, respectively, issues of law and complex assessments has significant consequences. The Court has long recognised that the Commission enjoys deference (or, if one prefers, a ‘margin of discretion’) in relation to the latter.³ As a result of this doctrine, two different standards of review may coexist in relation to a single issue: full review applying to points of law (for instance, the legal definition of dominance), and limited review to any related complex assessments (for instance, the tools relied upon to define the relevant market and the conclusions drawn from the use of such tools). The question that emerges, against this background, is whether it is realistic to expect that the two standards of review can be implemented in tandem or whether, instead, one will inevitably exercise its gravitational pull over the other. There is, more specifically, a risk that, as a result of the intertwinement, the Commission is given deference when construing legal provisions and applying them in individual factual scenarios. Even though, formally speaking, such points of law would be subject to full review, they would, in practice, be controlled only for manifest errors.

EU merger control is an area where legal issues and complex assessments are often difficult to disentangle and thus provides a useful case study. Under the regime created by virtue of Regulation 139/2004,⁴ concentrations are incompatible with the internal market where they would significantly impede effective competition.⁵ In and of itself, this substantive standard (‘significant impediment to effective competition’, hereinafter ‘SIEC’) is not operational. It needs to be fleshed out around a set of workable factors. The application of these factors in specific factual scenarios, in turn, may require complex economic assessments. Determining whether two parties to a transaction are ‘close competitors’, for instance, can only be meaningfully evaluated by examining in detail the features and dynamics of the relevant market. To the extent that complex assessments are involved, the Commission may well enjoy, de facto, deference on whether a concentration would amount to a SIEC (which, again, is in principle subject to full review).

This paper considers the issue of effective judicial review in EU merger control under Regulation 139/2004. In *CK Telecoms*, the Court had the chance to define, for the first time, how the SIEC test applies in the context of concentrations that would not create or strengthen a dominant position.⁶ The ruling held that the Commission enjoys no deference on issues of law, whether these relate to the SIEC test itself or to the factors into which the test is broken down (which include whether the parties are close competitors and whether the transaction involves an important competitive force).⁷ The interpretation of these factors (and their legal characterisation) is subject to full review. On the other hand, the Court did not clarify how legal issues are to be construed and applied, and, similarly, how one can ensure that administrative action remains subject to full review in practice. It simply held that the interpretation given by the General Court⁸ (hereinafter, the ‘GC’ or the ‘first-instance court’) was incorrect in law and referred the case back to it. As a result, the question remains open and unresolved at the time of writing.

It is submitted that some approaches to the interpretation of the SIEC test could transform the nature and intensity of judicial review in EU merger control. Following *CK Telecoms*, substance-

³Joined cases C-68/94 and C-30/95 *France and others v Commission (Kali & Salz)* ECLI:EU:C:1998:148, paras 223-4; and Case C-12/03 P *Commission v Tetra Laval BV* ECLI:EU:C:2005:87, para 38.

⁴Council Regulation (EC) 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24/1.

⁵*Ibid.*, Art 2(3): ‘A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market’.

⁶Case C-376/20 P *Commission v CK Telecoms UK Investments Ltd* ECLI:EU:C:2023:561.

⁷*Ibid.*, para 129.

⁸Case T-399/16 *CK Telecoms UK Investments Ltd v Commission* ECLI:EU:T:2020:217.

based review may give way to process-oriented scrutiny, which is inevitably confined to manifest errors of assessment. Judicial review may shift in nature and intensity, first, if the administrative authority is given the discretion to decide, case-by-case, the factors against which the lawfulness of a transaction is evaluated. The transformation may also occur, second, where the content of each of the legal terms does not have an autonomous meaning that can be discerned *ex ante*. Where the meaning of a concept can only be figured out *ex post* (that is, by characterising the facts at hand), it may not be possible to disentangle the legal interpretation from the associated complex assessments. For the same reason, this interpretative choice would turn an issue of law into one over which the Commission enjoys discretion. If either of these two approaches were followed, there is a risk that the question before the EU courts, in practice, is no longer whether the authority has correctly interpreted and applied the SIEC test, but whether its assessment of the transaction is a reasonable one and whether it has taken into account all the relevant factors.

These ideas are presented and organised hereinafter as follows. Section 2 provides an overview of the substantive aspects of EU merger control and its distinctive features. It presents the SIEC test, addresses the rationale behind its introduction and explains how it can only be made operational by breaking it down into a number of criteria. Section 3 moves to an analysis of *CK Telecoms* and explains the substantive disagreement between the GC and the Court. Section 4, in turn, addresses the potential gap that might emerge between theory and practice in the aftermath of the judgement. In principle, *CK Telecoms* confirms that issues of substantive law are subject to full review. In effect, however, deference and process-oriented scrutiny might become the *de facto* reality of judicial scrutiny in the wake of that ruling. Section 5, finally, discusses whether, and to what extent, this shift might be desirable or justified in the current economic and technological landscape.

2. EU merger control under the SIEC test

A. The SIEC test: rationale and challenge

Under Regulation 139/2004, the compatibility of mergers with the internal market is assessed against the SIEC test. As mentioned in the introduction, the relevant substantive question is whether the transaction would significantly impede effective competition.⁹ The SIEC test marked a break with the previous regime, which revolved around the concept of dominance. Under Regulation 4064/89, the Commission had to prove that the concentration would affect competition as a result of the creation or the strengthening of a dominant position,¹⁰ whether individually or collectively held.¹¹ The SIEC test is broader than the preceding one in the sense that it allows for intervention even absent the creation or strengthening of a dominant position. For instance, a transaction can be declared to be incompatible with the internal market even when the new entity would not even be the market leader in the post-merger scenario.¹²

The shift to the SIEC test is explained by a concern that the dominance-based standard was underinclusive and thus opened an ‘oligopoly gap’.¹³ The argument, more precisely, was that there

⁹Art 2(3) of Regulation 139/2004.

¹⁰See Art 2(3) of Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] OJ L 395/1.

¹¹The Court clarified that a dominant position within the meaning of Art 2(3) of Regulation 4064/89 encompassed the concept of collective dominance in *Kali & Salz* (n 3).

¹²See for instance *T-Mobile Austria/Tele.ring* (Case COMP/M.3916) Commission Decision of 26 April 2006.

¹³See in particular D Ridyard, ‘Joint Dominance and the Oligopoly Blind Spot Under the EC Merger Regulation’ 13 (1992) European Competition Law Review 161; L Ortiz Blanco, *Market Power in EU Antitrust Law* (Hart Publishing 2011); and I Kokkoris, *Merger Control in Europe: The Gap in the ECMR and National Merger Legislations* (Routledge 2011).

are some markets (namely non-collusive oligopolies¹⁴) where competition can be significantly affected even when a concentration is unlikely to create or strengthen a dominant position.¹⁵ In the same vein, it was argued that Regulation 4064/89 was not in line with the mainstream consensus. From an economic perspective, there is indeed no reason to expect or assume that concentrations only harm competition where they lead to, or reinforce, a dominant position. What matters is whether the change in the market structure results in a deterioration of the conditions of competition in the relevant market(s) affected by it.¹⁶

The dominance-based test might have been defective from an economic standpoint but had a clear advantage from a legal one. The notion of dominance, whether individual or collective, had relatively well-defined boundaries at the time of the adoption of the merger control regime. Since the notion is also enshrined in Article 102 TFEU, it had a long history of enforcement behind it when Regulation 4064/89 entered into force.¹⁷ As a result, the Court had already been presented with the opportunity to flesh out the concept¹⁸ and define proxies for it.¹⁹ The SIEC test, by contrast, was a legal innovation for which there were no obvious precedents. There were several reasons, moreover, why the new substantive standard could be a source of legal uncertainty. As the EU legislature explains in the Preamble to the Regulation, a SIEC encompasses instances in which the degree of market power is significant, but not necessarily significant enough for it to give rise to dominance.²⁰ The theoretical and practical challenge, against this background, was (and remains) to identify the requisite degree of market power that triggers the application of Regulation 139/2004 (and, similarly, to draw the line between significant and insignificant impediments to effective competition).

Delimiting the substantive scope of the SIEC test is particularly challenging in relation to mergers with a horizontal aspect – that is, transactions involving actual or potential competitors in one or more markets.²¹ These operations eliminate, by their very nature, a source of competitive pressure. In other words, they strengthen, at least to some degree, the market power of the parties.²² Therefore, every transaction with a horizontal dimension can be seen as *prima facie* problematic under Regulation 139/2004. The assessment of their compatibility with the internal market hinges, in practice, on whether the (inevitable) increase in market power to which they lead is ‘significant’ within the meaning of the SIEC test. The approach followed by the Commission to define this concept, and, in the same vein, the criteria used to distinguish between

¹⁴For a discussion of the concept and its implications, see Europe Economics, ‘Study on Assessment Criteria for Distinguishing between Competitive and Dominant Oligopolies in Merger Control’, Report for the Directorate General for Enterprise (May 2001).

¹⁵See Ridyad (n 13) at 161, for whom the so-called ‘oligopoly gap’ could ‘in principle leave the Commission powerless to prevent a merger which brought together two firms with respectively 25 and 24 per cent of a market, if their main competitor accounted for the remaining 51 per cent’.

¹⁶Europe Economics (n 14) 9, where it is explained that ‘[e]conomic literature does not talk about dominant versus competitive oligopolies or about “effective” competition, only about collusive and non-collusive behaviour’.

¹⁷The notion of dominant position was defined in 1979, in Case 85/76 *Hoffmann-La Roche & Co. AG v Commission* ECLI:EU:C:1979:36.

¹⁸*Ibid.*, para 38, where the Court defined it as ‘a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers’.

¹⁹See in this sense *AKZO* (n 2), para 60, which took a market share of 50 per cent as a proxy for dominance.

²⁰Regulation 139/2004, Recital 25, where the EU legislature clarifies that ‘[...] notion of “significant impediment to effective competition” in Art 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned’.

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

²²*Ibid.*, para 24, where the Commission explains that ‘[...] [t]he most direct effect of the merger will be the loss of competition between the merging firms [...]’.

significant and insignificant impediments to effective competition is of paramount importance under the regime.

B. Making the SIEC test operational

The Commission has operationalised the SIEC test by means of soft law instruments that break down the substantive standard into workable building blocks. Both the Guidelines on horizontal²³ and non-horizontal mergers²⁴ identify two broad reasons why a concentration could significantly impede effective competition: transactions can lead to either coordinated or non-coordinated effects. The former (coordinated effects) concern, in essence, a scenario of collective dominance, the boundaries of which were defined by the GC in *Airtours*.²⁵ More importantly for the purposes of the analysis that follows, the (cumulative) conditions laid down in that judgement have a clear meaning that is discernible *ex ante* and that is known to be stringent. As a result, the so-called *Airtours* criteria do not give rise to the sort of concerns on which this piece focuses.

The latter instance (non-coordinated effects), by contrast, was a relative novelty in the legal landscape, even though it shares some commonalities with the analysis of effects under Article 101(1) TFEU.²⁶ A (horizontal or non-horizontal) concentration gives rise to non-coordinated effects where it strengthens the market power of a firm to such an extent that it significantly affects the dynamics of competition. Where the transaction has a horizontal dimension (and thus involves actual or potential competitors), non-coordinated effects result from the elimination of a competitive constraint on the relevant market. The effects are, in other words, the very consequence of the transaction.²⁷ When the transaction is a possible source of non-horizontal concerns, on the other hand, non-coordinated effects, if manifested, will be triggered by the conduct of the new entity. Where the relevant markets are vertically related, the said entity may engage in a strategy of input or customer foreclosure;²⁸ where they are horizontally related, foreclosure might result from a tying or bundling strategy.²⁹

The analysis that follows focuses on non-coordinated effects arising from mergers involving actual or potential competitors (that is, mergers with a horizontal dimension). The Guidelines on horizontal mergers (hereinafter, the ‘Guidelines’) identify several factors against which the Commission commits to assessing the likelihood of a SIEC. These factors include the market shares of the parties (the higher the market share, the more likely the negative effects),³⁰ the closeness of competition (the impediment to effective competition being more probable where the parties are close competitors),³¹ whether customers have the ability to switch suppliers³² (the exercise of market power can be expected in the aftermath of the operation if they do not), whether competitors have the ability to react to the conduct of the new entity (which may not be the case where the former would be unable to expand capacity³³ or where the latter would have the ability

²³*Ibid.*

²⁴Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2008] OJ C 265/6.

²⁵Case T-342/99 *Airtours plc v Commission*, EU:T:2002:146, para 62.

²⁶Guidelines on the application of Art 81(3) of the Treaty [2004] OJ C 101/97, para 26, where the Commission explains that ‘[...] The degree of market power normally required for the finding of an infringement under Article [101(1)] in the case of agreements that are restrictive of competition by effect is less than the degree of market power required for a finding of dominance under Article [102]’.

²⁷Horizontal Merger Guidelines (n 21), para 24.

²⁸Non-Horizontal Merger Guidelines (n 24), para 30.

²⁹*Ibid.*, para 93.

³⁰Horizontal Merger Guidelines (n 21), para 27.

³¹*Ibid.*, paras 28–30.

³²*Ibid.*, para 31.

³³*Ibid.*, paras 32–5.

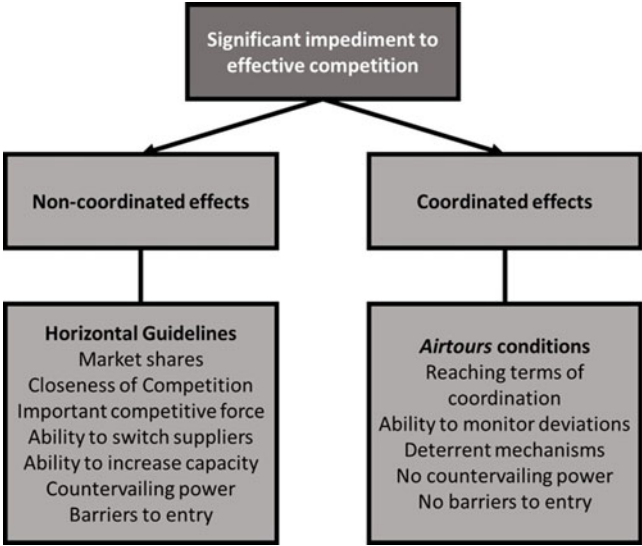


Figure 1. The SIEC test under Regulation 139/2004.

to hinder their expansion³⁴), and, finally, whether the transaction involves an important competitive force³⁵ (that, is a so-called ‘maverick’, the elimination of which affects market dynamics more than its modest position might suggest).

The conclusions based on these factors may then be corrected in light of other considerations, which relate to the features of the relevant market. Even when the analysis suggests, *prima facie*, that the transaction would lead to non-coordinated effects, an impediment to effective competition may not materialise, first, where the parties face strong constraints on either the buyer or the seller side.³⁶ In such an instance, the exercise of countervailing power may not allow the parties to exercise market power in the post-merger scenario. Second, non-coordinated effects cannot be expected to result from a transaction where entry is ‘sufficiently easy’, in the sense that it is likely and sufficiently timely so that the mere prospect of a new player restricts the ability and incentive of existing players to significantly affect the relevant parameters of competition (Figure 1).³⁷

C. The interpretation and application of the factors

There are three key aspects about the Commission’s approach to the abovementioned factors that are worth emphasising. First, the Guidelines note that each of the factors, considered in isolation, are not necessarily sufficient to substantiate a finding of non-coordinated effects.³⁸ Therefore, they will be typically assessed in combination with one another. Second, the Commission takes the view that a finding of non-coordinated effects need not consider every factor in each transaction.³⁹ One consequence of this approach is that the criteria against which the compatibility of a merger is assessed may change from operation to operation. For instance, the analysis in one case may rely on the parties’ market share and on the fact that they are close competitors; in another, the authority may place an emphasis on the status of one of them as a ‘maverick’.

³⁴*Ibid.*, para 36.
³⁵*Ibid.*, paras 37–8.
³⁶*Ibid.*, para 64.
³⁷*Ibid.*, para 68.
³⁸*Ibid.*, para 26.
³⁹*Ibid.*

The third aspect that is worth emphasising has to do with the fact that none of the factors identified in the Guidelines has clear, hard boundaries that can be discerned *ex ante*. In other words, there is no threshold of significance in relation to any of them. Consider ‘closeness of competition’. The Guidelines do not identify the requisite degree of closeness that would make it possible to draw the line between significant and insignificant impediments to effective competition. They do not present the issue as a binary one – whereby the parties are either significantly close competitors or they are not – but as one of degree, to be assessed on a case-by-case basis.⁴⁰ Similarly, the Guidelines mention that a transaction is more likely to impede effective competition where it involves an ‘important competitive force’. However, the Commission does not identify any operational criteria, other than the fact that the influence of a ‘maverick’ on the market may be greater than its market share might suggest.⁴¹

These three aspects, taken together, raise the question of whether they could give, in effect, something akin to *de facto* deference to the Commission when it evaluates mergers involving actual or potential competitors. This is so, to begin with, because the Guidelines follow an approach that allows the authority to decide, case-by-case, the benchmark against which the compatibility of transactions is assessed. In the same vein, it is an approach that does not give the merging parties the chance to argue that other factors, potentially casting doubts on the finding of a SIEC, should have been considered in the assessment. What is more, the nebulous boundaries of each of the factors are inextricably linked to the particularities of each case. In other words, the line between significant and insignificant impediments can only be determined *ex post*, once the assessment is performed.

The leeway which, by design, the Guidelines give to the authority may have the practical effect of turning an issue of law into one of policy. Merger control would revolve around policy in the sense that the decision of which transactions to prohibit and which to allow would not be determined and constrained by law, but by the enforcement priorities defined by the administrative authority. Concerns that the Commission’s approach may give it discretion in relation to horizontal transactions were, in fact, raised by practitioners in the years that followed the adoption of Regulation 139/2004. Venit, for instance, expressed the view that the authority’s approach ‘substantially reduces’ the ‘evidentiary burden’ to which it is subject.⁴² This commentator contrasted, in this sense, the *Airtours* conditions, which are cumulative and are discernible *ex ante*, with the way the Commission performed the assessment of non-horizontal effects under the SIEC test.⁴³

The consequences of the Commission’s approach to the assessment of horizontal mergers became apparent in *Hutchison 3G UK/Telefónica UK*.⁴⁴ The authority reiterated in its decision some of the key aspects of the philosophy permeating the Guidelines. First, it explained that the compatibility of a transaction need not consider every single one of the factors (which, in any event are not exhaustive).⁴⁵ Second, the Commission emphasised that the relevance of each factor is assessed along a continuum, not as binary options. Therefore, two parties can be deemed close competitors within the meaning of the Guidelines without necessarily being the

⁴⁰*Ibid.*, para 28: ‘[. . .] [t]he higher the degree of substitutability between the merging firms’ products, the more likely it is that the merging firms will raise prices significantly [. . .]’.

⁴¹*Ibid.*, para 37: ‘Some firms have more of an influence on the competitive process than their market shares or similar measures would suggest. A merger involving such a firm may change the competitive dynamics in a significant, anti-competitive way, in particular when the market is already concentrated [. . .]’.

⁴²JS 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’ 11 (2015) *European Competition Journal* 291.

⁴³*Ibid.*, 299.

⁴⁴Commission Decision of 11 May 2016 (Case M.7612 – *Hutchison 3G UK/Telefónica UK*).

⁴⁵*Ibid.*, paras 313 and 321.

closest competitors.⁴⁶ Similarly, an important competitive force need not be a ‘particularly important’ one and thus need not stand out relative to the constraints imposed by other players.⁴⁷

3. The EU courts’ interpretation of the SIEC test in *CK Telecoms*

A. The substantive criteria defined by the GC

In May 2020, the GC delivered its ruling in *CK Telecoms*, which annulled the Commission decision in *Hutchison 3G UK/Telefónica UK*.⁴⁸ The contributions it made in relation to the requisite standard of proof and the role and relevance of economic analysis have been widely discussed by commentators.⁴⁹ Arguably, the single most important conversation that the judgement started, and the one on which the remainder of the paper focuses, has to do with the way in which the GC construed the substantive factors around which the assessment of horizontal transactions revolves. The first-instance court departed from the Commission’s interpretation insofar as it placed meaningful substantive boundaries when defining the SIEC test. In this sense, the judgement specifies the requisite degree of significance justifying a finding of incompatibility.

According to the GC, for instance, it would not be enough to show that the parties are close competitors, as the Commission argued in its decision. It would be necessary to prove that they are particularly close competitors; that is, that there is something about the competitive relationship between the parties that is qualitatively different from the relationship that exists with other oligopolists. Two parties to a transaction could be seen as particularly close competitors, pursuant to the GC’s interpretation, where their products are seen as the only two meaningful substitutes for one another.⁵⁰ Such scenario would arise, for instance, where the merging firms target the same niche of customers⁵¹ or where the customers of one of the parties only contemplate switching to the other (Figure 2).⁵²

Similarly, the GC held that it would not be sufficient to prove that the ‘maverick’ involved in the concentration is an ‘important competitive force’. According to this interpretation, the authority would be required to establish that the said ‘maverick’ is a ‘particularly important’ competitive force, in the sense that the competitive pressure it exercises stands out from that coming from the rest of rivals.⁵³ According to this interpretation, a ‘maverick’ within the meaning of the SIEC test would not just be a firm that adds more dynamism than its market share might suggest. It would be the primary responsible for disciplining the behaviour of the rest of oligopolists. This situation could arise, for instance, where the ‘maverick’ is the late comer to a market with well-established players and therefore has to compete particularly aggressively to improve its position (Figure 3).⁵⁴

The GC was explicit about why the appropriate interpretation of the SIEC test demands the delineation of clear substantive boundaries in relation to each of the factors. It pointed out, in this sense, that the Commission’s interpretation of the various factors would allow it to establish a

⁴⁶*Ibid.*, para 324.

⁴⁷*Ibid.*, para 326.

⁴⁸Case T-399/16 *CK Telecoms* (n 8).

⁴⁹See in particular G Monti, ‘EU Merger Control After *CK Telecoms UK Investments v. Commission*’ 43 (2020) *World Competition* 447; K Fountoukakos and C Puech-Baron, ‘Towards a Higher Standard of Proof and a More Interventionist Judicial Review in Antitrust Cases Involving Complex (Economic) Assessments Following *CK Telecoms*?’ 11 (2020) *Journal of European Competition Law & Practice* 460; E Deutscher, ‘Prometheus Bound? – The Uncertain Future of the Unilateral Effects Analysis in EU Merger Control after *CK Telecoms*’ 18 (2022) *Journal of Competition Law & Economics* 323.

⁵⁰Case T-399/16 *CK Telecoms* (n 8), para 241.

⁵¹*Ibid.*, para 246.

⁵²*Ibid.*, para 248.

⁵³*Ibid.*, para 174.

⁵⁴Such was the issue at stake, for instance, in *T-Mobile Austria/Tele.ring* (n 12).

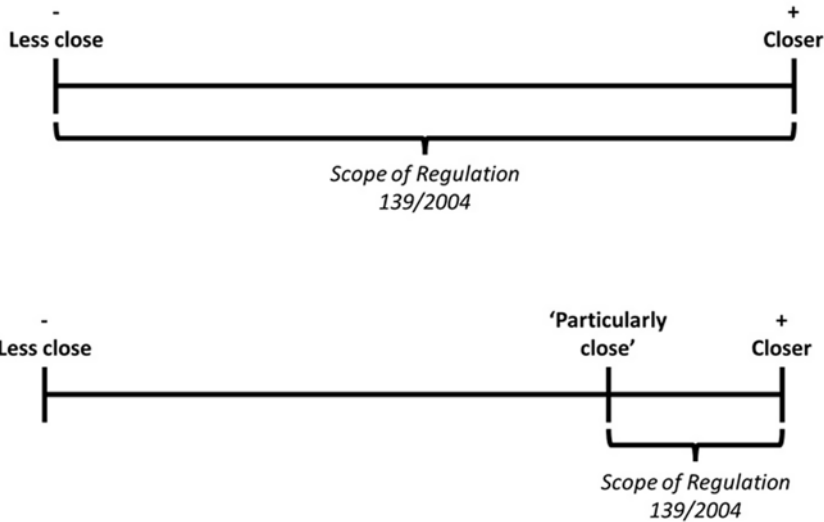


Figure 2. (1) and (2): 'Closeness of competition' as interpreted by the Commission (top) and the GC (bottom).

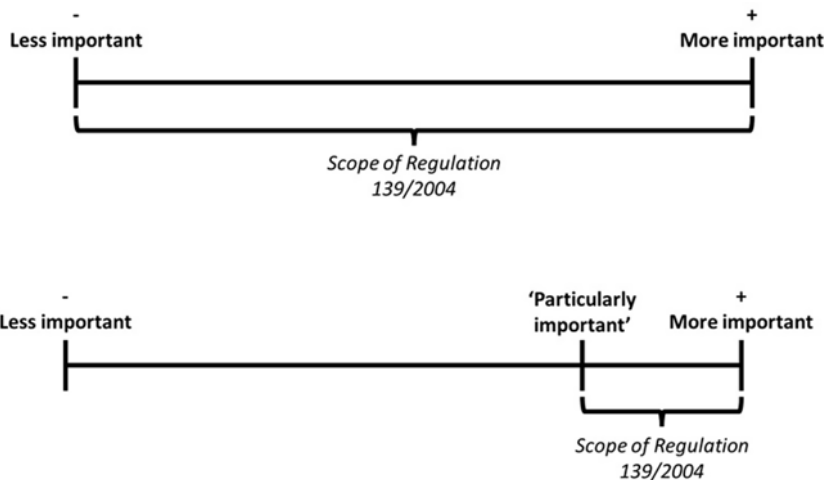


Figure 3. (1) and (2): 'Maverick firm' as interpreted by the Commission (top) and the GC (bottom).

SIEC in any oligopolistic market (which is tantamount to saying in virtually any market).⁵⁵ If it is accepted, for instance, that an 'important competitive force' need not stand out from the rest of rivals, every single firm within an oligopoly could potentially meet this condition. Similarly, every single horizontal merger would be problematic if it were accepted that the parties to the transaction need not be 'particularly close' competitors. If the relevance of this factor is assessed along a continuum (as the Commission argued in its decision), it would always be possible to

⁵⁵*Ibid.*, para 174: 'It follows that the Commission made an error of law and an error of assessment, in recital 326 of the contested decision, in finding that an 'important competitive force' does not need to stand out from its competitors in terms of impact on competition, particularly in so far as such a position would allow it to treat as an 'important competitive force' any undertaking in an oligopolistic market exerting competitive pressure'.

conclude that there is, at least to some extent, closeness of competition between the parties (and thus always possible to establish a SIEC). This is particularly true, the GC explains, in oligopolistic markets such as the one at stake in *Hutchison 3G UK/Telefónica UK*, which are characterised by a low degree of product differentiation.⁵⁶

In addition to fleshing out each of the individual factors laid down in the Guidelines, the GC introduced an overarching test to establish whether the non-coordinated effects resulting from a horizontal merger can be expected to lead to a SIEC. According to the GC's interpretation of Regulation 139/2004, the Commission would need to show that the transaction would lead to the elimination of 'important competitive constraints' that the merging parties had exerted upon each other and that, in addition, it would lead to a reduction of the competitive pressure to which remaining competitors are subject. These two criteria were derived by the GC from the Preamble to Regulation 139/2004, and more precisely from Recital 25.⁵⁷ The judgement specifically noted that this overarching test is not to be confused or conflated with the factors defined by the Commission in its Guidelines.⁵⁸

The definition of an overarching test served three purposes in the analytical framework crafted by the GC. First, it ensures that not every horizontal merger amounts to a SIEC merely because it entails the loss of (some degree of) competitive pressure.⁵⁹ By requiring that the elimination of a competitive constraint be an 'important' one, it emphasises that the impediment to effective competition must be shown to be 'significant'. The introduction of the overarching test means, second, that the individual factors are to be measured against a single overarching goal and are not examined in isolation. In addition, third, the test informs the fleshing out of individual factors. Because it demands that the constraints that the parties exerted upon each other be 'important', it would not be enough to show, for instance, that they were close competitors. They must be shown to be, in addition, 'particularly' close ones.

B. The Court ruling in *CK telecoms*

The ECJ set aside the GC ruling in *CK Telecoms* and referred the case back to the latter.⁶⁰ The appeal judgement followed, by and large, Advocate General Kokott's Opinion.⁶¹ To begin with, the Court rejected the overarching test proposed by the GC.⁶² By doing so, it brought the assessment back to the analytical framework sketched in Figure 1 (and rejected the extra step depicted in Figure 4). The ECJ advanced two main reasons in support of its conclusion. The need to preserve the effectiveness of the EU merger control regime is one of them. In addition, it argued that requiring the Commission to show not just that the transaction eliminates important competitive constraints placed upon each other but also that it would reduce the competitive pressure on remaining players would mean that the strengthening of the market power of the new entity in the post-merger scenario would be insufficient, in and of itself, to justify a finding of a SIEC.⁶³ Such an outcome, the judgement suggests, goes against the letter and logic of Regulation 139/2004.⁶⁴

⁵⁶*Ibid.*, para 240.

⁵⁷*Ibid.*, para 96: 'Thus, Art 2(3) of Regulation No 139/2004 must be interpreted in the light of recital 25 thereof, which lays down two cumulative conditions in order that non-coordinated effects arising from a concentration may, under certain circumstances, result in a significant impediment to effective competition: the concentration must involve (i) 'the elimination of important competitive constraints that the merging parties had exerted upon each other' and (ii) 'a reduction of competitive pressure on the remaining competitors'.

⁵⁸*Ibid.*, para 173.

⁵⁹*Ibid.*, para 97: 'It follows that the mere effect of reducing competitive pressure on the remaining competitors is not, in principle, sufficient in itself to demonstrate a significant impediment to effective competition in the context of a theory of harm based on non-coordinated effects'.

⁶⁰Case C-376/20 P *CK Telecoms* (n 6).

⁶¹Opinion of Advocate General Kokott in Case C-376/20 P *Commission v CK Telecoms UK Investments Ltd* ECLI:EU:C:2022:817.

⁶²Case C-376/20 P *CK Telecoms* (n 6), para 114.

⁶³*Ibid.*, para 112.

⁶⁴*Ibid.*, para 113.

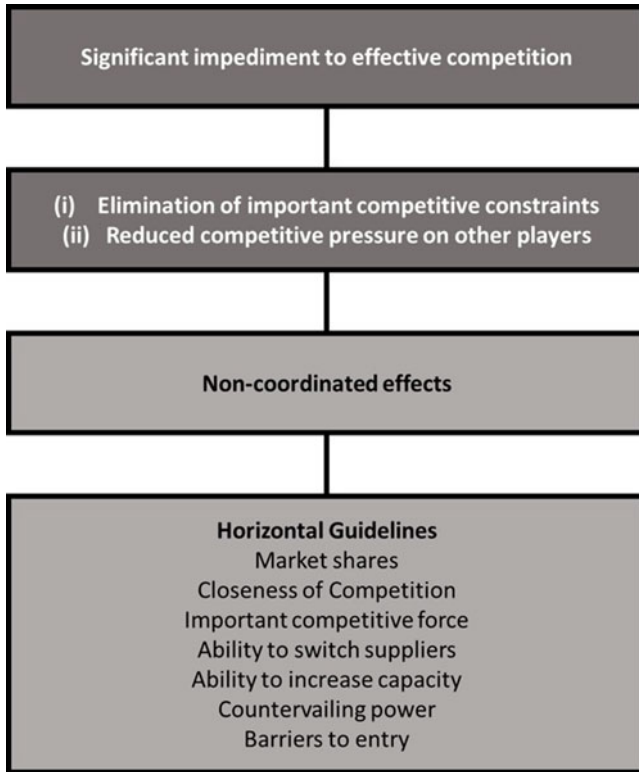


Figure 4. The GC's analytical framework in *CK Telecoms*.

Concerning the interpretation of the Guidelines, and the individual factors contained therein, the Court rejected the Commission's argument pursuant to which the administrative authority benefits from a margin of discretion when interpreting the meaning of concepts such as those of 'important competitive force' and 'closeness of competition'. The judgement noted, in this sense, that an administrative authority does not enjoy deference when construing the scope of legal provisions, including the substantive test enshrined in Regulation 139/2004.⁶⁵ In this sense, it neatly distinguished between points of law, the interpretation of which is subject to full review, and complex assessments, which are only controlled for manifest errors.⁶⁶ The Court pointed out, moreover, that the EU courts are in no way constrained by the choices made by the Commission, which is the only one bound by its own soft law instruments.⁶⁷

On the other hand, the Court concluded that the interpretation of the factors by the GC was incorrect in law. Contrary to what the first-instance court had held, the ECJ ruled that an 'important competitive force' (or 'maverick') within the meaning of the Guidelines need not be a 'particularly important' one. Therefore it would not be necessary to show that the competitive pressure it exerts is particularly aggressive.⁶⁸ Instead, the Court concurred with the interpretation given by the Commission, whereby the characterisation of a firm as a 'maverick' is appropriate whenever the influence of the undertaking on the competitive process is more important than its market share might suggest.⁶⁹ In a similar vein, the ECJ ruled that it cannot be excluded that more

⁶⁵*Ibid.*, para 126.

⁶⁶*Ibid.*, para 129.

⁶⁷*Ibid.*, para 123.

⁶⁸*Ibid.*, para 166.

⁶⁹*Ibid.*, para 167.

than a single firm qualifies as an ‘important competitive force’.⁷⁰ Again, considerations pertaining to the effectiveness of the merger control regime weighed in this interpretation.⁷¹

The Court interpreted the other factor, namely closeness of competition, in a similarly expansive manner. Contrary to what the GC had held, the ECJ ruled that it is not necessary to show that two parties are ‘particularly close competitors’ for this factor to be relevant in the assessment.⁷² According to the appeal judgement, a transaction could lead to a SIEC even when there is not a ‘very high degree of substitutability’ between the products offered by the merging undertakings.⁷³ The Commission may take this factor into account, the Court explained, provided that the degree of substitutability of the products offered by the parties is higher in relative terms.⁷⁴ Therefore, and in line with the Advocate General’s position, the judgement suggests that the factor must be assessed along a continuum, whereby a higher degree of closeness would point to a SIEC, while a lower degree would point to the opposite.⁷⁵

Finally, the Court concluded that the GC had erred in law by failing to engage in an overall evaluation of the Commission’s assessment of the likelihood of a SIEC. This point is particularly relevant in that it sheds light on the purpose and scope of judicial review. According to the appeal judgement, the GC must consider whether the contested decision, taken in its entirety, has established a SIEC to the requisite legal standard.⁷⁶ Accordingly, ruling that the Commission has erred in law when interpreting one or several of the factors enshrined in the Guidelines does not justify, in and of itself, the annulment of a decision. The first-instance court would need to ascertain, in addition, whether, in light of the assessment by the Commission in relation to other factors (not challenged and therefore deemed established), it could still be argued that the transaction would amount to a SIEC. Since the GC had failed to consider several arguments raised by the authority in its decision, the Court referred the case back to it.⁷⁷

The appeal judgement in *CK Telecoms* emphasises the importance of an effective EU merger control regime. On the other hand, the Court does not appear to give much weight to a consideration that was central in the GC’s assessment, namely that the approach enshrined in the Guidelines could turn, in effect, an issue of law into one of policy. As mentioned above, the first-instance judgement had concluded that the Commission had construed the substantive test in such a way that virtually every horizontal transaction would amount to a SIEC. While this question does not feature in the appeal judgement, it was addressed by Advocate General Kokott in her Opinion. She rejected its relevance, however, on two grounds. She noted, first, that the Commission has not systematically prohibited every horizontal merger since the entry into force of Regulation 139/2004; and second, that this argument is ultimately about placing a higher standard of proof in relation to mergers that do not create or strengthen a dominant position.⁷⁸

These arguments do not address the issue of de facto discretion. They are useful, however, in that they reveal that the theoretical and practical significance of the concerns raised by the GC may not always be fully appreciated. Contrary to what is suggested by the Advocate General, the fact that the interpretation of a legal provision gives, in effect, discretion to an administrative authority does not mean that it will be exercised to systematically prohibit every transaction. It simply means that the authority will have the leeway to decide which

⁷⁰*Ibid.*, para 163.

⁷¹*Ibid.*, para 161.

⁷²*Ibid.*, para 191.

⁷³*Ibid.*, para 189.

⁷⁴*Ibid.*

⁷⁵*Ibid.*: ‘[. . .] Even where substitutability between the merging parties’ products is not particularly high, there may also be a lower level of substitutability between those parties’ products and the products of undertakings which are not party to the concentration, which is capable of incentivising the parties to the concentration to increase the prices of their products’.

⁷⁶*Ibid.*, para 270.

⁷⁷*Ibid.*, paras 338–42.

⁷⁸Opinion of Advocate General Kokott in *CK Telecoms* (n 61), para 111.

transactions are incompatible with the internal market and which are not, and this without being meaningfully constrained by law. The reference to the standard of proof in the Opinion, in turn, reveals a tendency, relatively widespread in the community, to conflate issues of substance (such as the meaning of the SIEC test) and issues of evidence (such as the requisite standard of proof).⁷⁹

4. Judicial review after *CK Telecoms*: full review or deference on issues of law?

A. The intensity of judicial review after the appeal judgement: theory

Full judicial review of issues of law

At first sight, the landscape of judicial review in EU merger control seems straightforward. Full review applies both to the interpretation of the SIEC test as such and to the individual factors into which the test is broken down. As explained above, the Court rejected the idea that the Commission should be given deference in relation to the latter. Insofar as they are ‘concepts of EU law’,⁸⁰ it is incumbent upon the EU courts to define their meaning, and not simply to verify whether the Commission has committed a manifest error of assessment when fleshing them out. In one respect, the Court’s position is uneventful. It reiterates the doctrine defined in landmarks such as *Kali & Salz*,⁸¹ *Airtours*,⁸² and *Tetra Laval*,⁸³ whereby it is for the EU courts to delineate the legal boundaries of EU merger control – including, inter alia, the meaning of collective dominance or the definition of the instances where a conglomerate merger leads to a SIEC.

In another respect, the Court’s reiteration of this line of case law is valuable and relevant. The current economic and technological climate favours an expansive understanding of the substantive limits of the EU merger control regime. Specifically, there have been calls for the Commission to explore the application of emerging doctrines that either tackle relatively neglected harms in the past (such as the impact of concentrations on labour markets⁸⁴) or adjust to novel realities. Much ink has been spilled, for instance, on so-called ‘killer acquisitions’,⁸⁵ that is, transactions where large players acquire, at a very early stage, firms that could become a competitive threat at some point in the future. These operations occur before the target exercises ‘a significant constraining influence’ and before there is ‘significant likelihood that it would grow into an effective competitive force’. Typically, they would not warrant intervention under the Guidelines, which set a higher bar for potential competition to be considered in the assessment.⁸⁶

⁷⁹For an extensive discussion of this issue, see in particular A Kalintiri, *Evidence Standards in EU Competition Enforcement: The EU Approach* (Hart Publishing 2020) 78–81.

⁸⁰Case C-376/20 P *CK Telecoms* (n 6), para 126.

⁸¹*Kali & Salz* (n 3), para 171.

⁸²*Airtours* (n 25), para 62.

⁸³*Tetra Laval* (n 3), para 40.

⁸⁴See, inter alia, P Déchamps, ‘Labour Markets: A Blind Spot for Merger Control?’ (*Agenda*, September 2019), available at <<https://www.oxera.com/>> accessed 17 March 2025; I Marinescu and HJ Hovenkamp, ‘Anticompetitive Mergers in Labor Markets’ 94 (2019) *Indiana Law Journal* 1031; and DW Berger et al, ‘Merger Guidelines for the Labor Market’ (2023) NBER Working Paper 31147, available at <<http://www.nber.org/papers/w31147>> accessed 17 March 2025.

⁸⁵See in particular the seminal contribution by C Cunningham et al, ‘Killer Acquisitions’ 129 (2021) *Journal of Political Economy* 649. See also G Crawford et al, ‘“How Tech Rolls”: Potential Competition and “Reverse” Killer Acquisitions’ (Vox EU, 11 May 2020); N Levy et al, ‘Reforming EU Merger Control to Capture “Killer Acquisitions” – The Case for Caution’ 19 (2020) *Competition Law Journal* 51; and M Ivaldi et al, ‘Killer Acquisitions: Evidence from European Merger Cases’ (2024) TSE Working Papers 1420, available at <<https://www.tse-fr.eu/>> accessed 17 March 2025.

⁸⁶Pursuant to the Horizontal Merger Guidelines (n 21), para 60, pursuant to which a merger with a potential competitor can be expected to have significant anticompetitive effects where, first, ‘the potential competitor must already exert a significant constraining influence or there must be a significant likelihood that it would grow into an effective competitive force. Evidence that a potential competitor has plans to enter a market in a significant way could help the Commission to reach such a

The emerging doctrine that best captures the sign of the times is the ‘ecosystem theory of harm’. This expansion of the substantive scope of the regime featured in the Commission decision in *Booking/eTraveli*.⁸⁷ The distinctive feature of this new theory of harm, and the reason it departs from existing ones, is that it applies the principles and logic of the Guidelines to instances that do not involve the amalgamation of actual or potential competitors.⁸⁸ Even though the target in *Booking/eTraveli* did not operate in the same relevant market as the acquirer, the Commission argued that the transaction could strengthen the latter’s dominant position through the same mechanisms horizontal transactions lead to a SIEC.⁸⁹ The authority argued, moreover, that non-horizontal mergers can be problematic in instances other than the ones identified in the Guidelines on non-horizontal mergers.⁹⁰

Following the Court’s judgement in *CK Telecoms*, it is apparent that the Commission does not enjoy discretion in relation to this ‘ecosystem theory of harm’ (and, indeed, any new doctrine testing the boundaries of the regime beyond existing soft law instruments). It will be for the EU courts to decide, first, whether intervention based on this doctrine is sufficiently robust from an economic standpoint; second, whether it remains within the boundaries of what is permitted by Regulation 139/2004 (just like the Court did in *Kali & Salz*, on the issue of whether collective dominance fell within the scope of Regulation 4064/89); and, third, to define the conditions under which an ‘ecosystem theory of harm’ can lead to a SIEC (in the same way the GC did when it set out, in *Airtours*, the criteria against which the creation or the strengthening of a collective dominant position was to be evaluated). The same conclusions would apply if the Commission sought to expand the concept of potential competition to capture ‘killer acquisitions’ occurring at a stage where the target is not a ‘potential competitor’ within the meaning of the (current) Guidelines.

Limited judicial review of complex assessments

The Court also confirmed that the Commission enjoys a margin of discretion as far as complex assessments are concerned. Where such assessments are involved, judicial review will be limited, in the sense that it would be confined to manifest errors of assessment. Accordingly, the EU courts’ scrutiny will be confined to three questions, namely ‘whether the evidence relied on is factually accurate, reliable and consistent’, ‘whether that evidence contains all the information which must be taken into account in order to assess a complex situation’ and, finally, ‘whether it is capable of substantiating the conclusions drawn from it’.⁹¹ This passage in the appeal judgement is worthy of discussion not because of the position it expresses (it is, after all, a restatement of the

conclusion’ and, in addition, there is not ‘a sufficient number of other potential competitors, which could maintain sufficient competitive pressure after the merger’. In response to the letter of the Guidelines, some authors have proposed ‘broadening of the concept of potential competition to include all types of products and services that are, on the basis of their current functionalities, not yet close substitutes but could possibly expand in the future such as to become close competitors’. See in this sense the report prepared by H Schweitzer et al, *Competition Policy for the Digital Era* (2019) <<https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>> accessed 17 March 2025, 119.

⁸⁷*Booking Holdings/eTraveli Group* (Case M.10615) Commission Decision of 25 September 2023. The direct action against the Commission decision is currently pending. See Case T-1139/23 *Booking Holdings Inc. v Commission*, pending.

⁸⁸For an overview of this theory, see E Garces et al, ‘Ecosystem Theories of Harm in Merger Enforcement: Current Direction and Open Questions Get access Arrow’ 15 (2024) *Journal of European Competition Law & Practice* 272; and M Batra et al, ‘Ecosystem Theories of Harm in EU Merger Control: Analysing Competitive Constraints and Entrenchment’ 15 (2024) *Journal of European Competition Law & Practice* 357.

⁸⁹*Booking/eTraveli* (n 87), para 194: ‘Therefore, even though the Transaction relates to the acquisition of an operator active in a different market, ie the flight OTA market, the Transaction would make entry or expansion by rivals in the hotel OTA market more costly and reduce competitive constraints on Booking. As a result, the Transaction will strengthen Booking’s dominant position, enabling Booking to increase costs for its customers, namely hotels using Booking’s platform to list their properties and, likely also, end customers that search for accommodation on Booking [...]’.

⁹⁰Non-Horizontal Merger Guidelines (n 24).

⁹¹Case C-376/20 P *CK Telecoms* (n 6), para 125.

Tetra Laval doctrine defining the scope and intensity of judicial review under the merger control regime),⁹² but because of the view expressed by the GC in *CK Telecoms*. The first-instance judgement had made no reference to control for manifest errors when going over the principles governing the intensity of judicial review in EU merger control.⁹³

The remaining question, on which the appeal judgement sheds some light, relates to what amounts to a ‘complex assessment’ within the meaning of the case law. This category is best understood as encompassing two issues: in the first place, the economic tools on which the Commission relies; in the second, the conclusions it draws from them. The economic tools within the meaning of the category include the methodologies used to define the relevant market (such as the SSNIP test)⁹⁴ and to forecast the likely increase in prices in the post-merger scenario (of which the UPP and GUPPI tests are two examples).⁹⁵ In principle, the Commission enjoys discretion to decide the tools on which to rely. For instance, it cannot be compelled to administer the SSNIP test if there are other ways to define the relevant market.⁹⁶ The Commission also enjoys discretion when evaluating the findings that result from their use (for instance, the amount by which prices are expected to go up in the post-merger scenario and the boundaries of the relevant product market).⁹⁷

Against this background, the role of the EU courts in relation to complex assessments can be summarised as follows. In accordance with the *Tetra Laval* framework described above, the Court and the GC can ascertain, first, whether the economic tools used by the Commission are ‘robust’ enough. It could be the case, for instance, that the academic consensus sees the tools as unreliable (alternatively, they may remain untested, and their reliability is therefore yet to be established). The control for manifest errors also comprises, second, evaluating whether the evidence included by the Commission as part of its assessment is ‘complete’ and ‘accurate’. It seems uncontroversial to state that the outcome of complex assessments can only be trusted where all the necessary and correct inputs have been incorporated into the analysis.

Third, the EU courts may test whether the tools (and the outcomes that result from the use of such tools) are capable of substantiating the conclusions drawn from them. For instance, there should be little doubt that judicial scrutiny extends to the question of whether a particular econometric technique can, alone, substantiate the conclusion that the new entity would enjoy a dominant position in the post-merger scenario (or, more generally, that it would allow it to profitably increase its prices). Fourth (and in a similar vein), the GC and the Court may verify whether the evidence drawn from the use of such tools is internally consistent (and, likewise, whether the conclusions drawn by the Commission are based on the whole body of evidence or whether, instead, it is contradicted by some aspects thereof). These ideas are summarised in Figure 5.

The role of the EU courts in relation to complex economic assessments is usefully illustrated in light of the GC’s analysis in *CK Telecoms*. The Commission had relied, as part of its assessment, on UPP analysis. This tool showed that the transaction would incentivise the parties to significantly increase prices.⁹⁸ In line with the *Tetra Laval* case law (confirmed by the Court

⁹²*Tetra Laval* (n 3), para 39.

⁹³Case T-399/16 *CK Telecoms* (n 8), para 76.

⁹⁴Commission Notice on the definition of the relevant market for the purposes of Union competition law [2022] OJ C 1645.

⁹⁵Case T-399/16 *CK Telecoms* (n 8), para 260. On UPP and GUPPI, see J Farrell and C Shapiro, ‘Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition’ 10 (2010) B.E. Journal of Theoretical Economics Policies and Perspectives 9. The authors described these tools as ‘simple initial indicator of whether a proposed merger between rivals in a differentiated product industry is likely to raise prices through unilateral effects’.

⁹⁶Case C-581/22 P *thyssenkrupp AG v Commission*, EU:C:2024:821, para 171.

⁹⁷An example in this sense could be the price increases predicted by the UPP or GUPPI analysis. See for instance the *Hutchison 3G UK/Telefónica UK* (n 44), para 1224.

⁹⁸*Ibid.*, para 1225.

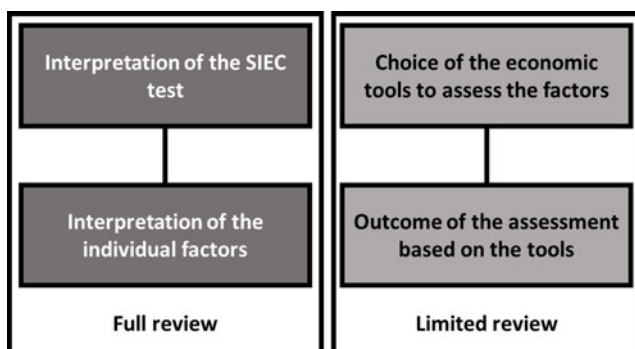


Figure 5. Full and limited review in EU merger control after the appeal judgement in *CK Telecoms*.

on appeal), the GC evaluated the robustness of this economic tool. It noted, in this sense, that UPP analysis is best used as a ‘first “screen”’ to determine whether a transaction warrants an in-depth investigation.⁹⁹ It was therefore not found to be robust enough, in and of itself, to substantiate the conclusion that a particular concentration would lead to a SIEC. The GC noted, more precisely, that the projections drawn from UPP analysis ‘must not [. . .] be regarded as credible forecasts of price increases or simulations of mergers’.¹⁰⁰ This aspect of the first-instance judgement was not challenged on appeal and, as already mentioned, is consistent with the *Tetra Laval* formula.

B. Towards *de facto* deference on issues of law?

Figure 5 is an attempt to capture the role and intensity of judicial review in EU merger control following the appeal judgement in *CK Telecoms*. As already explained, it is for the EU courts to interpret both the SIEC test and the factors into which it is broken down. Accordingly, it is not enough for the Commission to argue that its interpretation of the legal provisions is defensible (or not manifestly incorrect). It is equally irrelevant that the exercise involves complex economic assessments. The question, at least in principle, is whether the way the authority construes and applies the various legal concepts is the correct one. In the same vein, the EU courts are not bound by the Commission’s soft law instruments; and need not show deference with respect to emerging theories featuring in individual decisions or new iterations of the Guidelines.

In practice, however, the judicial review of issues of law may become less strict, and something akin to a reasonableness standard¹⁰¹ may become the norm *de facto* – if not *de iure* – in the wake of *CK Telecoms*. It is submitted, in this sense, that, once the EU courts are confronted with the reality of what the scrutiny of merger decisions entails, the doctrine that applies to complex assessments may creep into the review of issues of law. Moving forward, judicial review may revolve, in effect, around whether the interpretation of the relevant legal concepts is, first, reasonable from a substantive perspective; second, whether it is based on all the relevant factors;

⁹⁹Case T-399/16 *CK Telecoms* (n 8), para 257.

¹⁰⁰*Ibid.*, para 256.

¹⁰¹Reasonableness review refers to the default standard of judicial review in administrative law in the UK tradition, whereby an administrative decision can only be quashed if it is ‘so unreasonable that no reasonable authority could ever have come to it’. See *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation* [1948] 1 KB 223. By its very nature, it sets a lower standard of judicial review than the prevailing one in the EU legal order. For an analysis of the reasonableness standard, see P Daly, ‘*Wednesbury*’s Reason and Structure’ (2011) Public Law 238; and P Craig, ‘The Nature of Reasonableness Review’ 66 (2013) Current Legal Problems 131.

and third, whether due process considerations have been observed when evaluating the evidence and when considering the arguments raised by the parties.¹⁰²

The interpretative choices made by the Court help understand why administrative action may in practice be subject to a reasonableness standard (as opposed to full review) and become process-oriented (as opposed to substance-oriented).¹⁰³ To begin with, the factors against which the compatibility of concentrations is assessed are allowed to vary from one case to another. The basis for the substantive assessment can therefore fluctuate depending on the nature of the transaction and the underlying context. Second, the Court did not identify a general, overarching test – such as the one defined by the GC – against which the significance of the impediment can be assessed. Similarly, the judgement provides no guidance in relation to how many factors need to be present for a SIEC to be established to the requisite legal standard (or whether a minimum set of such factors must be established for a finding of non-coordinated effects to be deemed substantiated). Finally, the Court did not provide guidance on how to deal with instances where the analysis of the various factors leads to contradictory conclusions (with some factors suggesting a SIEC and others pointing to the opposite outcome).

The approach followed by the Court to define the substantive scope of each of the individual factors also favours the emergence of a reasonableness standard. Unlike the GC, the ECJ did not set a hard substantive boundary marking the point at which the closeness of competition between the parties is deemed significant enough for it to be considered in the assessment. In a similar vein, a maverick need not be, according to the appeal judgement, a ‘particularly important’ competitive force (to the point that the judgement does not rule out that there could be, in a given oligopolistic market, more than one such maverick). The Court suggests that the relevance of these factors must be assessed, along a continuum, in light of the features of the relevant market. Whether or not the parties are close competitors, for instance, can only be assessed on a case-by-case basis, that is, by ascertaining whether, in relative terms, the parties’ competitive relationship is close, even if it not particularly so.

The reason why these interpretative choices might inevitably alter the nature and intensity of judicial review is apparent. Where there is no overarching substantive test defining the boundaries between significant and insignificant impediments, and where the relevance of each of the factors depends on the specificities of the relevant market, there is no distinct, autonomous benchmark against which the legal characterisation of facts can be controlled by a judge. As a consequence, a court would only be in a position to engage in the full review of issues of law by engaging in complex assessments itself; that is, by substituting its own assessment for that of the authority. For instance, the question of whether the parties are close competitors would require ascertaining whether the Commission was correct when finding that the degree of substitutability of the products offered by the parties is higher than that of rivals. These are evaluations from which judges typically refrain.

If, by design, the review of issues of law demands the court to substitute its own assessment for that of the authority, it seems almost inevitable that the margin of discretion that applies to complex assessments will find its way into both the interpretation of legal concepts and the legal characterisation of facts. There are compelling reasons why review judges are likely to exercise restraint when confronted with this situation. If they were to substitute their own assessment for that of the authority, judges would become, in effect, second or third-tier administrative authorities evaluating the compatibility of concentrations with the internal market. This task is not one for which they are particularly well equipped. More importantly, it is not the task that has

¹⁰²The shift of judicial scrutiny from substance to process is a phenomenon that has been identified and discussed in the literature. See in particular F Castillo de la Torre, ‘On Boxes and Paradoxes: Form and Substance in Judicial Review of Competition Decisions’ (*EU Law Live*, 29 September 2022), who observes that ‘[t]he Court of Justice reacted to concerns about lack of review of complex assessments by developing a type of “process-oriented” review paradigm, based on the criteria for judicial review outlined in *Tetra Laval*’.

¹⁰³On process-oriented review in the EU legal order, see, generally K Lenaerts, ‘The European Court of Justice and Process-Oriented Review’ 31 (2012) *Yearbook of European Law* 3.

been allocated to them under the TFEU. The role of the EU courts is confined to reviewing the legality of decisions adopted by the Commission.

Expanding the margin of discretion doctrine to issues of law is not any less problematic from the perspective of the allocation of powers between the Commission and the EU courts. If the administrative authority benefits from *de facto* deference in relation to the interpretation and application of legal concepts, it would be enjoying jurisdiction on matters which are in principle the exclusive province of the Court (such as, *inter alia*, whether a new theory is robust enough to justify a finding of a SIEC). This point was, in fact, emphasised by Advocate General Kokott in her Opinion.¹⁰⁴ The conclusion that follows is that the interpretative choices made in *CK Telecoms* could lead, in effect, to two outcomes that are equally unsatisfactory and difficult to reconcile with the roles that the TFEU assigned to, respectively, the EU courts and the Commission. Placed between a rock and a hard place, process-oriented review, confined to manifest errors, is more likely to prevail.

5. Deference on issues of law: assessment and implications

A. Deference as an adjustment to a changing landscape

The preceding section concludes that the interpretative choices made by the Court in *CK Telecoms* have the potential to change the nature and intensity of judicial review in EU merger control. There would be compelling constitutional reasons to object to such a transformation. They have been outlined above and need not be rehearsed here. What is worth emphasising, on the other hand, is that, according to a growing number of commentators, the current economic and technological landscape provides arguments in support of leaving the Commission with a margin of discretion when evaluating the legality of concentrations. One can think of two overarching claims in support of deference on issues of law. The first has to do with the perception that merger control requires nimble decision-making. The second, with the importance of leaving authorities scope for experimentation. These two arguments are examined in turn.

Deference and nimble decision-making

It has been frequently stated in the course of the past decade that merger control has become too permissive, if not plain ineffective.¹⁰⁵ These claims must be understood against the background of a growing body of economic research discussing whether industries have become increasingly concentrated in the course of the past decades.¹⁰⁶ Proponents of vigorous action take the view that the merger control regime must be overhauled so that it addresses two perceived flaws. One of them is competition authorities' allegedly complacent attitude. According to this view, agencies may have become overly concerned with overenforcement, as opposed to underenforcement; and, similarly, have favoured negotiated outcomes (as opposed to outright declarations of incompatibility, which remain rare).¹⁰⁷ A second claim, which might explain in part the first, is, in essence, a criticism of the impact of economic analysis on competition authorities' ability to establish harm to the requisite legal standard. The economic evidence produced by the parties in

¹⁰⁴Opinion of Advocate General Kokott in *CK Telecoms* (n 61), paras 86–8.

¹⁰⁵S Marco Colino and KLM Chung, 'Reshaping EU Merger Control: from Harm Detection to Harm Control' 15 (2024) *Journal of European Competition Law & Practice* 409.

¹⁰⁶For a critical overview of this literature, see C Shapiro, 'Antitrust in a Time of Populism' 61 (2018) *International Journal of Industrial Organization* 714; and B Durand and A Jaoui, 'A Rising Trend in Market Concentration: Myth or Reality?' (*Network Law Review*, 13 July 2023).

¹⁰⁷It is true that the declaration of incompatibility of a merger remains a relatively rare occurrence. At the time of writing, only 15 transactions had been declared to be incompatible with the internal market since 2004. The statistics are available at <https://competition-policy.ec.europa.eu/mergers/statistics_en> accessed 17 March 2025.

the context of the administrative procedure would arguably place an unmanageable load on agencies.¹⁰⁸

A number of proposals have been advanced to reinvigorate merger control regimes and allow for nimble decision-making. Some of the ideas involve reversing the burden of proof, at least in relation to transactions with a horizontal dimension. For instance, Lancieri and Valletti plead in favour of presuming the incompatibility of concentrations exceeding certain thresholds.¹⁰⁹ Such an approach would dispense with the need to define the relevant market and to establish the likely impact of the operation. Instead, it would be for the parties to provide the requisite evidence showing why the transaction would be on balance pro-competitive. Other approaches are aimed at tweaking the applicable threshold of effects so that agencies enjoy greater leeway in practice. A prominent example in this sense is provided by the so-called Furman Report.¹¹⁰ The authors proposed a ‘balance of harms’ standard, which would allow, in essence, authorities to take action against a merger when it is plausible that it would be on the whole anticompetitive.¹¹¹

Deference on issues of law is an effective alternative to these proposed adjustments to the system. Process-oriented review would lead to analogous outcomes, albeit via a different route. The shift from substance to process would give authorities, in effect, the sort of leeway that the abovementioned approaches intend to provide. Limited review, confined to manifest errors of assessment is, in essence, the mirror image of the ‘balance of harms’ approach advocated in the Furman Report. Similarly, deference on issues of law, without going as far as to lead to a reversal of the burden of proof, may work in a fundamentally identical way. This is so, in particular, where the authority exploits the increased margin of discretion to develop proxies and bright lines dispensing it with the need to engage in the sort of in-depth economic analysis that, it is argued, delays decision-making.

A deferential standard of scrutiny on issues of law would not just be the functional equivalent to other proposed approaches. It would have the added advantage that it could develop organically through the interaction between the administrative authorities and the review courts. The increased margin of discretion would not require legislative amendments, or even the adoption of a new set of Guidelines. It would simply be manifested in its decision-making practice. A more deferential approach to the review of administrative action need not even be declared explicitly, or even in a reiterated manner. It can be inferred and signalled to the authority from the approach displayed in individual cases. Commentators have noted, for instance, that the intensity of the scrutiny by the GC in *thyssenkrupp* contrasts with that displayed in the *CK Telecoms*.¹¹² In its appeal in the former the firm argued, unsuccessfully, that the first-instance court had proved overly deferential to the Commission.¹¹³

Deference as a platform for experimentation

A second, related reason why deference may be warranted has to do with the fact that full review of issues of law discourages risk-taking by authorities. In a changing economic and technological landscape, the argument goes, agencies should be entitled to reshape and redefine legal concepts to tackle emerging challenges more effectively. For instance – and coming back to one of the

¹⁰⁸This thesis is developed in M Jugl et al, ‘Spamming the Regulator: Exploring a New Lobbying Strategy in EU Competition Procedures’ 12 (2024) *Journal of Antitrust Enforcement* 7.

¹⁰⁹F Lancieri and T Valletti, ‘Towards an Effective Merger Review Policy: A Defence of Rebuttable Structural Presumptions’ 40 (2024) *Oxford Review of Economic Policy* 763.

¹¹⁰J Furman et al, *Unlocking Digital Competition: Report of the Digital Competition Expert Panel* (March 2019).

¹¹¹*Ibid.*, para 3.88: ‘A more economic approach to assessing mergers would be to weigh up both the likelihood and the magnitude of the impact of the merger. This would mean mergers being blocked when they are expected to do more harm than good. The Panel calls this a “balance of harms” approach’.

¹¹²G Monti, ‘The Merger Control Regulation: What’s Past Is Prologue’ 59 (2022) *Common Market Law Review* 13.

¹¹³*thyssenkrupp* (n 96).

examples mentioned above – one could argue that an authority should be given the necessary deference to reinterpret the concept of potential competition so as to capture sources of competitive pressure that are not necessarily likely to materialise in the foreseeable future (and therefore would not meet the conditions set out in the current iteration of the Guidelines). Such a revised interpretation would prevent harm resulting from, among others, ‘killer acquisitions’. According to this view, deference would mean treating what is in principle an issue of law (the scope and meaning of the notion of potential competition) as a policy matter, thereby allowing the authority to preserve the effectiveness of merger control.

Increased deference would encourage experimentation and risk-taking by the authority in a different way. Giving a margin of discretion on issues of law would change how the Commission engages with non-legal disciplines. With the advent of the ‘more economics-based approach’, expertise was conceived as a constraint on administrative action, in the sense that it sought to keep the latter within the mainstream body of knowledge and within the range of approaches and methodologies widely accepted by subject-matter specialists. Such an understanding ensured, for instance, that the notion of collective dominance would be defined by reference to the economic concept of tacit collusion, as opposed to a *sui generis* interpretation developed by the Commission.¹¹⁴ It also ensured, just to give another example, that intervention against conglomerate transactions would remain confined to the instances identified as potentially problematic in the relevant literature.¹¹⁵

Once deference is extended to issues of law, the relationship between legal and non-legal expertise is fundamentally altered, and this in two ways. In the first place, the latter would no longer act as a constraint on administrative action. Its role would be the opposite, in the sense that it would provide the very intellectual basis for the expansion of the boundaries of intervention. Under this approach, second, expertise need not reflect or capture consensus views. It could also be unorthodox or relatively tentative. For instance, intervention could be grounded on an emerging theory that has not necessarily gained widespread acceptance in the relevant extra-legal profession. Similarly, the range of expertise on which administrative action relies could be expanded. It has been noted, in this sense, that the so-called ‘ecosystem theory of harm’, on which cases like *Booking/eTraveli* are based, has been developed by management scholars, not by economists.¹¹⁶

B. Implications of deference

Any analysis of deference on issues of law, and how it could allow the system to adjust to the demands of a changing economic and technological landscape, would be incomplete without a discussion of its implications for EU merger control at large. The fact that a margin of discretion relating to the interpretation of the SIEC test might improve the effectiveness of enforcement does not imply that the system would necessarily fare better if process-oriented review and a standard of reasonableness became the norm. An inescapable consequence of the shift would be its impact on legal certainty and predictability. A second potential consequence relates to the quality of decision-making. It is unclear whether, as a general rule, greater leeway would improve the Commission’s output and, similarly, allow for the minimisation of enforcement errors.

The Court judgement in *CK Telecoms* placed particular emphasis on effective enforcement by the Commission. As explained above, it held that the GC’s interpretation of the SIEC test would leave unscrutinised transactions significantly strengthening the market power of one or several

¹¹⁴*Airtours* (n 25), para 62. For a critical analysis of the Commission’s approach in the case, see J Briones and J Padilla, ‘The Complex Landscape of Oligopolies under EU Competition Policy – Is Collective Dominance Ripe for Guidelines?’ 24 (2001) World Competition 307.

¹¹⁵See in this sense *Tetra Laval* (n 3), and also Case T-5/02 *Tetra Laval v Commission* ECLI:EU:T:2002:264, paras 154–5.

¹¹⁶For an overview of the literature and its application to competition law issues, see MG Jacobides and I Lianos, ‘Ecosystems and Competition Law in Theory and Practice’ 30 (2021) *Industrial and Corporate Change* 1199.

oligopolists. On the other hand, the ruling did not expressly address how the interpretation of the various factors enshrined in the Guidelines could impact legal certainty. Insofar as the relevant legal concepts (such as ‘closeness of competition’ or ‘important competitive force’) lack hard boundaries and can only be defined ex post (to the point that the authority enjoys de facto deference), it may not be obvious for the parties to anticipate the outcome of administrative action. Similarly (and this is a point raised by the GC), the authority may be in a position to find that the factors are present in virtually always and in every transaction. To the extent that this is the case, effective enforcement could be achieved at the expense of legal certainty.

While the latter principle did not feature in the Court’s analysis in *CK Telecoms*, it played a preeminent role in its subsequent judgement in *Illumina*.¹¹⁷ The latter did not engage with substantive matters, but jurisdictional ones. This case is valuable, however, in that it provides an example of the tension that might arise between effective enforcement and legal certainty, and of how this tension might be resolved. More precisely, *Illumina* concerned the issue of whether the Commission could claim jurisdiction, pursuant to Article 22 of the Regulation 139/2004, in relation to transactions that do not have a Union dimension and also fail to meet the notification thresholds at the national level.¹¹⁸ If effective enforcement were the only consideration, it would make sense to allow for the referral of such transactions. In fact, the response would meaningfully remedy the flaws of traditional notification thresholds, which may not always capture the potential significance of concentrations in certain industries, thereby jeopardising the regime’s ability to protect competition.¹¹⁹

The Court ruled in *Illumina* that the Commission does not have the power to examine transactions referred by national authorities where the latter lack jurisdiction to consider their compatibility with the domestic regime.¹²⁰ Crucially for the purposes of this discussion, legal certainty was the central consideration in its analysis. The Court noted, in particular, that effective enforcement was not the only principle underpinning the referral mechanism in Regulation 139/2004 (and, more generally, the merger control regime). The system had also been designed to provide predictable outcomes.¹²¹ In this sense, the point of the referral mechanism was to strengthen the logic of the system, which revolves around the so-called ‘one-stop shop’ principle and seeks to avoid potentially conflicting decisions resulting from multiple notifications of the same transaction.¹²²

The twin concern with legal certainty and effective enforcement in Regulation 139/2004 is not limited to jurisdictional matters. Recital 25, which has been discussed above and that was central to the outcome of *CK Telecoms*, makes an explicit reference to legal certainty. This general principle of EU law was, in fact, behind the shift to the SIEC test in Regulation 139/2004. Unlike *Illumina*, *CK Telecoms* did not clarify how legal certainty is to be balanced against effective enforcement. How to do so, as far as substantive issues are concerned, was ultimately left open in the judgement. It might arise in future cases. The fundamental question, if the issue is to be

¹¹⁷Joined Cases C-611/22 P and C-625/22 P *Illumina Inc. and Grail LLC v Commission* ECLI:EU:C:2024:677.

¹¹⁸See in this sense Guidance on the application of the referral mechanism set out in Art 22 of the Merger Regulation to certain categories of cases [2021] OJ C 113/1, where the Commission defended the idea that it could claim jurisdiction in relation to transactions that do not satisfy the thresholds defined at the national level.

¹¹⁹*Ibid.*, para 9.

¹²⁰*Illumina* (n 117), para 218.

¹²¹*Ibid.*, para 199.

¹²²*Ibid.*, para 203: ‘Viewed from a systemic perspective, it can be inferred from the recitals of Regulation No 139/2004 that, although that regulation seeks to establish ‘a specific legal instrument . . . to permit effective control of all concentrations in terms of their effect on the structure of competition’ (recital 6), it seeks also to establish an effective and predictable control system, taking into account the need for legal certainty and based on the ‘one-stop shop’ principle (recitals 8 and 11). That system is based both on a clear allocation of the tasks assigned to the Commission and the Member States and on a precise definition of the notification and suspension conditions imposed on the parties to a concentration [. . .]’.

brought again before the Court, is whether a shift towards a reasonableness standard and process-oriented review would strike the right balance between legal certainty and effective enforcement. It is not clear that it would, and this insofar as it is likely to place too much emphasis on the latter.

It is equally unclear whether shifting the balance to favour effectiveness over legal certainty would necessarily lead to better enforcement. One cannot deny that deference on issues of law would give the Commission more leeway to test novel theories and to establish harm in a more straightforward way. It does not follow from this fact, however, that the quality of decision-making would necessarily improve. One can think of a number of reasons why more robust checks on administrative action might lead to better outcomes, both from a legal and a non-legal standpoint. This conclusion is, if anything, confirmed by the very history of EU merger control, which suggests that efforts to improve enforcement may be prompted by judicial review.¹²³

One of the reasons why deference and process-oriented review may not necessarily lead to better decision-making is that they could increase the likelihood of enforcement errors. It is undeniable, on the one hand, that a system that gives the administrative authority a margin of discretion on issues of law may well substantially reduce the risk of underenforcement. On the other hand, it is not necessarily the optimal regime to minimise the likelihood of errors across the board. A second reason has to do with reliance on novel, unorthodox or untested theories. There is no guarantee that a system that relies on such theories would lead to better outcomes. Tentative doctrines, by their very nature, will in some instances prove incorrect or misguided. For the same reasons, peer review by experts in the field may be seen as an indispensable robustness check on the non-legal aspects of administrative action, as well as a mechanism to ensure that resources are put to the best use.

6. Conclusions

The fact that issues of law are in theory subject to full review does not mean that they necessarily will be, in practice. One of the conclusions of this paper is that some interpretations of a legal provision may not allow for the effective and meaningful control of administrative action. This is so, in particular, where the definition of a legal concept is not obvious to disentangle from the complex assessments that are required to characterise the facts of the case. It is submitted that, at least in the area of merger control, full review of points of law may only be possible where provisions have an autonomous meaning that is independent of the specificities of the transaction under consideration. These insights informed the GC's interpretation of the SIEC test in *CK Telecoms*. For instance, it held that, whether or not two parties are 'close competitors' is a legal question that should be defined *ex ante*, so its boundaries are not contingent on the outcome of any complex assessments.

Where the meaning of a legal concept can only be discerned *ex post* (that is, once the features of the relevant market and the dynamics of competition therein have been evaluated), there is a risk that, almost inevitably, judicial review is confined to control for manifest errors. If the interpretation of a legal concept necessitates complex assessments, full scrutiny of issues of law requires judges to substitute their own assessment for that of the authority. It requires them, in other words, to become, *de facto*, an upper-tier administrative authority. Placed between Scylla and Charybdis, one can expect review courts to favour judicial restraint. The appeal judgement in *CK Telecoms* did not engage with the consequences of interpreting legal concepts in a way that makes it necessary to perform complex assessments. The issue therefore remains therefore open at the time of writing.

Confining the scrutiny of issues of law to manifest errors of assessment would entail a major transformation of the relationship between the Commission and the EU courts. Marginal control

¹²³See in this sense the institutional reform that resulted from the aftermath of the annulment of the Commission decisions in issue in *Airtours* (n 25), *Tetra Laval* (n 3) and *Case T-77/02 Schneider Electric SA v Commission* ECLI:EU:T:2002:255.

of substantive legal questions would give way to a form of process-oriented review. Since the EU courts cannot substitute their own assessment for that of the Commission and since they lack the tools to perform complex economic assessments, the evaluation of the interpretation of legal concepts would be confined to ascertaining whether it is a reasonable one in light of the features and dynamics of the relevant market. There would be compelling constitutional reasons to object to the transformation of the nature and intensity of judicial review in such a way. It would amount, in effect, to delegating the definition of legal concepts to the administrative authorities.

In the current economic and technological landscape, however, there are growing calls for rethinking merger control regimes so that authorities have the means and the incentives to take greater risks. Deference on issues of law and process-based review would give the Commission the policy space to test unconstrained emerging theories (including those revolving around ecosystems) and to tackle new harms (such as those resulting from the so-called ‘killer acquisitions’, which might require an expansive redefinition of the concept of potential competition). In addition, a margin of discretion in relation to the interpretation of legal concepts may ensure that enforcement remains effective, in the sense that it allows the Commission to attain its aims. The effectiveness of administrative action was, in fact, central to the Court’s assessment in *CK Telecoms*.

Even leaving constitutional arguments aside, it is not clear that a shift towards deference and process-based review would be beneficial for the merger control regime considered as the whole. One should bear in mind, first, that effective enforcement cannot be the only consideration informing the shaping of the system and the definition of its boundaries. Legal certainty is at least as relevant in this regard, as the Court judgement in *Illumina* emphasised. Against this background, it is not clear that deference on issues of law strikes the right balance between the two considerations. A second factor to take into account is that there is no certainty that giving the authority more leeway will necessarily increase the quality of decision-making. If anything, the very history of merger control provides a cautionary tale in this regard. Given the many issues that were left open in *CK Telecoms*, how judicial review in EU merger control evolves remains an open question.

Acknowledgements. I am grateful to Eduardo Baistrocchi, Gianni De Stefano, Andriani Kalintiri and Ioanna Kladi for their comments on a previous version of this article. I am also indebted to Joana Mendes for the inspiring conversations on the core argument and to the editors of *European Law Open*.

Competing interests. In accordance with the ASCOLA declaration of ethics, I am happy to clarify that I have nothing to disclose.