CK TELECOMS AND THE NEW FRAME OF REFERENCE FOR THE ANALYSIS OF UNILATERAL EFFECTS IN EU MERGER CONTROL – A CRITICAL APPRAISAL

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In the recent CK Telecoms (Case T-399/16) judgment, the General Court annulled the European Commission's decision to block the 4-to-3 telecom merger Hutchison3G UK/Telefónica UK. This watershed case is set to curtail the Commission's ability to challenge future mergers in concentrated markets and proposes a fundamental reshape of the analysis of unilateral effects in the absence of dominance. This article shows that CK Telecoms advances six propositions that form the foundations of a new frame of reference for the analysis of unilateral effects under the EU Merger Regulation. This new framework has been welcomed by commentators as a long-overdue recognition that 'the law' trumps the Commission's administrative discretion and as a vindication of the 'more economic approach'. Based on a thorough review of 15 years of merger enforcement in the mobile telecommunication sector, this article challenges this account by debunking both the 'rule of law' and the 'more economic approach' arguments in support of the new framework. It instead demonstrates that each of the six principles advanced by CK Telecoms neither constitutes a reaffirmation of the 'law', nor aligns EU merger enforcement with the economic analysis of unilateral effects. In critically reflecting on the new framework laid down in CK Telecoms, this article formulates a number of policy proposals as building blocks for an alternative frame of reference that would preserve the effectiveness of EU merger enforcement in unilateral effects cases while enhancing its legal certainty.

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Introduction

In 1978, Robert Bork lambasted the merger case law of the Warren Court as 'The Crash of Merger Policy'[1] and 'a disaster for rational, consumer-oriented merger policy.'[2] Since then, merger policy, not least due to the work of Bork and other influential thinkers of the Chicago School, has changed dramatically. The rigid structuralist approach underpinning the hostility of the Warren Court era towards industrial concentration has been superseded on both sides of the Atlantic by a more economic approach coined by Chicago and post-Chicago thinking. The days when a competition authority or a court would block mergers with a combined market share of roughly 5% are long gone by.[3] The demise of the structural approach, however, has not put an end to misguided merger rulings.

In May 2020, the General Court of the European Union handed down with *CK Telecoms* a judgment that might provoke, if upheld by the Court of Justice, a European version of 'The Crash of Merger Policy'. In this ruling, the General Court annulled the European Commission's decision to block the merger between Hutchison 3G UK and Telefónica. This merger would have reduced the number of mobile operators in the UK from four to three. Back in 2016, the Commission prohibited this tie-up between Three and O2, finding that the transaction would give rise to unilateral effects[4] in the retail and wholesale market for mobile telecommunication services. The Commission also took the view that the merger would cause additional harm to competition by undermining O2's and Three's incentives to maintain their participation in their respective network sharing agreements with the remaining two operators, BE/EE and Vodafone.[5]

The General Court's *CK Telecoms* ruling is significant. Annulling the Commission decision in *Hutchison 3G UK/Telefónica UK* (hereinafter '*H3G UK/Telefónica UK*') on all major points, the *CK Telecoms* judgment marks arguably the greatest defeat for the Commission's merger policy since the *Airtours*[6] judgment in 2002. *CK Telecoms* fundamentally questions, if not dismantles, the analytical framework for the assessment of unilateral effects in telecommunication mergers the Commission had developed over the last one-and-a-half decades. *CK Telecoms*, instead, advances six major propositions or 'first principles' that fundamentally reconfigure the frame of reference for the assessment of non-coordinated effects under the EU Merger Regulation 139/2004 EC ('EUMR').[7] In essence, *CK Telecoms* makes the following six points:

(i) A merger only results in unilateral effects giving rise to a Significant Impediment of Effective Competition ('SIEC') if it leads to (a) a removal of an

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1 R. H. Bork, *The Antitrust Paradox: A Policy at War with itself [1978]* (Maxwell Macmillan 1993) 198.
2 ibid 216.
3 *Brown Shoe Co. Inc. v. United States* 370 U.S. 294 (1962); *United States v. Von's Grocery Co.* 384 U.S. 270 (1966).
4 Most economic literature and competition authorities use the term 'unilateral effects' to describe what is known as 'non-coordinated effects' in the EU competition law lingo. I use both terms interchangeably in this article.
5 Case No COMP/M.7612 Hutchison 3G UK/Telefónica UK. C(2016) 2796 final.
6 Case T-342/99 *Airtours v Commission* ECLI:EU:T:2002:146.
7 Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings. OJ [2004] L 24/1.

important competitive constraint between the merging parties *and* (b) a reduction of competitive pressure on the non-merging parties.

(ii) In horizontal merger cases involving complex economic analysis, the Commission has to demonstrate the existence of a SIEC to a standard of proof that is stricter than the standard of balance of probabilities.

(iii) A merger will only lead to unilateral effects if the merging parties are 'particularly close' competitors.

(iv) A firm must be a 'particularly aggressive' competitor to qualify as an important competitive force.

(v) The Commission has to demonstrate the significance of anticompetitive price increases by including an efficiency credit in its Upward Pricing Pressure ('UPP') analysis.

(vi) Any merger creates 'standard efficiencies' which do not have to be substantiated by the merging parties and which must be rebutted by the Commission to find a SIEC.

In the short term, the new framework set out in *CK Telecoms* is set to deal a major blow to the European Commission's enforcement practice in horizontal merger cases involving unilateral effects. Even more, the judgment weakens the Commission's capacity to effectively control mergers in highly concentrated industries, as it substantially raises the bar for the Commission to challenge any future 4-to-3 merger in oligopolistic markets. The ruling will also have considerable medium- and long-term policy implications, as it proposes a restrictive interpretation of the SIEC test, which was introduced in 2004 to close what was perceived back then as an enforcement gap of EU merger policy in oligopolistic markets. The General Court's restrictive interpretation of the SIEC test will curtail the Commission's leeway to address growing concerns about industry concentration, the impact of mergers on innovation markets, and the role of start-up acquisitions in the digital economy. In short, *CK Telecoms* risks nothing less than seriously derailing the European Commission's merger enforcement policy.

Surprisingly, the *CK Telecoms* judgment has earned a lot of praise amongst learned commentators.[8] Some have heralded the *CK Telecoms* as a reaffirmation of the primacy of 'the law' over the allegedly excessive 'discretion' of the Commission's enforcement practice ('rule of law account').[9] Others have welcomed it as the 'maturation of the economic approach'[10] in EU merger policy ('more economic approach account'). This article respectfully disagrees with both views by debunking the 'rule of law' and 'more economic approach' accounts. The judgment neither advances legal certainty, nor does it cure any major economic flaws in the Commission's analysis of anticompetitive unilateral effects of mergers in oligopolistic markets. On the contrary, the judgment is difficult to square with the legislative history, statutory language, or spirit of the EUMR, let alone precedent. Its economics oddly disregards the economic theory and analysis of unilateral effects. And its policy implications are arguably disastrous to 'rational, consumer-oriented merger policy'. In critically responding to the shortcomings of the *CK Telecoms* ruling, this paper advances policy proposals for an alternative frame of reference for the analysis of unilateral effects analysis that is more in line with

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[8] For a rare exception G. Monti, 'EU Merger Control After CK Telecoms UK Investments v. Commission' (2020) 43(4) World Competition 447.

[9] P. I. Colomo, 'Case T-399/16, CK Telecoms v Commission: a new Airtours moment and the future of effects analysis' (2020) <https://chillingcompetition.com/2020/05/28/case-t-399-16-ck-telecoms-v-commission-a-new-airtours-moment-and-the-future-of-effects-analysis/> accessed 20 September 2020. In this sense also T. Caspary and V. Bozhikov, 'CK Telecoms UK Investments v Commission—the Judgment That Defines a Significant Impediment to Effective Competition in Oligopolistic Merger Cases' (2020) 11(7) Journal of European Competition Law & Practice 363 365–366; M. Furse, 'Locking down the meaning of SIEC in the EUMR - CK Telecoms v Commission' (2020) 41(9) European Competition Law Review 427, 432.

[10] D. Auer and N. Petit, 'CK Telecoms v Commission: The Maturation of the Economic Approach in Competition Case Law' (2020) 11(5-6) Journal of European Competition Law & Practice 225; T. Kuhn and S. Thomas, 'The More Economic Judicature: How the General Court has Recalibrated the Merger Gauge' [2020] Competition Policy International accessed 20 September 2020.

economic theory and the legal principles of the EUMR and would ensure the effectiveness of EU merger control in oligopolistic markets in future cases.

The remainder of the paper seeks to support this argument in three steps. Part 1 sets the scene, providing a short flash-back on the 2004 reform of the EU merger policy and the Commission's merger enforcement in the mobile telecoms sector (Section I). Part 2 scrutinises each of the six propositions advanced by the General Court in *CK Telecoms*: Section II examines the General Court's interpretation of the SIEC test. Section III discusses the General Court's pronouncements about the requisite standard of proof under the EUMR. Section IV reviews the General Court's interpretation of the requisite degree of closeness of competition from which the existence of unilateral effects can be inferred. Section V reconsiders the General Court's restrictive interpretation of the concept of 'important competitive force'. Section VI discusses the General Court's requirement of the inclusion of an 'efficiency credit' as a filter for significant competitive effects in the quantitative Upward Pricing Pressure (UPP) analysis. Section VII reflects on the newly crafted category of 'standard efficiencies'. Part 3 challenges the General Court's assumptions about the significance of anticompetitive effects and the role of presumption in merger control which constitute the overarching theme of the *CK Telecoms* ruling and explain the rationale underpinning the new frame of reference (Section VIII). Section IX concludes and proposes an alternative framework for the analysis of unilateral effects in future merger cases.

I. THE 2004 REFORM OF EU MERGER CONTROL: TAKING UNILATERAL EFFECTS SERIOUSLY

The rationale behind the reform of the EU Merger Regulation (EUMR) and the adoption of the SIEC test in 2004 is well-known. To fully grasp the implications of the *CK Telecoms* judgment, it is nonetheless worthwhile briefly to recall the economic and legal considerations that motivated the introduction of the new substantive test and the emergence of the unilateral effects analysis under the revised 2004 EUMR.

At the beginning of the 1990s, new economic insights fundamentally changed our understanding of horizontal mergers. Until that date, competition analysis was primarily concerned about mergers creating a single dominant firm[11] or facilitating tacit collusion in oligopolistic markets.[12] Both theories of harm were fashioned for an industrial economy characterised by the mass manufacturing of relatively homogenous commodity products.[13] With the growing importance of branded and complex consumer products for our post-industrial economies, competition in differentiated product markets increasingly moved into the spotlight of economic analysis. Advances in the theory of industrial organisation shed light on the fact that mergers in differentiated product markets may cause harm to competition without necessarily creating a dominant firm or facilitating tacit collusion. Instead, new economic insights revealed that mergers involving two producers of differentiated products, who were closely competing with each other prior to the merger, will create incentives for the

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[11] G. J. Stigler, 'Monopoly and Oligopoly by Merger: Reprinted from Papers and Proceedings, American Economic Review, Vol. XL, No. 2. (1950)' 96–103. Bork (n 1) 199, 200, 206, 210, 219-220.

[12] Stigler (n 11) 103–106; G. J. Stigler, 'Mergers and Preventive Antitrust Policy: Reprinted from University of Pennsylvania Law Review, Vol. 104, No 2 (1955)' 299–303; G. J. Stigler, 'A Theory of Oligopoly: Reprinted from Journal of Political Economy Vol. LXXII, No1 (1964)' in G. J. Stigler (ed), *The Organization of Industry* (1968) 39–56. R. A. Posner, *Antitrust Law* (University of Chicago Press 2001) 118-119, 124-126; R. A. Posner, 'Oligopoly and the Antitrust Laws: A Suggested Approach' (1968-1969) 21 Stanford Law Review 1562 1598-1605, also 1598-1605; J. B. Baker and C. Shapiro, 'Reinvigorating Horizontal Merger Enforcement' in R. Pitofsky (ed), *How the Chicago School overshot the mark: The effect of conservative economic analysis on U.S. antitrust* (Oxford University Press 2008) 236–238.

[13] C. Shapiro, 'The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years' (2010) 77 Antitrust Law Journal 701 705–706.

merged entity and the non-merging competitors unilaterally to raise prices above the competitive level after the merger.[14]

To understand the mechanics of these unilateral effects, suppose that there is a merger between firms A and B which produce two differentiated products, Product 1 and 2. Assume also that Product 1 and 2 are perceived as close substitutes by a considerable number of consumers. The merger will generate unilateral effects through two channels. The elimination of competition between the merging parties A and B will entail as a 'first-order effect' that the merged entity AB has an incentive to raise its prices post-merger. This is because after the merger AB will be able to internalise some of the losses that the merging party A (or B) would have suffered prior to the merger if it had unilaterally raised its prices on a standalone basis. After the consummation of the merger, the merged entity AB will be able to recapture the demand of part of the customers who, prior to the merger, would have diverted their purchases from A to B (or *vice versa*) in response to such unilateral price increase. This first-order unilateral effect is further compounded by the second-order effect that operates if the elimination of competition between the parties also reduces the competitive pressure on the remaining non-merging competitors C and D. This so-called 'feedback' or 'multilateral' effect results from the strategic complementarity between the merged entity and non-merging parties.[15] The non-merging competitors will benefit, albeit to a lesser extent, from price increases on the part of the merged entity AB, as some customers of products 1 and 2 will divert their demand to the products of C and D in response to a price increase. The non-merging parties C and D, in turn, may also have an incentive to raise prices unilaterally.[16]

The discovery of unilateral effects became a major conundrum for EU merger policy. The fact that unilateral effects may arise without any form of coordination between the merged entity and non-merging firms and even if the merger does not create a dominant firm, but say, combines the second or third firm,[17] was perceived as the source of a major enforcement gap – soon dubbed the 'non-collusive oligopoly gap'[18] – in the EU merger regime. Under the then-existing EC Merger Regulation 4065/89 ('ECMR'),[19] the Commission was only allowed to challenge mergers leading to the creation or strengthening of a dominant position. This so-called 'dominance test' appeared ill-suited for challenging a merger combining the second and third industry player in an oligopolistic differentiated product market because there would still remain a market leader with a higher market share in the market.[20] At the same time, a majority of commentators asserted that unilateral effects could not be tackled under the concept of

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[14] The theory of unilateral effects in differentiated product markets has been first articulated by R. D. Willig, 'Merger Analysis, Industrial Organization Theory, and Merger Guidelines' [1991] Brookings Papers on Economic Activity. Microeconomics 282, 293, 299-300. Willig thereby drew upon R. Deneckere and C. Davidson, 'Incentives to Form Coalitions with Bertrand Competition' (1985) 16(4) The RAND Journal of Economics 473. Shapiro (n 13), 706. For a comprehensive overview of the emergence of the unilateral effects analysis G. J. Werden and L. M. Froeb, 'Unilateral Competitive Effects of Horizontal Mergers' in P. Buccirossi (ed), *Handbook of Antitrust Economics* (MIT Press 2008) 43–57 .G. J. Werden, 'Unilateral Competitive Effects of Horizontal Mergers I: Basic Concepts and Models' in Collins, Wayne D Collins and J. A. Angland (eds), *Issues in Competition Law and Policy* (American Bar Association. Section of Antitrust Law 2008) 1320–1325. M. Ivaldi and others, 'The Economics of Unilateral Effects: Interim Report for DG Competition, European Commission' (2003) 34–38.

[15] Deneckere and Davidson (n 14). J. Vickers, 'Merger policy in Europe: retrospect and prospect' (2004) 25(7) European Competition Law Review 455 459. For the notion of strategic complementarity J. I. Bulow, J. D. Geanakoplos and P. D. Klemperer, 'Multimarket Oligopoly: Strategic Substitutes and Complements' (1985) 93(3) Journal of Political Economy 488.

[16] Willig (n 14), 299. Shapiro (n 13), 724; J. Farrell and C. Shapiro, 'Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition' (2010) 10(1) The BE Journal of Theoretical Economics 1 7–9. Deneckere and Davidson (n 14). Ivaldi and others (n 14) 32–33, 38-41.

[17] Shapiro (n 13), 721. See for instance *FTC v H.J. Heinz Co.* 246 F.3d 708 (D.C.Cir. 2001).

[18] V. Verouden, C. Bengtsson and S. Albaek, 'Draft EU Notice on Horizontal Mergers: A Further Step toward Convergence, The' (2004) 49 Antitrust Bull. 243 244; Vickers (n 15), 458–459; S. Völcker, 'Mind the Gap: Unilateral Effect Analysis Arrives in EC Merger Control' 2004(395-410) European Competition Law Review 409. R. Whish and D. Bailey, *Competition law* (Oxford University Press 2018) 883; G. Monti, 'The New Substantive Test in the EC Merger Regulation – Bridging the Gap Between Economics and Law?' (2008). LSE Law, Society and Economy Working Papers 10/2008 4–5.

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

[20] Verouden, Bengtsson and Albaek (n 18), p. 249-254; Völcker (n 18), 395–397; A. Lindsay and A. Berridge, *The EU merger regulation: Substantive issues* (Sweet & Maxwell 2012) 44–45.

collective dominance, since *Airtours* limited the application of the concept of collective dominance to coordinated effects.[21] On a conceptual level, too, it appeared to be difficult to conceive how non-coordinated effects could be fitted into the concept of collective dominance which presupposes several firms to act as one and to adopt a common policy.[22]

With the growing awareness of these 'gap cases', calls for a reform of the substantive merger test gained momentum. The conventional view emerged that the replacement of the dominance test with a new substantive test was the only way to provide the EU Commission with a legal basis to tackle unilateral effects in gap cases.[23] Many proponents of reform also cherished the hope that the replacement of the dominance test with a new substantive test would have the positive side-effect of steering EU merger policy away from the form-based, structural analysis of mergers that characterized the Commission's merger policy under the ECMR. The overhaul of the substantive test would align EU merger control with the agenda of the 'more economic' or more 'effects-based approach'. Instead of inferring harm to competition from the merger's impact on market structure, the Commission would henceforth have to determine the legality of mergers by assessing their actual effects on consumer welfare.[24]

The negotiations over the new substantive merger test, however, remained until the very end mired by deep divisions between policymakers and Member States. A considerable number of Member States and commentators suggested that the dominance test should be substituted by the Significant Lessening of Competition (SLC) test which governs the assessment of mergers in the US and in the UK.[25] This position was, however, met by strong opposition from the European Commission[26] and the *Bundeskartellamt* (German Competition Authority).[27] Both feared that the replacement of the dominance test by the SLC test would undermine legal certainty and render the existing body of precedent established under the dominance test obsolete.[28] The EU legislator (i.e. the Council, aka. the Member States) eventually came up with an ingeniously straightforward solution to overcome this impasse: it simply reversed the wording of the substantive test. While the dominance test of the ECMR prohibited a merger that 'creates or strengthens a dominant position as a result of which effective competition would be significantly impeded', the new SIEC test directs the Commission to block any merger 'which would significantly impede effective competition […] in particular as a result of the creation or strengthening of a dominant position'.

Apart from this linguistic sleight of hand, the legislator provided little guidance on the appropriate interpretation and scope of the new SIEC. It, instead, merely inserted recital 25 which clarified that the SIEC test '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

[21] Case T-342/99 *Airtours v Commission* (n 6) para.61-62; I. Kokkoris, *Merger control in Europe: The gap in the ECMR and national merger legislations* (Routledge 2011) 20–26.
[22] Vickers (n 15), 459; L. Coppi and M. Walker, 'Substantial Convergence or Parallel Paths - Similarities and Differences in the Economic Analysis of Horizontal Mergers in the U.S. and EU Competition Law' (2004) 49 Antitrust Bull. 101 125–126. See for the contrary position U. Böge and E. Müller, 'From the market dominance test to the SLC test: are there any reasons for a change?' (2003) 10(23) European Competition Law Review 495 496.
[23] For a critical review of this argument Monti (n 18).
[24] Verouden, Bengtsson and Albaek (n 18), 243, 247. Lindsay and Berridge (n 20) 43.
[25] Vickers (n 15), 457; Völcker (n 18), 395; Kokkoris (n 21) 38; Lindsay and Berridge (n 20) 43; Verouden, Bengtsson and Albaek (n 18), 243, 247.
[26] See also for the (ex post) argument, that the reform of the test was not necessary and grounded in a misguided understanding of the concept of dominance Monti (n 18) 3–11. See also for the criticism that the new test may lead to the odd outcome that a merger creates or strengthens a dominant position but is not found to give rise to a SIEC W. Möschel, 'European Merger Control' (2013) 34(6) European Competition Law Review 283 284.
[27] Bundeskartellamt, 'Reply of the Bundeskartellamt to the Green Paper of the Commission of the Review of Regulation (EEC) No 4064/89 of the Council on the control of concentrations between undertakings' (2002) 16–18 <http://ec.europa.eu/competition/consultations/2002_council_regulation/bundeskartellamt.pdf+&cd=2&hl=fr&ct=clnk&gl=it> accessed 15 November 2015.
[28] Kokkoris (n 21) 38; Böge and Müller (n 22), 496; Verouden, Bengtsson and Albaek (n 18), 248.

concerned.'[29] A further Recital 26 was added to acknowledge the continuous role of the concept of dominance and the existing case law under the new SIEC test.[30] The legislator however largely dispensed with issuing any further guidance on how the new substantive test ought to be applied to unilateral effects in gap merger cases: that is mergers resulting in unilateral effects without creating or strengthening a dominant position. It, instead, expressly mandated in recital 28 the European Commission to 'publish guidance which should provide a sound economic framework for the assessment of concentrations with a view to determining whether or not they may be declared compatible'.[31] The Commission promptly responded to this mandate and issued in the same year the Horizontal Merger Guidelines.[32] On the one hand, the Guidelines codified existing case law and decisional practice on mergers creating a single[33] or collective dominant position (coordinated effects).[34] On the other, the Guidelines forged as a major innovation an analytical framework for the assessment of unilateral effects (non-coordinated effects) under the new SIEC test.

The first merger in which the Commission put this newly devised framework to assess unilateral effects in 'gap mergers' into action was the *T-Mobile Austria/tele.ring* merger in 2006.[35] The Commission, in this case, concluded for the first time that a SIEC may arise from a merger that does not create or strengthen a single or collective dominant position. Since then, mobile telecommunication mergers lay at the forefront of the Commission's development of its analytical framework for unilateral effects analysis and the use of quantitative methods in merger analysis. Between 2006 and today, the Commission mobilised the framework for the analysis of unilateral effects laid down in the Horizontal Merger Guidelines to review in total 20 'gap mergers' in the mobile telecommunication sector (Table 1).

[29] Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (n 7) rec. 25.
[30] Bundeskartellamt, 'Reply of the Bundeskartellamt to the Green Paper of the Commission of the Review of Regulation (EEC) No 4064/89 of the Council on the control of concentrations between undertakings' (n 27) 16; Möschel (n 26); Proposal for a Council Regulation on the control of concentrations between undertakings ("The EC Merger Regulation") COM(2002) 711 final — 2002/0296(CNS) (1). OJ C 20, 28.1.2003, p. 4–57. See for a similar interpretation Whish and Bailey (n 18) 886.
[31] Proposal for a Council Regulation on the control of concentrations between undertakings ("The EC Merger Regulation") COM(2002) 711 final — 2002/0296(CNS) (1) (n 30) recital 28.
[32] Commission Guidelines on the assessment of horizontal mergers 2004. O.J [2004] C 31/5.
[33] ibid paras. 4, 25.
[34] ibid paras. 39-57.
[35] Case No COMP/M.3916 T-Mobile Austria/Tele.Ring. C(2006) 1695.

Table 1. EU Commission Mobile Telecom Merger Decisions 2006-2019

Merger	Year and Commissioner	Outcome	Legal basis	Type
Case No. COMP/M.3916 T-Mobile Austria/tele.ring	26/04/2006 Kroes	phase II conditional clearance	8 (2)	5-to-4
Case No. COMP/M.4748 T-Mobile/Orange Netherlands	20/08/2007 Kroes	phase I unconditional clearance	6 (1) (b)	4-to-3
Case No. COMP/M.5730 Telefónica/Hansenet	29/01/2010 Kroes	phase I unconditional clearance	6 (1) (b)	MNO/non-MNO
Case No. COMP/M.5650 T-Mobile/Orange UK	01/03/2010 Almunia	phase I conditional clearance	6 (2)	5-to-4
Case No. COMP/M.6584 Vodafone Group/ Cable & Wireless Worldwide	03/07/2012 Almunia	phase I unconditional clearance	6 (1) (b)	MNO/non-MNO
Case No. COMP/M.6497 Hutchison 3G Austria/Orange Austria	12/12/2012 Almunia	phase II conditional clearance	8 (2)	4-to-3
Case No. COMP/M.6990 Vodafone/ Kabel Deutschland	20/09/2013 Almunia	phase I unconditional clearance	6 (1) (b)	MNO/non-MNO
Case No. COMP/M.6992 Hutchison 3G UK/Telefónica Ireland	28/05/2014 Almunia	phase II conditional clearance	8 (2)	4-to-3
Case No. COMP/M.7231 Vodafone/Ono	02/07/2014 Almunia	phase I unconditional clearance	6 (1) (b)	MNO/non-MNO
Case No. COMP/M.7018 Telefónica Deutschland/ E-plus	02/07/2014 Almunia	phase II conditional clearance	8 (2)	4-to-3
Case No. COMP/M.7421 Orange/Jazztel	19/05/2015 Vestager	phase II conditional clearance	8 (2)	MNO/non-MNO
Case No. COMP/M.7419 TeliaSonera/Telenor	11/09/2015 Vestager	Aborted	n/a	4-to-3
Case No. COMP/M.7637 Liberty Global/Base Belgium	04/02/2016 Vestager	phase II conditional clearance	8 (2)	MNO/non-MNO but only 3 MNOS
Case No. COMP/M.7612 Hutchison 3G UK/Telefónica UK	11/05/2016 Vestager	phase II blocking	8 (3)	4-to-3
Case No. COMP/M.7978 Vodafone/Liberty Global - Dutch JV	03/08/2016 Vestager	phase I conditional clearance	6 (2)	MNO/non-MNO
Case No. COMP/M.7758 Hutchison 3 Italy/WIND/JV	01/09/2016 Vestager	phase II conditional clearance	8 (2)	4-to-3
Case No. COMP/M.8131 Tele2 Sverige/TDC Sverige	07/10/2016 Vestager	phase I unconditional clearance	6 (1) (b)	MNO/non-MNO
Case No. COMP/M.8808 T-Mobile Austria/UPC Austria	09/07/2018 Vestager	phase I unconditional clearance	6 (1) (b)	MNO/non-MNO
Case No. COMP/M.8842 Tele2/Com Hem Holdings	08/10/2018 Vestager	phase I unconditional clearance	6 (1) (b)	MNO/non-MNO
Case No. COMP/M.8792 T-Mobile Netherlands/Tele2 Netherlands	27/11/2018 Vestager	phase II unconditional clearance	8 (1)	4-to-3
Case No. COMP/M.8864 Vodafone/Certain Liberty Global Assets	18/07/2019 Vestager	phase II conditional clearance	8 (2)	MNO/non-MNO

A majority of 11 out of the 21 mobile telecom mergers (including *T-Mobile/tele-ring*) reviewed since 2006 involved one fully integrated Mobile Network Operator (MNO) that owned its own mobile telecommunications network and a non-MNO player that provided retail mobile telecommunication services by roaming on the network of another MNO. The remaining 10 mergers combined two MNOs and, thus, reduced the number of full-size MNOs from 5-to-4 or 4-to-3. None of these mergers created or strengthened a dominant market leader.

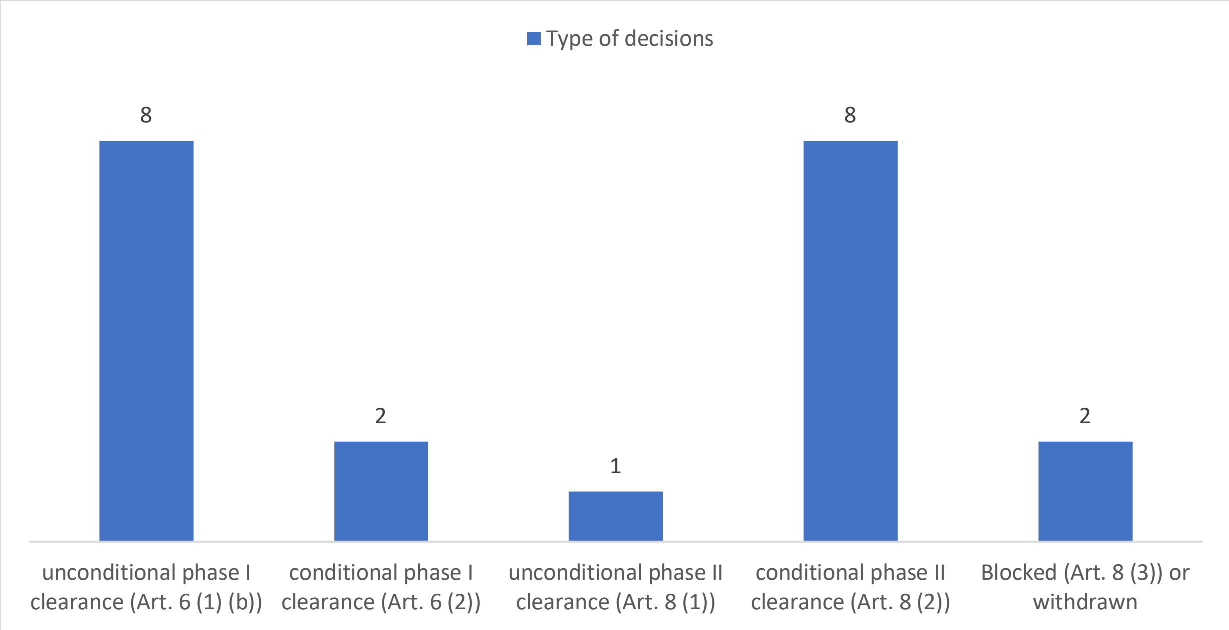

Figure 1. Mobile telecom mergers 2006-2019 - Decision outcomes

The decisional practice of the Commission in mobile mergers suggests that the 2004 reform was successful in closing the 'non-collusive oligopoly gap'. Whereas the Commission unconditionally cleared 8 mobile telecom mergers in phase I and one merger in phase II, it found in a majority of 12 cases that the merger would lead to a SIEC (Figure 1). Two of these cases were cleared subject to commitments in phase I. Eight were cleared after the parties accepted commitments in phase II. Yet, two of the notified mergers did not go through: they were, in the case of *TeliaSonera/Telenor* either aborted,[36] or, in the case of *H3G UK/Telefónica UK*, blocked by the Commission. A great majority of the cases in which the Commission identified unilateral effects were 5-to-4 and 4-to-3 mergers, whereas a majority of MNO/non-MNO mergers were considered unproblematic (See Figure 2).

[36] Statement by Commissioner Vestager on announcement by Telenor and TeliaSonera to withdraw from proposed merger (Statement/15/5627) 11 September 2015; Withdrawal of notification of a concentration in case COMP/M.7419 TeliaSonera/Telenor/ JV. OJ [2015] C 316/1.

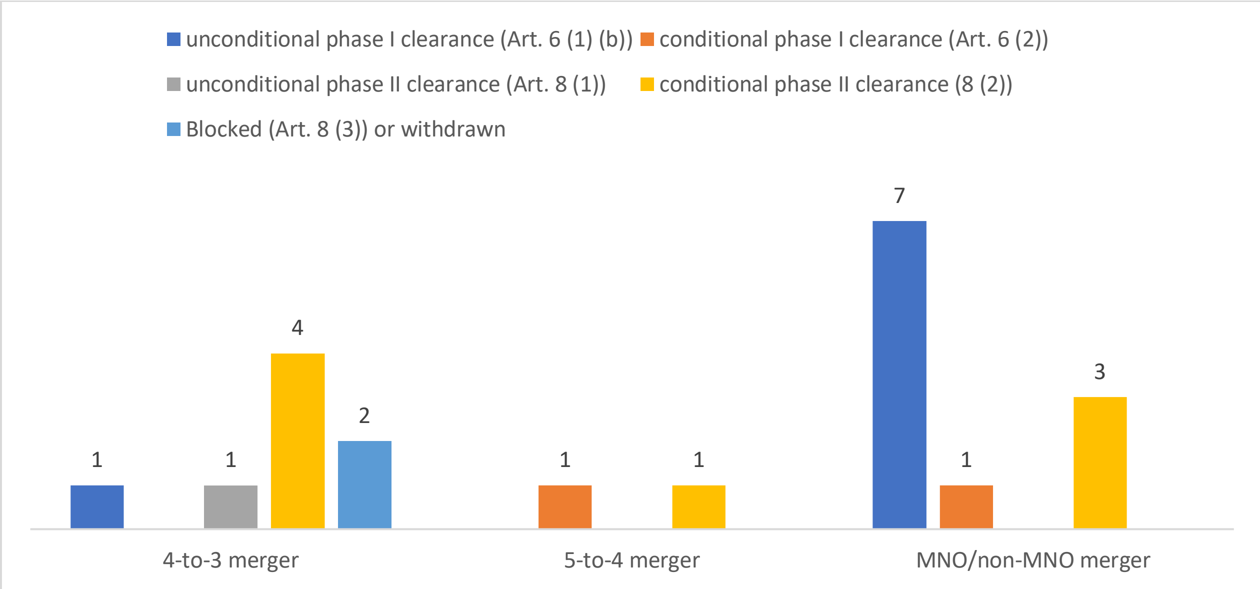

Figure 2. Types of mobile merger cases and outcomes 2006-2019

The high challenge rate of mergers reducing the number of MNOs below 5 or 4 prompted commentators and industry members to argue that the Commission relied on an implied structural presumption against 5-to-4 or 4-to-3 mergers.[37] Although the Commission continued to steadfastly maintain that there was 'no magic number'[38] in mobile telecom mergers, its enforcement practice, culminating in the decision to challenge and block yet another 4-to-3 merger between Three and O2, appeared to suggest otherwise. What is at stake in *CK Telecoms* is this perception that the Commission, despite the shift towards a 'more economic approach', increasingly relied on a presumption against 4-to-3 mergers which would prohibit virtually all mergers in concentrated markets. And it is against this backdrop that the General Court's judgment is best understood.

Two observations might be relevant here before we turn to the major changes brought about by the *CK Telecoms* case. First, it bears noting that the history of the SIEC test and the development of the framework of unilateral effects analysis by the Commission suffice to debunk accounts suggesting that the General Court's ruling in *CK Telecoms* reaffirmed the supremacy of the 'law' over the Commission's arbitrary administrative discretion.[39] This simplistic dichotomy of 'law v discretion'[40] is not borne out by the legislative history of the 2004 reform. It ignores that the EU legislator provided very little guidance on what the 'law' under the new SIEC test actually is.[41] On the contrary, the EU legislator conferred by way of

[37] S. Thomas, 'The Known Unknown: In Search For a Legal Structure of the Significance Criterion of the SIEC test' (2017) 13(2) Journal of Competition Law & Economics 346 381; J. 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(2-3) European Competition Journal 291 307.
[38] S. Vande Walle and J. Wambach, 'No magic number to dial - The Commission's review of mobile telecoms mergers' (2014) 1 Competition Merger Brief 10; European Commission, 'Speech by Commissioner Vestager 'Competition in telecom markets'' (42th Annual Conference on Antitrust Law and Policy, New York, 2 October 2015); European Commission, 'Statement by Commissioner Vestager on competition decision to prohibit Hutchison's proposed acquisition of Telefónica UK' (11 May 2016).
[39] Colomo, 'Case T-399/16, CK Telecoms v Commission: a new Airtours moment and the future of effects analysis' (n 9).
[40] ibid. See in a similar sense P. I. Colomo, 'Protecting the 'Law' in Competition Law' (2020) 11(7) Journal of European Competition Law & Practice 333 <http://dx.doi.org/10.1093/jeclap/lpaa074>.For a recent critique of this simplistic dichotomy between the rule of law and administrative discretion in antitrust law S. Makris, 'Openness and Integrity in Antitrust' [2020] Journal of Competition Law & Economics, 32–35.
[41] This view is even supported by the General Court's ruling itself, which observes in para. 91 that 'the conditions and limits of [the] extension of the scope of Regulation No 139/2004 have not been specified by the EU legislature' Case T-399/16 *CK Telecoms UK Investments v Commission* ECLI:EU:T:2020:217 para. 91.

law an express mandate,[42] and, hence, a decent amount of administrative discretion to the Commission to flesh out the normative content of the SIEC test. The fact that this discretion is the offspring rather than the antonym of the 'law' brings the 'law v discretion' dichotomy to the brink of collapse.

Second, *CK Telecoms* was the first opportunity for the EU judicature in the sixteen years since the introduction of the new substantive SIEC test to review its application by the Commission to unilateral effects in gap cases. This fact alone is remarkable and makes *CK Telecoms* significant. Given the low frequency with which substantive issues in merger cases are litigated, the implications of the *CK Telecoms* case will stay around for long. If upheld, this ruling marks a potentially tectonic shift in the application of the SIEC to unilateral effects. It advances six propositions about the analysis of horizontal mergers that are likely to profoundly reconfigure EU merger policy. Each of the propositions, it is respectfully argued here, is deeply flawed both in legal and economic terms. All six propositions, if confirmed by the Court of Justice, are likely seriously to debilitate the assessment of non-coordinated effects under the EUMR.

[42] Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (n 7) recital 28 and 29.

II. PROPOSITION 1 – OPERATIONALISING THE SIEC TEST: TWO CONDITIONS ARE BETTER THAN ONE

The first reason why *CK Telecoms* is significant is that it answered, for the first time, the basic question of *when* competition law should interfere with so-called 'gap mergers' that do not lead to a dominant position or tacit collusion but nevertheless result in unilateral price increases. The General Court addressed this issue by clarifying two important points of law: the scope of the revised EUMR and the operationalisation of the SIEC test in non-coordinated effects cases.

First, with respect to the scope of the EUMR, *CK Telecoms* posits that the replacement of the dominance with the SIEC test in 2004 has not lowered the threshold for intervention in mergers.[43] The General Court took the view that the SIEC prohibits mergers in oligopolistic markets that create a non-dominant merged entity only if they lead to a restriction of competition equivalent to that attributable to a single or collective dominant position. Accordingly, a gap merger will only be caught under the SIEC test if it 'confer[red] on the merged entity the power to enable it to determine, by itself, the parameters of competition and, in particular, to become a price maker instead of remaining a price taker.'[44] In other words, only oligopolistic gap mergers bestowing a merged entity with market power comparable to that of a dominant firm may be caught under the SIEC test.

Second, *CK Telecoms* expounds on how this narrow interpretation of the scope of the SIEC test ought to be operationalised in unilateral effects cases. The General Court made it clear that a horizontal merger can only be considered to give rise to unilateral effects warranting the finding of a SIEC, if a two-pronged, cumulative standard[45] is met:

> Article 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.[46]

It follows from the cumulative nature of this test that a horizontal merger giving rise to unilateral effects could only be prohibited if the Commission demonstrates that the merger is likely to reduce both competition between the merging parties and the remaining competition between the merged entity and the non-merging parties. By contrast, the showing of 'the mere effect of reducing competitive pressure on the remaining competitors, is not, in principle, sufficient in itself to demonstrate [SIEC] in the context of a theory of harm based on non-coordinated effects.'[47] It also flows from the cumulative nature of the proposed standard that the mere showing of a reduction of competition between the merging parties and the ensuing unilateral price increase on the part of the merged entity is, on its own, insufficient to support the finding of a SIEC.

[43] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) para. 79.
[44] ibid para. 90.
[45] Unlike what is suggested by Auer and Petit, the General Court operationalised here the SIEC as a standard rather than as a rule Auer and Petit (n 10), 226; L. Kaplow, 'Rules versus Standards: An Economic Analysis' (1992) 42(3) Duke Law Journal 557 560.
[46] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) para. 96 (emphasis added).
[47] ibid para. 97.

A. The restrictive interpretation of the SIEC test in the context of unilateral effects and the 'rule of law' account

The attempt by the General Court in *CK Telecoms* to shed light on the scope of the EUMR and the requisite legal test for finding unilateral effects is commendable. Yet, unlike what is suggested by the General Court in the *CK Telecoms* ruling, there is little basis for its narrow interpretation of the SIEC test in the *travaux préparatoires*[48] and legal history of the EUMR. On the contrary, the legislative history might equally, if not more convincingly, compel a broad interpretation of the scope of the SIEC test. The preparatory documents clearly state that a 'large majority of delegations' perceived the purpose of the new SIEC test 'as closing *any* possible gap with regard to non-collusive oligopolies and therefore providing a maximum certainty for business while preserving existing case law by the Court of Justice'.[49] This reference to '*any* possible gap' lends support to an extensive interpretation of the SIEC test. From this vantage point, the adoption of the SIEC test was supposed to enable the Commission to challenge any merger that caused harm to competition, even if the merger hurts competition to a lesser extent than one creating a dominant position. This broad reading of the scope of the SIEC test also finds support in recital 25 of the EUMR. This recital unequivocally states that the adoption of the SIEC sought to extend the scope of the EUMR beyond dominance with a view to addressing the harm caused by non-coordinated effects in oligopolistic markets.[50]

The General Court's literal[51] and (purportedly) systemic[52] interpretation of the EUMR in support of the restrictive reading in *CK Telecoms* also markedly contrasts with the expansive, teleological exegesis that the EU judicature had accorded the scope of the EU merger laws in earlier case law. The cases *Kali&Salz* and *Gencor* are insightful in this respect. The Court and the then-Court of First Instance were confronted in both cases with a similar question about the appropriate scope of the EU merger regulation as the General Court faced in *CK Telecoms*. They had to decide whether the Commission could rely on the concept of collective dominance to apply the ECMR to tackle mergers resulting in tacit coordination in oligopolistic markets without creating a dominant firm. At the time of the negotiation of the ECMR, Member States could not agree on whether the Regulation should apply to mergers creating or strengthening an oligopolistic market structure.[53]

Unlike the General Court in *CK Telecoms*, the EU Courts in *Kali&Salz* and *Gencor* disavowed a literal and restrictive interpretation of the scope of the ECMR. They went as far as holding that the fifteenth recital of the ECMR, whose plain wording suggested that mergers creating firms with a market share of less than 25% would fall outside the scope of the Regulation,[54] could not preclude the application of the concept of collective dominance to mergers with a lower market share. To support this expansive interpretation of the ECMR, the EU judicature insisted that the objectives of EU competition rules[55] and their effectiveness

[48] ibid paras. 87-90.
[49] Report - Competition Working Party- Proposal for a Council Regulation on the control of concentrations between undertakings ("The EC Merger Regulation") 24 October 2003. 13892/03 3 (emphasis added).
[50] Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (n 7) recital 25.
[51] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) paras. 90, 95-96.
[52] ibid 91.
[53] Case C-68/94 *France and Société commerciale des potasses and de l'azote and Entreprise minière and chimique v Commission* ECLI:EU:C:1998:148 paras. 159 - 168; Case T-102/96 *Gencor v Commission* ECLI:EU:T:1999:65 para. 129.
[54] Case C-68/94 *France and Société commerciale des potasses and de l'azote and Entreprise minière and chimique v Commission* (n 53) paras. 168-169 176-177. Case T-102/96 *Gencor v Commission* (n 53) paras. 125-129, 132, 134-136, 149. The EU judicature came here to the opposite conclusion of Advocate General Tesauro who argued that recital 15 would support a restrictive interpretation of the scope of the ECMR. Opinion of Advocate General Tesauro in C-68/94 *France and Société commerciale des potasses and de l'azote and Entreprise minière and chimique v Commission* ECLI:EU:C:1997:54 paras. 85-88.
[55] Case C-68/94 *France and Société commerciale des potasses and de l'azote and Entreprise minière and chimique v Commission* (n 53) paras. 170; Case T-102/96 *Gencor v Commission* (n 53) para. 150.

would be seriously frustrated if mergers facilitating tacit collusion in oligopolistic markets could not be challenged under the ECMR.[56]

This concern about the effectiveness (*effet utile*) of the EUMR carries surprisingly little weight in the General Court's purported review of the legislative history and objectives of the SIEC test[57] in *CK Telecoms*. The ruling indeed makes no mention of the widespread concern about an 'enforcement gap' of the dominance test in relation to unilateral effects as the major driver behind the adoption of the SIEC test in 2004. The judgment also casts silence on the fact that the Member States could not agree until the very end of the negotiation process on the requisite legal test and the appropriate interpretation of the concept of 'SIEC' and its relationship with dominance. The concern about the 'non-collusive oligopoly gap' and the disagreement about the substantive tests are well-documented in a number of preparatory documents, none of which are discussed in the judgment.[58] Contrary to what the General Court wants us to believe, neither the legislative history of the EUMR, nor its systematic or teleological interpretation unequivocally compel the restrictive reading of the scope and substance of the SIEC test with respect to unilateral effects adopted in *CK Telecoms*. On the contrary, *CK Telecoms* is oblivious to the legislative intent of plugging the 'enforcement gap' of EU merger rules in the context of unilateral effects which was the principal motivation behind the decision to replace the dominance test with the SIEC test.

B. The restrictive interpretation of the SIEC test in the context of unilateral effects and the 'more economic approach' account

The General Court's interpretation of the scope and operationalisation of the SIEC test proposed in *CK Telecoms* also sits uneasily with the economics of unilateral effects for several reasons.

A first source of serious concern is the requirement introduced by *CK Telecoms* that a merger must give rise to an anticompetitive effect of comparable scale to that caused by a merger creating or strengthening a dominant position for it to result in a SIEC. This requirement is difficult to square with the economics underpinning unilateral effects. Even if the scale of anticompetitive harm was a function of the size of the market shares held by the merged entity,[59] it is conceivable that a merger between two firms could entail material unilateral effects, even if it falls short of the type of anticompetitive harm inflicted by unilateral price increases by a dominant firm.[60]

As an illustration, consider a market with three players: firm A with a 60% market share, firm B with a 30% market share, and firm C with a 10% market share. Assume further that the rate of substitution between the three firms is proportionate to their market shares. In other words, a majority of consumers also perceive the largest firm and second-largest firm as their

[56] Case C-68/94 *France and Société commerciale des potasses and de l'azote and Entreprise minière and chimique v Commission* (n 53) para. 171; Case T-102/96 *Gencor v Commission* (n 53) para. 151.
[57] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) paras. 95-96.
[58] See for instance Proposal for a Council Regulation on the control of concentrations between undertakings ("The EC Merger Regulation") - Progress Report 24 April 2003. 8607/03 5–9. Proposal for a Council Regulation on the control of concentrations between undertakings ("The EC Merger Regulation") - Progress Report - revised 5 May 2003. 8607/1/03 REV 1 5–9.Report - Competition Working Party- Proposal for a Council Regulation on the control of concentrations between undertakings ("The EC Merger Regulation") (n 49) 2–3. Presidency Compromise Text - Proposal for a Council Regulation on the control of concentrations between undertakings 13 November 2003. 14386/03 2 (Art. 2 (2)-(4)) and 3-4 (recitals 20 to 21 (a)). Council of the European Union; Proposal for a Council Report - Regulation on the control of concentrations between undertakings ("The EC Merger Regulation") 21 November 2003. 15122/03 10-11 (recital 20 - 21 (a)) and 22 (Art. 2 (2)-(4), see also fn 8.
[59] For such assumption in the context of abuse of dominance see Case C-52/09 *TeliaSonera Sverige* ECLI:EU:C:2011:83 para. 81. For the context of merger assessment Verouden, Bengtsson and Albaek (n 18), 253–254.
[60] For a discussion of the market power and price effects of mergers between non-dominant firms Ivaldi and others (n 14) 55–59.

first and second choice respectively.[61] All things being equal, a merger between the first and second-largest firm A and B would give rise to a price increase of greater order of magnitude than a merger between the second and third players B and C. Yet, even if the merger BC were not causing prices to rise to the same extent as the merger AB, the resulting price increases may nonetheless be significant. The merger BC can be expected to inflict substantial consumer harm, albeit to a lesser extent than the merger creating a dominant merged entity AB.[62]

The restrictive interpretation of the scope of the SIEC test in *CK Telecoms*, which requires the showing that the merger gives rise to an anticompetitive effect of comparable scale to that caused by a dominant firm, would preclude the Commission from challenging mergers like the one between B and C described above. It thus curtails the Commission's ability to challenge mergers that entail localised competition effects. By insisting that the SIEC test applies only to mergers that bestow the merged entity with the power to act as a 'price maker',[63] *CK Telecoms* disregards that localised effects may materialise and cause material consumer harm even if the merged entity did not possess sufficient market power to raise prices to all customers within the relevant market, as it would be the case for a dominant firm.[64]

What is even more troublesome from an economic perspective is the proposed cumulative two-limbed operationalisation of the SIEC test for unilateral effects. *CK Telecoms* suggests that the Commission could only challenge a merger that leads to unilateral post-merger price increases by both (i) the merged entity and (ii) the non-merging parties. [65] It is true that economic analysis of unilateral effects predicts that mergers in differentiated product markets will often not only prompt the merging parties to raise prices, but *may* also lead to unilateral price increases by non-merging firms. Yet, this economic insight does by no means compel making the finding of unilateral effects subject to the presence of both unilateral price increases by the merged entity (first-order effect) and multilateral effects on the part of the non-merging parties (second-order effect).

Economists have, indeed, been adamant that a merger can entail profitable unilateral price increases on the part of the merged entity irrespective of the strategic response of the non-merging parties. Herein lies the major difference between unilateral (non-coordinated) and coordinated effects. In case of coordinated effects, price increases by competitors are a *precondition* for the merging parties' price increase to be profitable. By contrast, in the case of unilateral effects, such price increases by the non-merging parties may be a *result* of and reinforce the merging parties' price increase. Yet, they are by no means a *precondition* for unilateral price increases by the merged entity to be successful.[66] On the contrary, the merged entity may be able to unilaterally increase prices irrespective of whether non-merging parties proceed to compete to the extent they did prior to the merger. In theory, non-merging firms can offset such unilateral price increases by the merged entity, for instance, by repositioning their brands. Yet, such repositioning tends to be rare, as it entails important risks and costs.[67] It may also prove insufficient to defeat these price increases.[68] In other words, the reaction of

[61] Note that this is a strong presumption because, in particular in differentiated product markets there is no systematic relationship between market shares and cross-elasticity of demand Willig (n 14), 300–301. Antitrust Division of the US Department of Justice/Federal Trade Commission - Horizontal Merger Guidelines - 1992 22. Shapiro (n 13), 721; Ivaldi and others (n 14) 61–62. Yet, the assumption nonetheless holds in markets where product differentiation is moderate Draft Revised Merger Assessment Guidelines November 2020. CMA129 CON paras. 4.13-4.14.

[62] This was, for instance, the constellation in the '*babyfoods*' case that fuelled the discussion about the 'non-collusive oligopoly gap' in Europe. *FTC v H.J. Heinz Co.* (n 17).

[63] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) para. 90.

[64] C. Shapiro, 'Mergers with Differentiated Products' (1995) 10 Antitrust 23 23; Coppi and Walker (n 22), 128–130; Shapiro (n 13), 745–746; Antitrust Division of the US Department of Justice/Federal Trade Commission - Merger Guidelines 2010 6–7.

[65] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) para. 96.

[66] For this distinction between precondition and result Coppi and Walker (n 22), 127.

[67] Commentary on the Horizontal Merger Guidelines 2006 31; Shapiro (n 13), 717–718. Verouden, Bengtsson and Albaek (n 18), 251.

[68] ibid.

competitors to unilateral price increases may affect the magnitude of the competitive harm resulting from the first-order effect but does not determine its existence or likelihood.[69]

This insight that merging parties in differentiated product markets may find it profitable to increase prices unilaterally, regardless of whether non-merging firms follow, has been central to the concern of a 'non-collusive oligopoly gap' under the dominance test of the old ECMR. As unilateral effects may emerge without any accommodating conduct of the non-merging parties, a majority of commentators argued that unilateral effects could not be adequately addressed by the concept of collective dominance as interpreted by the General Court, which presupposes some form of strategic interdependence between merging and non-merging firms.[70] The SIEC test was hence introduced to also tackle anticompetitive harm that might exclusively result from the unilateral price increase of the merged entity (first-order effect) without necessarily being followed by the non-merging firms (second-order effect).

The cumulative requirement of the showing of elimination of competition between the merging parties, as well as a reduction of competitive pressure on non-merging parties as the basis for a finding of an SIEC in *CK Telecoms* reverses, at least in part, the achievements of the reform of the substantive merger test in 2004. The interpretation of the SIEC test in *CK Telecoms* seems to preclude any intervention against mergers giving rise to unilateral price increases on the part of the merged entity that are not followed and compounded by price increases by non-merging players (see shaded third row in Table 2). It thus stands in sharp contrast with the economic arguments that militated for the adoption of the SIEC test.

Table 2. The application of the SIEC test to gap cases before and after *CK Telecoms*

	Economic analysis of unilateral effects	SIEC test prior to *CK Telecoms*	Cumulative, two-pronged SIEC test in *CK Telecoms*
Merger creating/strengthening a dominant position	potentially harmful	challenged	challenged
Gap merger: unilateral price increases by merged entity (first-order effect) *and* non-merging parties (second-order effect)	potentially harmful	challenged	challenged
Gap merger: unilateral price increase by merged entity (first-order effect only) *without* price increases by the non-merging parties	potentially harmful	challenged	cleared

The restrictive interpretation of the SIEC test as a cumulative standard in *CK Telecoms* is set to remove a considerable number of (first-order effect only) mergers that lead to significant price increases and consumer harm from the scope of the EUMR. *CK Telecoms* thus partially tears open the very 'non-collusive oligopoly gap' that the EU legislator sought to close when it introduced the SIEC test.[71]

[69] Verouden, Bengtsson and Albaek (n 18), 252; Ivaldi and others (n 14) 38–41. This observation does however not call into question the importance to analyse the equilibrium effect of the merger instead of merely focusing on the price increases of the merging parties. Ivaldi and others (n 14) 40–41.
[70] Vickers (n 15), 459–460. Coppi and Walker (n 22), 126–128.
[71] It also remains unclear whether this new two-pronged standard for unilateral effects also applies to mergers creating or strengthening a dominant position or only to 'gap cases'.

This mismatch between the test for finding a SIEC and the economics of unilateral effects should suffice to cast doubt on the view expressed in some quarters that the stricter standard in *CK Telecoms* would bring EU merger control more in line with economic theory in a similar way as *Airtours* did two decades earlier.[72] The contrary is the case. The restrictive interpretation of the scope and test of the EUMR in *CK Telecoms* appears utterly out of kilter with the economics of unilateral effects. Any analogy between the *CK Telecoms* judgment and *Airtours* is therefore misleading. *Airtours* narrowed the gap between the Commission's analysis of coordinated effects and economic understanding of tacit collusion;[73] *CK Telecoms*, by contrast, drives a wedge between the legal and economic analysis of non-coordinated effects.

III. PROPOSITION 2 – THE STANDARD OF PROOF: 'MORE LIKELY THAN NOT' IS NOT LIKELY ENOUGH

Aside from spelling out how the SIEC test applies in unilateral effects cases, *CK Telecoms* also clarified the requisite standard of proof that the Commission had to satisfy to show that a merger would result in a SIEC. The General Court insisted that the Commission was required to produce evidence that showed 'with a strong probability'[74] the existence of a SIEC. More specifically, in paragraph 118 of the judgment, the General Court held:

> In the context of an analysis of a significant impediment to effective competition the existence of which is inferred from a body of evidence and indicia, and which is based on several theories of harm, the Commission is required to produce sufficient evidence to demonstrate with a strong probability the existence of significant impediments following the concentration. Thus, the standard of proof applicable in the present case is therefore stricter than that under which a significant impediment to effective competition is 'more likely than not', on the basis of a 'balance of probabilities', as the Commission maintains. By contrast, it is less strict than a standard of proof based on 'being beyond all reasonable doubt' (see, to that effect, Opinion of Advocate General Tizzano in *Commission v Tetra Laval*, C-12/03 P, EU:C:2004:318, points 72 to 77, and of Advocate General Jääskinen in *France v Commission*, C-559/12 P, EU:C:2013:766, points 34 and 35; see, a contrario, Opinion of Advocate General Kokott in *Bertelsmann and Sony Corporation of America v Impala*, C-413/06 P, EU:C:2007:790, points 209 to 211).[75]

On its face, this paragraph does nothing less than tightening the required legal standard to which the Commission must show that a horizontal merger entails anticompetitive effects.[76] The General Court's endorsement of a 'strong probability standard' appears to overrule the less exacting standard of proof that the Commission used in its assessment of previous mobile mergers. In *H3G UK/Telefónica UK* and other mobile mergers, the Commission ascertained whether the proposed mergers are 'likely' or 'more likely than not' to result in a SIEC.[77] Against this backdrop, the General Court's decision to heighten the evidentiary burden for the Commission by requiring it to show that a horizontal merger has a 'strong probability' to give

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[72] Colomo, 'Case T-399/16, CK Telecoms v Commission: a new Airtours moment and the future of effects analysis' (n 9); Auer and Petit (n 10), 226; Caspary and Bozhikov (n 9), 363; Kuhn and Thomas (n 10).
[73] B. Lyons, 'Reform of European Merger Policy' (2004) 12(2) Review of International Economics 246 251.
[74] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) para. 118.
[75] ibid.
[76] J. Buhart and D. Henry, 'CK Telecoms v Commission: a heightened and universal standard of proof under the EUMR?' (2020) 41(12) European Competition Law Review 587 594.
[77] See in this sense, Case No COMP/M.7612 Hutchison 3G UK/Telefónica UK (n 5) paras. 242 314, 327; Case No COMP/M.7758 Hutchison 3G Italy/WIND/JV 2016. C(2016) 5487 final para. 202; Case No COMP/M.7018 Telefónica Deutschland/Eplus 2 July 2014. C(2014) 4443 final para. 123.

rise to a SIEC again raises fundamental legal and economic concerns. This tightening of the standard of proof appears to be difficult to square both with existing precedent ('rule of law' account) and the precepts of decision theory ('more economic approach' approach).

A. The tightening of the standard of proof and the 'rule of law' account

The question of the requisite standard of proof in merger control has given rise to much controversy in the past. This is not least because the EU judicature used a relatively vague and open-textured formula to describe the standard of proof in merger control. It requires the Commission to 'envisage various chains of cause and effect with a view to ascertaining which of them is the most likely.'[78] Commentators[79] and some Advocate Generals ('AGs')[80] interpreted this formula as a balance of probabilities standard of proof.[81] Accordingly, to support the finding of a SIEC, the Commission would have to show that the merger under investigation is on a balance of probabilities more likely than not to give rise to anticompetitive effects.[82] This conceptualisation of the Court of Justice's 'most likely' formula as a balance of probabilities standard makes sense, as merger control confronts a competition authority with the task to determine which of two alternative, binary outcomes is most likely: either the merger causes on balance harm to competition or it does not cause harm because it is pro-competitive or competitively neutral. Should this representation of merger control as a binary decision tree be accurate, the Court's 'most likely' formula is congruent with a balance of probabilities standard.

The *CK Telecoms* thus marks a significant development as it seemingly departs from the established balance of probabilities standard and augments the Commission's evidentiary burden in (horizontal?) merger cases. Given the significance of this development, the General Court's reasoning in support of this exacting interpretation of the standard of proof remains particularly underwhelming. *CK Telecoms* fails to point to any precedent that provides a legal basis for the heightening of the Commission's standard of proof. It instead contents itself to reference two Opinions by AGs Tizzano[83] and Jääskinen[84] in support of a stricter standard of proof in merger cases. Yet, neither of the two opinions has been explicitly endorsed by the Court of Justice. At the same time, the General Court discarded *in passim* AG Kokott's interpretation of the requisite standard of proof in merger control as a balance of probabilities standard in *Bertelsmann*.[85] No explanation is, however, provided as to why the General Court deemed AG Kokott's interpretation less convincing than that of her brethren Tizzano and Jääskinen.[86]

[78] Case C-413/06 *P Bertelsmann and Sony Corporation of America v Impala* ECLI:EU:C:2008:392 para. 47; Case C-12/03 P *Commission v Tetra Laval* ECLI:EU:C:2005:87 para. 43; Case C-265/17 P *Commission v United Parcel Service* ECLI:EU:C:2019:23 para. 32; Case T-79/12 *Cisco v Commission* ECLI:EU:T:2013:635 para. 47; Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) para. 108.
[79] D. Bailey, 'Standard of proof in EC merger proceedings: A common law perspective' (2003) 40(4) Common Market Law Review 845 860; B. Vesterdorf, 'Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts' (2005) 1(1) European Competition Journal 3 19–20; T. Reeves and D. Ninette, 'Standards of Proof and Standards of Judicial Review in European Commission Merger Law: Fordham Law School Centennial Issue' (2006) 29 Fordham International Law Journal 1034 1040; Buhart and Henry (n 76), 588–590.
[80] Opinion of Advocate General Kokott in Case C-413/06 P *Bertelsmann und Sony Corporation of America/ Impala* ECLI:EU:C:2007:790 paras. 209-211.
[81] See for the opposite view and a critical review of the relevant literature A. Kalintiri, *Evidence Standards in EU Competition Enforcement: The EU Approach* (Hart 2019) 91–94.
[82] Such a balance of probabilities standard also governs the phase II analysis of mergers by the Merger Inquiry Group of the Competition and Markets Authority (CMA) in the UK. Merger Assessment Guidelines 2010 2010. CC2/OFT1254 para. 2.6 and 2.12; Whish and Bailey (n 18) 938.
[83] Opinion of Advocate General Tizzano in Case C-12/03 P *Commission v Tetra Laval* ECLI:EU:C:2004:318 paras. 72-77.
[84] Opinion of Advocate General Jääskinen Case C-559/12 P *France v Commission* ECLI:EU:C:2013:766 paras. 34-35.
[85] Opinion of Advocate General Kokott in Case C-413/06 P *Bertelsmann und Sony Corporation of America/ Impala* (n 79) paras. 209-211.
[86] For a similar criticism Monti (n 8), 465–466.

Contrary to what has been argued in some quarters,[87] the tightening of the standard of proof in *CK Telecoms* fails to enhance legal certainty. *CK Telecoms* leaves future merging parties, their legal counsel, and the Commission wondering whether the demanding *CK Telecoms* standard of proof is supposed to apply to all mergers, be they horizontal vertical and conglomerate; or only horizontal mergers, or only to all mergers in which the Commission relies 'on several theories of harm'.[88]

B. The tightening of the standard of proof and the 'more economic approach' account

The heightened standard of proof in *CK Telecoms* also raises a number of serious economic and decision-theoretical questions. Decision-theory usually operationalises the civil law balance of probabilities standard as setting the preponderance of evidence threshold slightly in excess of 50%.[89] In the context of EU merger control, this means that the EU Commission would have to show that the merger causes with a 51% likelihood a SIEC. Or, in other words, that the merger is more likely to be anti-competitive than not. By contrast, the criminal law standard of 'beyond (all) reasonable doubt' is often associated with a critical likelihood ratio[90] of 90% or even 95%.[91] In the context of merger control, this means that the Commission would have to show that the merger would entail anticompetitive effects with a likelihood of 90%. This would require the Commission to prove the anticompetitive effects of a merger with quasi-certainty.[92]

CK Telecoms tells us that the Commission must show that a SIEC will occur with a probability in the range of 52% (stricter than the 'balance of probabilities' (51%)) to 89% (not as strict as 'beyond reasonable doubt' (90%)) to challenge a merger. This statement is, however, of little help in determining where exactly to draw the line: should a SIEC be proven to be likely to materialise with a likelihood of, say, 60%, or 75%, or rather 85% (see Figure 3)?

[87] Colomo, 'Case T-399/16, CK Telecoms v Commission: a new Airtours moment and the future of effects analysis' (n 9).
[88] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) para. 118. See to this effect also Monti (n 8), 465; Buhart and Henry (n 76), 594–595.
[89] L. Kaplow, 'Likelihood Ratio Tests and Legal Decision Rules' (2014) 16(1) American Law and Economics Review 1 4; L. Kaplow, 'Burden of Proof' (2012) 121(4) The Yale Law Journal 738 741–744.
[90] For a discussion of the concept of critical likelihood ratio Kaplow (n 88).
[91] ibid 15.
[92] Buhart and Henry (n 76), 593.

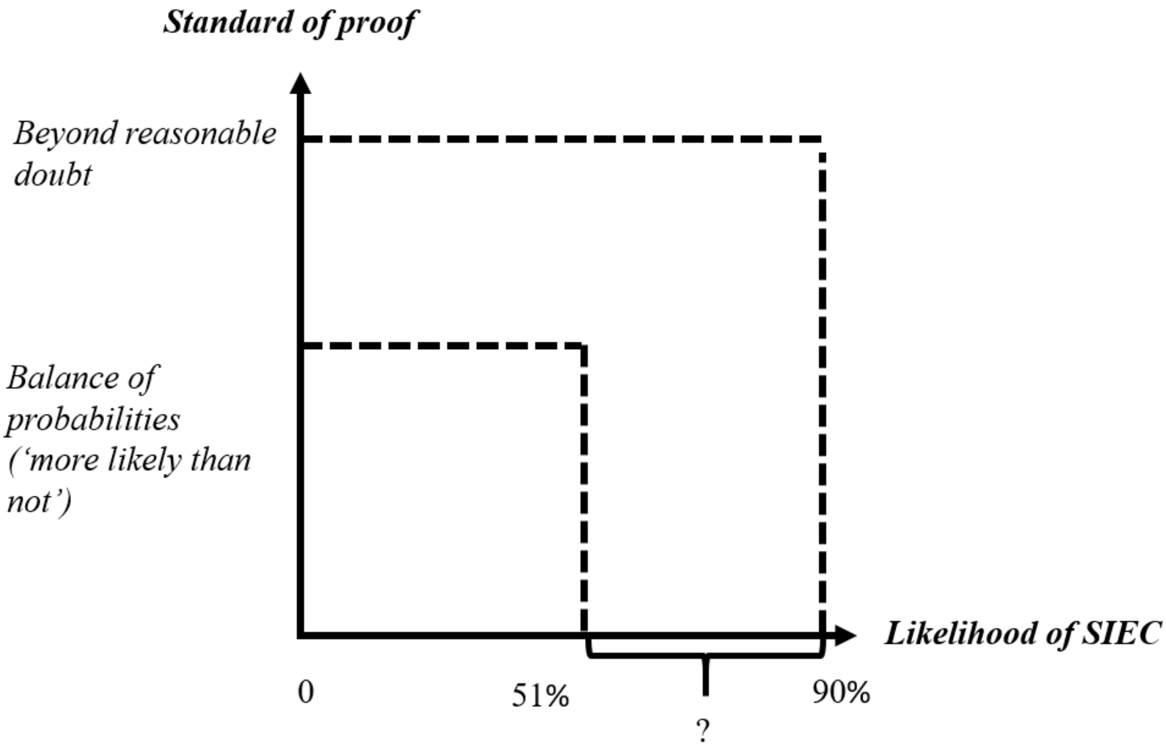

Figure 3. The elusive standard of proof in *CK Telecoms*

What might appear at first glance as an esoteric academic discussion of Bayesian probabilities has important practical legal and economic consequences. The balance of probabilities standard allows the Commission to find a SIEC and challenge a merger in tight cases, where the margins between the respective odds of the merger being anticompetitive or not are razor-thin: for instance, 51% probability of harm versus 49% probability of no-harm. At the same time, for the rare instances where it is not clear on which side the case will fall – for example, in cases where the odds of the merger being anti- or pro-competitive are 50-50 – the balance of probabilities standard establishes a margin of doubt (of up to 1%) to the benefit of the merging parties. In these rare borderline (50-50) cases where the Commission possesses inconclusive evidence about the effects of a merger (*non liquet*), this margin of doubt tilts the scales in favour of the merging parties and towards non-intervention.[93] Strictly speaking, the balance of probabilities standard already encodes an implied default presumption that mergers are marginally pro-competitive or at least competitively neutral.[94]

A tightening of the standard of proof as proposed in *CK Telecoms*, even if moderate, might have wide-ranging implications. Suppose, for instance, that the General Court envisaged a moderately heightened standard of proof requiring the Commission to show that the merger will result in anticompetitive effects with a likelihood of, say, 66% or 75% instead of merely 51%. The impact of what appears, at first glance, a moderate increase in the critical likelihood ratio by 15% or 24% is huge. For it is equivalent to a requirement to demonstrate that the merger is twice (66%$\frac{66,6}{;33,3}$) or three (75%; $\frac{75}{25}$) times more likely to be anticompetitive than not! In plain (probabilistic) language, the General Court's formulation of the standard of proof in *CK*

[93] Opinion of Advocate General Kokott in Case C-413/06 P *Bertelsmann und Sony Corporation of America/ Impala* (n 79) para. 223-224. For a similar discussion, yet drawing different conclusions Opinion of Advocate General Tizzano in Case C-12/03 P *Commission v Tetra Laval* (n 82) paras. 76-81.

[94] S. C. Salop, 'An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards' (2017) 7 <https://scholarship.law.georgetown.edu/facpub/2007/>.

Telecoms suggests that the Commission would have to demonstrate that a merger is somewhere between slightly below twice ($\frac{66,6}{;33,3}$) and nine times ($\frac{90}{10)}$) more anticompetitive than not.

One might object that the General Court's failure to clearly define a critical likelihood threshold for the heightened evidentiary burden in *CK Telecoms* constitutes a source of formidable legal uncertainty. Yet, from a more cynical perspective, the tightened standard of proof in *CK Telecoms* provides a considerable amount of legal certainty to merging parties.[95] It signals that future mergers are less likely to be challenged by the Commission. Indeed, the judgment clearly stacks the odds against the Commission by considerably raising the critical likelihood threshold that the Commission has to satisfy in order to find a SIEC.

By setting this threshold somewhere between 52 and 89%, the General Court also inflates the margin of doubt in favour of the parties by order of magnitude between 2 to 39%. Under the balance of probabilities standard, only a few borderline (50-50) cases fall within the grey zone or margin of doubt where the balance by default tilts in favour of the merging parties. The heightened standard of proof in *CK Telecoms* expands this margin considerably. As a result, more mergers would fall within the grey-zone category that will be automatically cleared despite a considerable likelihood of anticompetitive effects. The adoption of a stricter standard of proof thus transforms what constituted a margin of doubt or tie-breaker in tight cases into a full-blown presumption that mergers tend to be pro-competitive. Surprisingly, the General Court shows little concern over the fact that such a blanket presumption of the pro-competitiveness of mergers stands in open contradiction to the existing case law which clearly rejects any general presumption that a notified merger is (in)compatible with the internal market.[96]

The most important consequence of the heightening of the requisite standard in *CK Telecoms* and the ensuing *de facto* presumption of pro-competitiveness of mergers is that it may (further) bias EU merger control towards false negatives and under-deterrence.[97] To reduce error costs, decision theory counsels the standard of proof to be calibrated with both the likelihood and magnitude of the expected anti-competitive harm.[98] Economic theory provides little support to the proposition that horizontal mergers are unlikely to result in anticompetitive harm or that this harm is often of such insignificant scale that a higher evidentiary burden for proving anticompetitive effects is warranted. On the contrary, there is a general consensus that horizontal mergers are more likely to produce much greater harm than vertical or conglomerate

[95] This point has been raised in a CCP conversation by Amelia Fletcher. Centre for Competition Policy, 'What are the appropriate standards for economic evidence in horizontal merger cases after Case T-399/16 CK Telecoms ('Hutchison/O2'): Kai-Uwe Kühn, Amelia Fletcher, Elias Deutscher' (3 November 2020) <http://competitionpolicy.ac.uk/events/ccp-conversations> accessed 24 April 2021.

[96] Case C-413/06 *P Bertelsmann and Sony Corporation of America v Impala* (n 77) para. 48; Case T-79/12 *Cisco v Commission* (n 77) para. 46, 48.

[97] For the proposition that there is likely to be more over- than under-deterrence with respect to firms' merger decisions S. C. Salop, 'The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach' (2015) 80(2) Antitrust Law Journal 269 297. This is also confirmed by empirical analysis of EU merger control: Duso et al. found that since the 2004 modernisation of the EU Merger Regulation, the Commission merger policy is clearly characterised by a propensity towards type 2 errors (in two-thirds of the cases) as compared to type 1 errors (in one third of the cases) T. Duso, K. Gugler and F. Szücs, 'An Emprirical Assessment of the 2004 EU Merger Policy Reform' (2013) 123 The Economic Journal 596 609; M. Motta and M. Peitz, 'Challenges for EU Merger Control: Discussion Paper' (2019) 2. A majority of empirical studies find that the 2004 reform has led to a reduction of the probability of mergers being challenged. A. T. V. Mai, 'Is EU Merger Policy Less Stringent After Its 2004 Reform?' (2016). PESO Working Paper 1:2016 32 <https://www.diva-portal.org/smash/get/diva2:900189/FULLTEXT01.pdf> accessed 9 February 2021; M. A. Bergman and others, 'Does Merger Policy Converge After the 2004 European Union Reform?' (2019) 15(1) Journal of Competition Law & Economics 664 675, 679; F. Mini, 'Fifty is the New Forty: EU Merger Policy Permits Higher Market Shares After the 2004 Reform' (2018) 53(3) Review of Industrial Organization 535 551; A. Bradford, R. J. Jackson and J. Zytnick, 'Is E.U. Merger Control Used for Protectionism? An Empirical Analysis' (2018) 15(1) Journal of Empirical Legal Studies 165 173.

[98] C. F. Beckner, III and S. C. Salop, 'Decision Theory and Antitrust Rules' (1999) 67 Antitrust L.J. 41 61–62. See for a formal analysis Kaplow (n 88), 16–18. Decision theory would therefore even support a standard of proof that is *less* strict than the balance of probabilities in mergers giving rise to significant harm. See to this effect, L. Kaplow, 'Efficiencies in Merger Analysis' (2021). Harvard M. Olin Center for Law, Economics and Business Policy Discussion Paper 3/2021 46–47.

mergers because they have as their immediate effect the elimination of competition between the merging parties and reduce the number of competitors by one.[99]

The reasoning underpinning the adoption of a stricter standard of proof in *CK Telecoms* appears even less convincing if one considers that the Commission's decision in *H3G UK/Telefónica UK* suggested that the merger was likely to result in anticompetitive harm of considerable magnitude. The Commission, in total, identified three channels through which the merger would lead to anticompetitive horizontal effects both on the retail and wholesale markets. Recall that the decision theory suggests that in order to minimise error costs, the standard of proof should be commensurate to both the likelihood and magnitude of the potential harm caused by the merger.[100] Accordingly, the finding that a merger will lead to multiple, cumulative forms of harm – provided neither type of this harm is of negligible magnitude or fanciful – would militate for a less demanding rather than a stricter standard of proof as envisaged by the General Court in *CK Telecoms*. Such decision-theoretical concerns about under-deterrence appear to be largely extraneous to the General Court's decision to heighten the standard of proof in *CK Telecoms*.

C. Policy implications of the tightening of the standard of proof

The policy implications of the heightening of the evidentiary burden for the Commission in *CK Telecoms* can hardly be overstated. The exacting formulation of the standard of proof in *CK Telecoms* raises the bar for the Commission to challenge mergers in which the theory of harm is more speculative and the chain of causality between the merger and the anticompetitive harm is more tenuous.[101] It thus has the potential to thwart recent attempts by the Commission to factor medium- to long-term harm of mergers on innovation into the analysis of unilateral effects. In recent agrochemical mergers, the Commission, for instance, relied on bolder counterfactuals that looked beyond the usual 2 to 5 years timeframe and the confines of the relevant product market to account for their adverse effects on innovation.[102] Should the *CK Telecoms* standard find broad application, the Commission will become increasingly cautious, if not reluctant, to challenge mergers that may have long-term adverse effects on innovation.

The timing of the tightening of the standard of proof in *CK Telecoms* is particularly telling. It coincides with calls for a more robust merger control of the so-called 'killer acquisitions' of small start-ups by dominant incumbents. Antirust experts and authorities have grown increasingly wary about the anticompetitive long-term effects of acquisitions of small start-ups which are not yet in a direct competitive relationship with the dominant incumbent, but rather constitute a distant competitive threat to their business model.[103] Even if their immediate competitive harm is often limited, these killer acquisitions may have significant long-term effects by nipping future innovation in the bud. This concern about the adverse effects of killer acquisitions on innovation has prompted calls for a recalibration of the burden and standard of proof in merger control to enable competition authorities to address mergers that may give rise to low-probability but high-impact harm to innovation.[104] The General

[99] Whish and Bailey (n 18) 830.
[100] Beckner, III and Salop (n 97), 61–62.
[101] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) paras. 111, 332.
[102] Case No COMP/M.7932 Dow/DuPont. C(2017) 1946 final paras. 342, 2032-2034.
[103] C. Cunningham, F. Ederer and S. Ma, 'Killer Acquisitions' (2019) <https://ssrn.com/abstract=3241707> accessed 28 September 2019; Competition and Markets Authority, 'A new pro -competition regime for digital markets - Advice of the Digital Markets Taskforce' . CMA135 4.120-4.159; FTC v Facebook, Inc. 9 December 2020; Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act). COM/2020/842 final, Art. 12.
[104] J. Furman and others, 'Unlocking digital competition: Report of the Digital Competition Expert Panel' (2019) 13, 99-100; J. Crémer, A.-Y. de Montjoye and H. Schweitzer, 'Competition policy for the digital era' (2019) 4, 11, 51, 116-124. The CMA proposes to follow this advice by subjecting the phase II analysis of start-up acquisitions by digital platforms with 'strategic market status' to a 'realistic prospect'

Court's ruling in *CK Telecoms* pulls into the diametrically opposite direction. A tightening of the standard of proof for finding a SIEC, in particular for more complex theories of harm, is likely to move 'killer acquisitions' even further beyond the scope of the Commission's merger scrutiny. The heightening of the standard of proof in *CK Telecoms* thus constitutes a rather blunt rebuke of calls for reform to keep EU merger control abreast of new challenges in innovation-driven and digital markets.

IV. PROPOSITION 3 – INFERRING UNILATERAL EFFECTS: CLOSE COMPETITION IS NOT CLOSE ENOUGH

A third takeaway of the *CK Telecoms* judgment is that the Commission has to demonstrate that the merging parties are 'particularly close'[105] competitors, as opposed to merely 'close' competitors, to support a finding of likely unilateral effects. In so doing, the General Court overturned a key element of the Commission's analysis of unilateral effects in recent telecom mergers.

A. The Commission's approach to closeness of competition

The assessment of closeness of competition between the merging parties lies at the heart of the European Commission's analysis of unilateral effects in horizontal mergers. The Commission's Horizontal Merger Guidelines list the closeness of competition between the merging parties as an important variable for applying the SIEC test to unilateral effects. Paragraph 28 of the Guidelines, entitled '*Merging firms are close competitors*' states that the likelihood and importance of unilateral effects largely depend on the closeness of competition or degree of substitutability between the differentiated products produced by the merging parties and their respective pre-merger profit margins.[106] As a rule of thumb: the closer the substitutability between the products of the merging parties, the higher the likelihood and magnitude of unilateral effects.[107] This means that 'a merger between two producers offering products which a substantial number of customers regard as their first and second choices could generate a significant price increase.'[108] At the same time, the Guidelines observe that unilateral effects are unlikely when 'there is a high degree of substitutability between the products of the merging firms and those supplied by rival producers.'[109]

The focus of the Horizontal Merger Guidelines on closeness of competition marked the alignment of the Commission's analysis of unilateral effects with the approach followed by the US Merger Guidelines since 1992.[110] The prominent role of closeness of competition in the Commission's analysis of unilateral effects is also in keeping with economic theory. The economic analysis of unilateral effects suggests that the removal of competitive constraints existing between the merging parties prior to the merger is the first-order effect that drives unilateral effects in differentiated product markets. The degree of pre-merger substitution between the products of the merging parties, hence, constitutes the most reliable proxy of the negative externality that both players imposed on each other's profitability prior to the merger

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rather than a 'balance of probabilities' standard. Competition and Markets Authority (n 102) 4.153-4.154; Competition and Markets Authority, 'A new pro -competition regime for digital markets - Appendix F: The SMS regime: a distinct merger control regime for firms with SMS' . CMA135 paras. 112-153.

[105] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) para. 247.

[106] Commission Guidelines on the assessment of horizontal mergers (n 32) para. 28: see also to this effect para. 17. For an insightful discussion see A. Oldale and A. J. Padilla, 'EU Merger Assessment of Upward Pricing Pressure: Making Sense of UPP, GUPPI, and the Like' (2013) 4(4) Journal for European Competition Law & Practice 375; Oldale and Padilla (n 105), 375–378; A. J. Padilla, 'Should Profit Margins Play a More Decisive Role in Horizontal Merger Control?' (2018) 9(4) Journal for European Competition Law & Practice 260 262–263.

[107] Commission Guidelines on the assessment of horizontal mergers (n 32) para. 28.

[108] ibid.

[109] ibid.

[110] Antitrust Division of the US Department of Justice/Federal Trade Commission - Horizontal Merger Guidelines - 1992 (n 61) 22; Antitrust Division of the US Department of Justice/Federal Trade Commission - Merger Guidelines 2010 (n 64) 20–22.

and that the merged entity will be able to internalise post-merger. Along with the merging parties' respective profit margins, the degree of closeness of competition is, hence, the principal factor that determines the magnitude of the merged entity's incentive to unilaterally raise prices post-merger.[111]

While the Commission had already occasionally accounted for the closeness of competition prior to the 2004 reform,[112] it made the qualitative and quantitative assessment of the closeness of competition through diversion ratios a lynchpin of its assessment of unilateral effects in (particular in) gap cases.[113] It is therefore rather unsurprising that the question of the specific degree of closeness between the merging parties allowing the inference of unilateral effects became a central bone of contention in all mobile telecom mergers.[114]

In the first mobile telecommunication gap mergers decided under the newly adopted Horizontal Merger Guidelines, the Commission grounded its findings of unilateral effects on the fact that the merging parties were each other's 'closest'[115] or 'particularly close'[116] competitors. In *Hutchison 3G/Austria*, the Commission seemingly lowered the critical threshold of closeness of competition that would justify the inference of unilateral effects. The Commission referred again to the merging parties as each other's 'closest'[117] and 'particularly close'[118] competitors. Yet, it acknowledged for the first time that the reference in the Guidelines to 'products which a *substantial number of customers* regard as their first and second choices'[119] does not necessarily mean that a *majority* of customers has to consider the merging parties' products as closest substitutes for the latter to qualify as close competitors within the meaning of paragraphs 17 and 28 of the Horizontal Merger Guidelines.[120] Subsequently, from the *Telefónica Deutschland/Eplus* merger onwards, the Commission further elaborated on this point by repeatedly asserting that the notion of closeness of competition ought to be understood as a relative, rather than an absolute, concept.[121] Accordingly, the Commission held in more recent mergers, including the *H3G UK/Telefónica UK* takeover, that it would be sufficient for the merging parties to be close competitors,[122] rather than 'particularly close' or 'closest competitors', to support a finding of unilateral effects.

The Commission thus increasingly took a sliding scale approach in analysing closeness of competition. This means that it did not set a quantifiable minimum threshold to determine when two merging parties are close competitors in order to find unilateral effects. Instead, it assumed that unilateral effects become more likely and significant, the closer the merging

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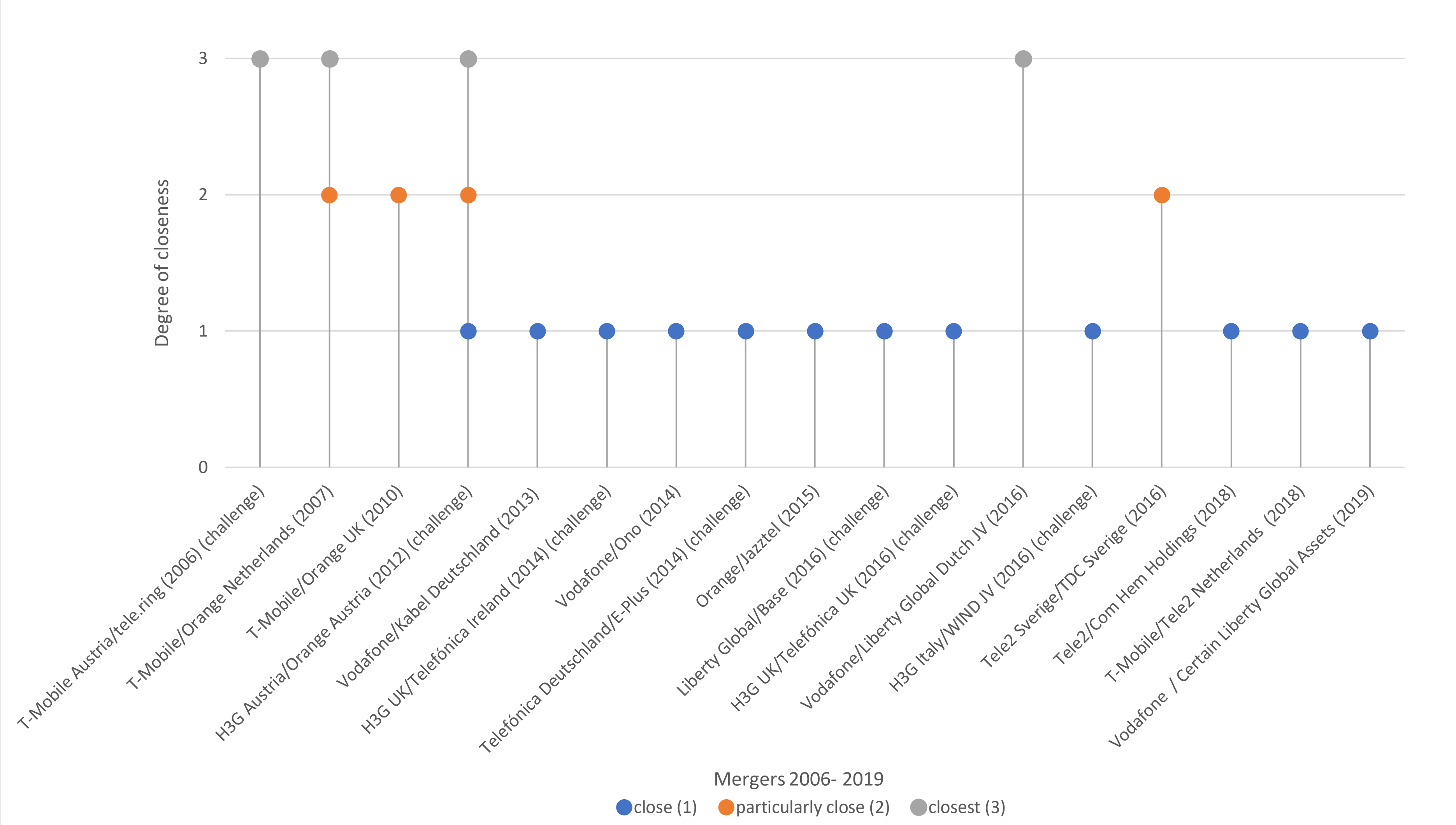
[111] Willig (n 14), 299–300.Shapiro (n 13), 724–726. Farrell and Shapiro (n 16), 1–15. Werden (n 14) 1330–1333; S. C. Salop and D. P. O'Brien, 'Competitive Effects of Partial Ownership: Financial Interest And Corporate Control' (2000) 67(3) Antitrust Law Journal 598–602.
[112] Verouden, Bengtsson and Albaek (n 18), 254–256.
[113] T. Büttner, 'Closeness of Competition from an Economic Perspective' (2016) 7(10) Journal for European Competition Law & Practice 690 294–295.
[114] T. Caspary and L. Görlitz, 'EU Merger Control and Mobile Telecoms: Consolidation at the Cost of Competition or Regulation Hampering the Creation of European Champions' (2015) 36(5) European Competition Law Review 211 214, 216. See also for a general discussion beyond mobile telecom mergers W. Berg and S. Real, 'How Close Is Too Close? A Critical Review of the European Commission's Assessment of Closeness of Competition' (2016) 7(7) Journal of European Competition Law & Practice 442; S. Thomas, 'Close Competitors in Merger Review' (2013) 4(5) Journal of European Competition Law & Practice 391.
[115] Case No COMP/M.3916 T-Mobile Austria/Tele.Ring (n 35) para. 51; Case No COMP/M.4748 T-Mobile/Orange Netherlands para. 35.
[116] Case No COMP/M.4748 T-Mobile/Orange Netherlands (n 114) paras. 41-42. Case No COMP/M.5650 T-Mobile/Orange UK. C(2010) 1274 para. 58.
[117] Case No COMP/M. 6497 Hutchison 3 G Austria/Orange Austria. C(2012) 9198 final paras. 176, 225-226.
[118] ibid paras. 223, 227.
[119] Commission Guidelines on the assessment of horizontal mergers (n 32) para. 28 (emphasis added).
[120] Case No COMP/M. 6497 Hutchison 3 G Austria/Orange Austria (n 116) paras. 176-178.
[121] Case No COMP/M.7018 Telefónica Deutschland/Eplus (n 77) para. 277-280. Case No COMP/M.7637 Liberty Global/BASE Belgium 2016. C(2016) 531 final paras. 215-216. Case No COMP/M.7758 Hutchison 3G Italy/WIND/JV (n 77) paras. 781-782. Case No COMP/M.7612 Hutchison 3G UK/Telefónica UK (n 5) paras. 323-324, 407-463. See also B. Bühler and others, 'The Final Countdown: Five, Four, Three No, Wait' (2017) 3(4) Competition Law & Policy Debate 18 20–22.
[122] Case No COMP/M.6992 Hutchison 3G UK/Telefónica Ireland 28 May 2014. C(2014) 3561 final paras. 200, 531; Case No COMP/M.7018 Telefónica Deutschland/Eplus (n 77) paras. 117, 278; Case No COMP/M.7612 Hutchison 3G UK/Telefónica UK (n 5) 324, 421, 1193.

parties are competing with each other pre-merger. Accordingly, if the merging parties are one another's closest competitors, the expected anticompetitive effects of a merger are particularly serious. Yet, this does not mean that the merging parties' products must be regarded by a majority of customers as the closest substitutes for unilateral effects to arise. In other words, the mere fact that some customers view the products of other non-merging competitors as closer substitutes is not sufficient to undermine the finding that the merging parties are close competitors and that their combination will result in anticompetitive effects.[123] Closeness of competition, thus, according to the Commission is a matter of degree, rather than a clear-cut binary ('either' or 'or') category.

This evolution of the Commission's analysis of closeness of competition is reflected in Figure 4, which maps the threshold value of closeness of competition in all mobile telecom merger decisions decided under the Horizontal Merger Guidelines (by coding closest competitors as 3, particularly close competitors 2 and close competitors as 1).

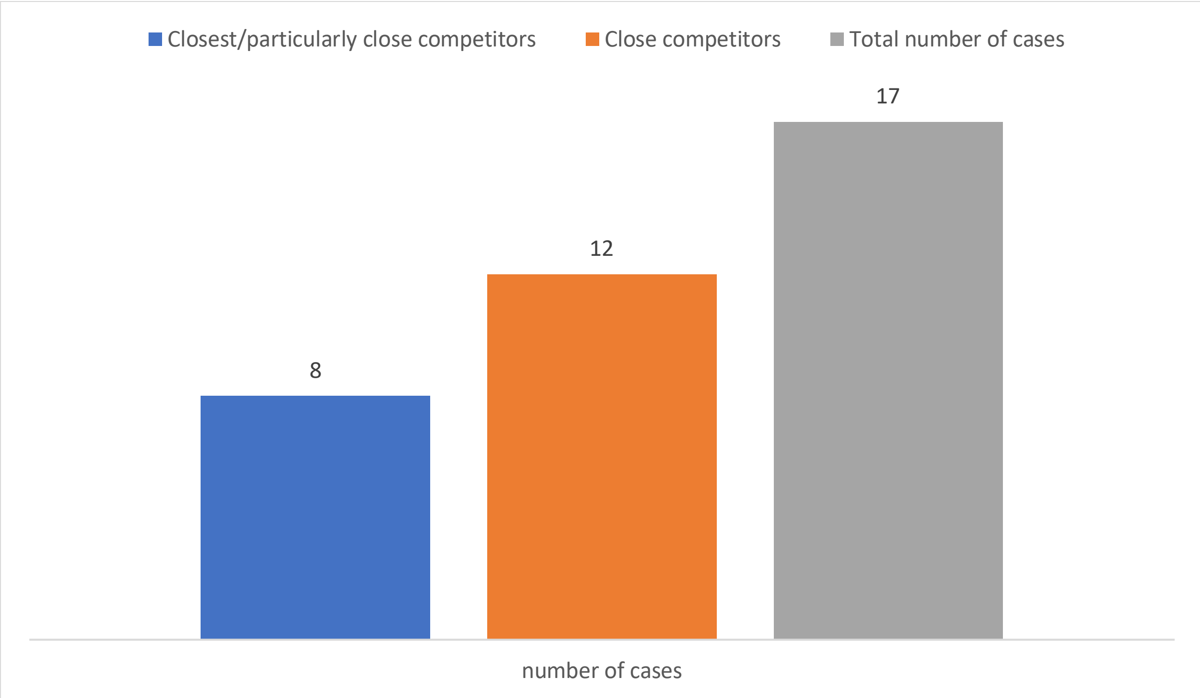
[123] Case No COMP/M.7018 Telefónica Deutschland/Eplus (n 77) paras. 278-280. Case No COMP/M.7612 Hutchison 3G UK/Telefónica UK (n 5) paras. 323-324. Case No COMP/M.7758 Hutchison 3G Italy/WIND/JV (n 77) paras. 781–783, 923. Case No COMP/M.7637 Liberty Global/BASE Belgium (n 120) paras. 215-216. Case No. COMP/M.8792 T-Mobile NL/Tele2 NL. C(2018) 7768 final para. 352.

Figure 3. The analysis of closeness of competition in mobile telecom merger cases (2006-2019)



In a clear majority of mobile telecom mergers reviewed since 2006, the Commission considered the fact that the merging parties were 'close' competitors as the critical benchmark to decide whether the merger was likely to give rise to unilateral effects (Figure 5).[124].

Figure 4. The relative understanding of closeness of competition in mobile telecommunication merger cases (2006-2019)



This relative, sliding-scale approach towards the degree of substitutability between the parties attracted considerable criticism from the merging parties and commentators. The central criticism levelled at the Commission's approach was that its expansive interpretation of the concept of closeness competition, combined with the considerable weight it attributed to it, had brought into being a *de facto* presumption against 4-to-3 mergers.[125] This is due to the fact that in oligopolistic markets any of the four players would be a relatively close competitor to the other three.

The example of the *H3G UK/Telefónica UK* merger is insightful in this respect. The (provider-level) diversion ratios from Three to O2 amounted to roughly 40-50% in the pre-paid and 30-40% in the post-paid segment. They thus considerably exceeded the diversion ratios between Three and the non-merging parties. By contrast, the diversion ratios from O2 to Three did not exceed 20-30% in the pre-paid and 10-20% in the post-paid segment. They hence equalled or even fell short of the diversion ratios between 02 and the non-merging competitors BT/EE and Vodafone which reached 20-30% in the pre-paid and 30-40% in the post-paid segment. [126] In other words, while O2 was perceived as the second-best choice by Three users, O2 users clearly considered the non-merging parties as closer substitutes than Three. The Commission nonetheless found that the merger would give rise to unilateral effects because the parties were 'close' competitors. The implicit consequence of this loose standard of 'close competitors' is that it would have allowed the Commission to also find unilateral effects in any other merger between O2 and the other two MNOs (BT/EE and Vodafone). Critics of the undemanding standard of 'close' competition argued that it would indicate unilateral effects in

[124] Note that in some of the 17 cases in which the degree of closeness of competition was assessed, the Commission referred to more than one standard. This explains why the number of cases in which the Commission referred to either 'closest/particularly close' or 'close' competitors exceeds the total number of cases in which closeness was assessed
[125] Caspary and Görlitz (n 113), 216. Berg and Real (n 113), 453–454. Thomas (n 113). Thomas (n 37).
[126] Case No COMP/M.7612 Hutchison 3G UK/Telefónica UK (n 5) Annex B, para. 67, Table 2.

virtually all 4-to-3 mergers and hence create an undue presumption against four-to-three mergers in oligopolistic markets.[127]

B. The restrictive standard of 'particularly close competitors' in *CK Telecoms*

The General Court in *CK Telecoms* seemingly endorsed this criticism. It made it plain that the finding that the two merging parties are 'relatively close competitors […] cannot suffice to establish a significant impediment to effective competition; if that were not the case, any concentration resulting in a reduction from four to three operators would as a matter of principle be prohibited.'[128] The General Court instead insisted that the Commission would have to establish that both merging parties are 'particularly close mobile network operators'[129] to support the finding of unilateral effects. It thus substantially raised the bar for the Commission to establish the existence of unilateral effects.

The General Court thereby departed from previous case law where it appeared to endorse the 'close' competitors standard.[130] *CK Telecoms* thus throws into question the Commission's relative approach toward the closeness of competition requirement that enabled it not only in mobile telecom mergers but also in other recent horizontal mergers to find anticompetitive effects although the parties were "merely" close competitors.[131]

C. The 'particularly close competitors' standard and the 'rule of law' account

Given the far-reaching implications of this holding, it is all the more surprising that the General Court omitted to give any further guidance on how this strict standard of 'particularly close' competitors ought to be operationalised in practical terms. Alas, the notion of 'particularly close' competitors does very little in clarifying the necessary degree of substitution between the merging parties that would indicate likely unilateral effects. Indeed, *CK Telecoms* falls short of explaining whether there is a specific threshold of substitutability, for instance, in terms of diversion ratios, below which the merging firms cannot be considered 'particularly close' competitors. Does 'particularly close' mean that – say in a 4-to-3 merger – both parties must be at least each others' second-closest but not third-closest competitors? This question remains unanswered.

This failure to articulate a specific economic threshold of substitution or requirements that would have to be met for the competitive relationship between the merging parties to qualify as 'particularly close' is yet another source for considerable legal uncertainty. It further undermines the credibility of attempts to portray *CK Telecoms* as restoring legal certainty and the rule of law.[132] The contrary is the case. The General Court does not offer sufficient guidance on the appropriate operationalisation of the concept of 'particularly close' competitors. *CK Telecoms* merely plays the ball back to the Commission who is confronted with the daunting task to develop alternative metrics or benchmarks indicating the likelihood of unilateral effects. It will ultimately give the Commission a free hand to come up with new ways to determine

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[127] Caspary and Görlitz (n 113), 216. The inference of unilateral effects from (observed) diversion ratios between the merging parties in the range of 20-30% is indeed likely to indicate anticompetitive effects in a majority of mergers in oligopolistic markets with four major players. By way of example, take a market with four equally sized competitors each having a market share of 25%. The calculation of benchmark market share-based diversion ratios (assuming that substitution patterns are proportionate to market shares) would suggest that the diversion ratio between all players is about 33%. (Market share-based benchmark diversion ratios are computed by dividing the firm's market share to which substitution is assessed, by the share of the remaining competitors minus the market share from which consumers switch. This ratio accounts for the fact that the consumers switching away from the firm will be divided between the firm to which diversion is assessed and the remaining competitors.).

[128] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) para. 249.

[129] ibid 247.

[130] Case T-282/06 *Sun Chemical Group* ECLI:EU:T:2007:203 paras. 69, 72, 78.

[131] Case No COMP/M.7932 Dow/DuPont (n 101) paras. 425-426. Case M.8677 Siemens/Alstom. C(2019) 921 final paras. 327-329.

[132] Thomas (n 113), 400.

closeness of competition. *CK Telecoms* is thus set to add further legal uncertainty and discretion to the analysis of closeness of competition, instead of reducing it.

D. The 'particularly close competitors' standard and the 'more economic approach' account

Leaving aside its shortcomings with respect to legal certainty, the General Court's 'particularly close competitors' standard is also out of sync with economic analysis. Economic theory underpinning the analysis of unilateral effects clearly suggests that the merging parties do not have to be each others' 'closest competitors' or 'particularly close competitors' for their combination to give rise to material anticompetitive effects. Instead, it is sufficient that a significant number of customers perceive both parties' products as their first and second choice.[133]

A simple numerical example may help illustrate this point. Consider, for instance, a market with four roughly equally sized MNOs, A, B, C, and D. All four MNOs have symmetric (per-customer) marginal costs of 10 EUR and set the prices of their monthly mobile plans at 20 EUR. This means that the pre-merger price-cost (P - C) margin is 10 EUR (i.e., the gross margin is 50%).[134] Suppose further that A and B are competing more closely with each other than A and C: the diversion ratio between AB (D_{AB}) equals 0.4 (i.e., 40%), whereas the diversion ratio between AC (D_{AC}) amounts to 0.2 (i.e., 20%).

In such a scenario, economic theory would predict the anticompetitive effects of the merger between the two closest competitors AB to be most serious. Absent any repositioning by competitors, entry, feedback effects, and efficiencies, A will have an incentive to raise prices post-merger by 20%, charging 24 instead of 20 EUR for its monthly mobile plan, if A and B merge. This upward pricing pressure results from the fact that, following the merger, A will be able to recapture the value of sales it would have otherwise lost to B, had it raised its price unilaterally on a standalone basis. This recaptured value of diverted sales to B (i.e., D_{AB} * profit margin_B = 0.4*10 EUR) [135] will produce a gross upward pricing pressure on A of 20%, as the value if $GUPPI_A$ is equal to $\frac{D_{AB}*(P_B - C_B)}{P_A} = \frac{0.4*10\ EUR}{20\ EUR} = 0.2.$ [136]

Consider now what happens if the more distant competitors A and C merge. Following the merger, A will have an incentive to increase prices by 10%, charging customers 22 EUR instead of the initial 20 EUR for its monthly mobile plan. The mechanics of the upward-pricing pressure are the same as in the merger between A and B. Post-merger, A will be able to internalise the loss of the value of diverted sales to C, equalling 2 EUR per sales unit diverted (D_{AC} * profit margin_C = 0.2 * 10 EUR). Hence, all other things being equal, the merger will entail for A a gross upward pricing pressure of 10%, as the value of $GUPPI_A$ is $\frac{D_{AC}*(P_C - C_C)}{P_A} = \frac{0.2*10\ EUR}{20\ EUR} = 0.1$. It bears noting that even a moderate diversion ratio between A and C of, say, 10% – akin to the lower-bound (provider-based) diversion ratio identified between O2 and

[133] Shapiro (n 13), 720.

[134] In assuming a gross margin of 50%, I follow the example of S. C. Salop and S. Moresi, 'Updating the Merger Guidelines: Comments' (2009) 20 <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2675&context=facpub>. See for similar (contribution) margins used in the Commission's robustness check in Case No COMP/M. 6497 Hutchison 3 G Austria/Orange Austria (n 116) Annex 2 para. 26.

[135] For the role of the value of diverted sales as opportunity cost for the merging firm to compete more fiercely and driving force of unilateral effects, as well as the formula used see Shapiro (n 13), 724–725. Willig (n 14), 299.

[136] For the computation of the GUPPI see S. C. Salop, S. Moresi and J. R. Woodbury, 'Scoring Unilateral Effects with the GUPPI: The Approach of the New Horizontal Merger Guidelines' (2010). CRA Insight 4.Salop and Moresi (n 133) 19–21.Farrell and Shapiro (n 16), 6–15. Shapiro (n 13), 725–726; Salop and O'Brien (n 110), 598–602; J. Hausman, S. Moresi and M. Rainey, 'Unilateral effects of mergers with general linear demand' (2011) 111(119) Economic Letters 119.

Three in the post-paid segment in *Hutchison 3 G UK/Telefónica UK* – would in our example entice A to raise its prices by 5%, i.e. from 20 to 21 EUR. Consequently it cannot be said that, just because the merger between the two closest or particularly close competitors A and B will have the most detrimental impact on competition, a merger between more distant, albeit still close, competitors A and C is innocuous.

This numerical example shows that the Commission's relative, sliding-scale approach towards closeness of competition is economically sound, while the General Court's 'particularly close standard' does not accord with standard economic analysis of unilateral effects. It also explains why other competition authorities, for instance in the US and the UK, explicitly refrain from requiring that both merging parties be one another's 'closest' or 'particularly close competitor'. On the contrary, the US 2010 Horizontal Merger Guidelines state that a 'merger may produce significant unilateral effects for a given product even though many more sales are diverted to products sold by non-merging firms than to products previously sold by the merger partner.'[137] This is also reflected in the US Department of Justice's and Federal Communications Commission's analysis of mobile telecom mergers. Contrary to what is suggested elsewhere,[138] US authorities challenged mergers in which both merging wireless carriers fell short of being each other's 'closest competitors' and non-merging firms were in a closer competitive relationship with one of the parties.[139]

Aside from disregarding that a merger between "merely" close competitors may entail significant price increases, the General Court's 'particularly close competitors' standard also overlooks that the degree of closeness of competition between the merging parties is only one out of two factors that directly affect merging firms' incentives to raise prices unilaterally. Economic literature emphasises that diversion ratios *and* pre-merger margins always act in tandem in creating upward pricing pressure.[140] Suppose, for instance, that C is more efficient than A and therefore generates a greater pre-merger price-cost margin of 12 instead of 10 EUR. Keeping the diversion ratio D_{AC} at 0.2, a merger between A and C would result in a gross upward pricing pressure for A of 12% instead of 10%. This illustrate that, in the presence of high pre-merger margins, mergers may give rise to significant unilateral effects, even if the degree of substitution between the merging parties does not indicate that they are each others' closest or particularly close competitors.[141]

A third issue with the 'particularly close competitors' standard is that it implicitly assumes symmetric patterns of substitution between the merging firms. Yet, in differentiated product markets, substitution and switching patterns are not always symmetric but often asymmetric.[142] Diversion ratios in *H3G UK/Telefónica UK*, for instance, showed that O2 was viewed as the second-best choice by a majority of Three's users and hence the 'closest' competitor of Three. By contrast, Three exerted a less important competitive constraint on O2.

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[137] Antitrust Division of the US Department of Justice/Federal Trade Commission - Merger Guidelines 2010 (n 64) 21–22. The OFT, Competition Commission and, since 2014, the CMA follow a similar approach Merger Assessment Guidelines 2010 (n 81) paras. 5.4.6 and 5.4.9. Merger Assessment Guidelines 2021. CMA 129 paras. 4.8, 4.10.

[138] K. Tyagi, 'Four-to-Three Telecoms Mergers: Substantial Issues in EU Merger Control in the Mobile Telecommunications Sector' (2018) 49(2) International Review of Intellectual Property and Competition Law 185 208.

[139] See for instance Complaint in AT&T Wireless Services, Inc./Cingular Wireless Corporation 2004. 1:04CV01850 para. 26; Complaint in Alltel Corporation/Midwest Wireless Holdings L.L.C. 2006 para. 17; Complaint in United States v. AT&T Inc. and Dobson Communications Corp. 2007. Civil No. 1:07-CV-01952 para. 28; Complaint in SBC Communications Inc./BellSouth Corporation 2000 para. 5; Second amended complaint in AT&T/T-Mobile 30 September 2011. Case 1:11-cv-01560-ESH Document 39 para. 37.

[140] Shapiro (n 13), 725. See also Padilla (n 105), 262–263; T. Valletti and H. Zenger, 'Should Profit Margins Play a More Decisive Role in Merger Control? – A Rejoinder to Jorge Padilla' (2018) 9(5) Journal of European Competition Law & Practice 336 337, 339-340.

[141] For an insightful numerical example see Valletti and Zenger (n 139), 342.

[142] Merger Assessment Guidelines (n 136) para. 4.11. This point has been raised in a CCP conversation by Kai-Uwe Kühn. Centre for Competition Policy, 'What are the appropriate standards for economic evidence in horizontal merger cases after Case T-399/16 CK Telecoms ('Hutchison/O2'): Kai-Uwe Kühn, Amelia Fletcher, Elias Deutscher' (n 94).

Accordingly, many O2 customers switched to non-merging competitors rather than Three.[143] The asymmetry in switching patterns however does by no means automatically prevent the merger from giving rise to unilateral effects.[144] On the contrary, the merger may engender a 'localised' harm for Three's customers who perceive O2 as the second-best option. This asymmetry in substitution patterns casts even more doubt on attempts to condition the finding of unilateral effects on a hard-and-fast critical threshold of 'closest' or 'particularly close competitors'.

The above shows that the criticism levelled by the General Court at the Commission's sliding-scale assessment of closeness of competition and its choice of the 'particularly close competitors' standard is inconsistent with the economic analysis of unilateral effects. By limiting the Commission's ability to find unilateral effects only to mergers between 'particularly close' competitors, *CK Telecoms* is likely to increase false negatives and allow harmful mergers to pass unchallenged. Furthermore, *CK Telecoms* pays little heed to the asymmetry of substitution patterns in differentiated product markets. As a result, the new 'particularly close' standard introduced by *CK Telecoms* discounts the anticompetitive effects on localised customer groups, suggesting that they are not cognisable under the SIEC test. This, of course, runs counter to the very rationale underpinning the adoption of the SIEC in the first place. For it was the growing awareness of localised effects that lay at the roots of the concern about an enforcement gap under the dominance test.[145]

V. PROPOSITION 4 – IDENTIFYING AN 'IMPORTANT COMPETITIVE FORCE': AGGRESSIVE IS NOT AGGRESSIVE ENOUGH

A fourth fundamental proposition advanced by the General Court in *CK Telecoms* is that a firm has to stand out from its competitors and must be a 'particularly aggressive'[146] competitor to qualify as an important competitive force. Alongside the degree of closeness between the merging parties, the concept of important competitive force has been pivotal for the Commission's analysis of unilateral effects in almost all mobile telecom merger cases. By interpreting it as referring to a particularly aggressive competitor, *CK Telecoms* considerably tightens the evidentiary standard for finding that a horizontal merger leads to unilateral effects by eliminating an 'important competitive force'. It thus further weakens the Commission's hand to tackle unilateral effects in gap cases.

A. The Commission's interpretation of 'important competitive force' and the 'cannibalisation effect'

The concept of 'important competitive force' introduced in paragraph 37 of the Horizontal Merger Guidelines is commonly associated with the analysis of coordinated effects. It is often seen as being synonymous with the idea of a maverick firm that disrupts the stability of tacit collusion.[147] Against this backdrop, it might surprise that the concept of 'important competitive force' appears under the Section on non-coordinated effects in the Horizontal Merger

[143] Case No COMP/M.7612 Hutchison 3G UK/Telefónica UK (n 5) Annex B, para. 67, Table 2. A similar situation arose in Case No COMP/M.7758 Hutchison 3G Italy/WIND/JV (n 77) para. 812-813.
[144] See for a formal of unilateral effects in the presence of asymmetric substitution patterns Hausman, Moresi and Rainey (n 135), 120–121.
[145] Coppi and Walker (n 22), 124, 128-133.
[146] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) para. 170.
[147] J. B. Baker, 'Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects under the Antitrust Laws' (2002) 77 N.Y.U. L. Rev. 135 156–179. J. Bromfield and M. Olczak, 'The Role of the Maverick Firm Concept in European Commission Merger Decisions' (2018) 14(2) Journal of Competition Law & Economics. D. Gilo, 'The Anticompetitive Effect of Passive Investment' (2000) 99(1) Michigan Law Review 1 39–40. D. T. Scheffman and M. Coleman, 'Quantitative Analyses of Potential Competitive Effects from a Merger' (2003) 12 Geo. Mason L. Rev. 319 325–329. M. Jacobs, 'Second order oligopoly problems with international dimensions: sequential mergers, maverick firms and buyer power' 2001 The Antitrust Bulletin 537 547-553.

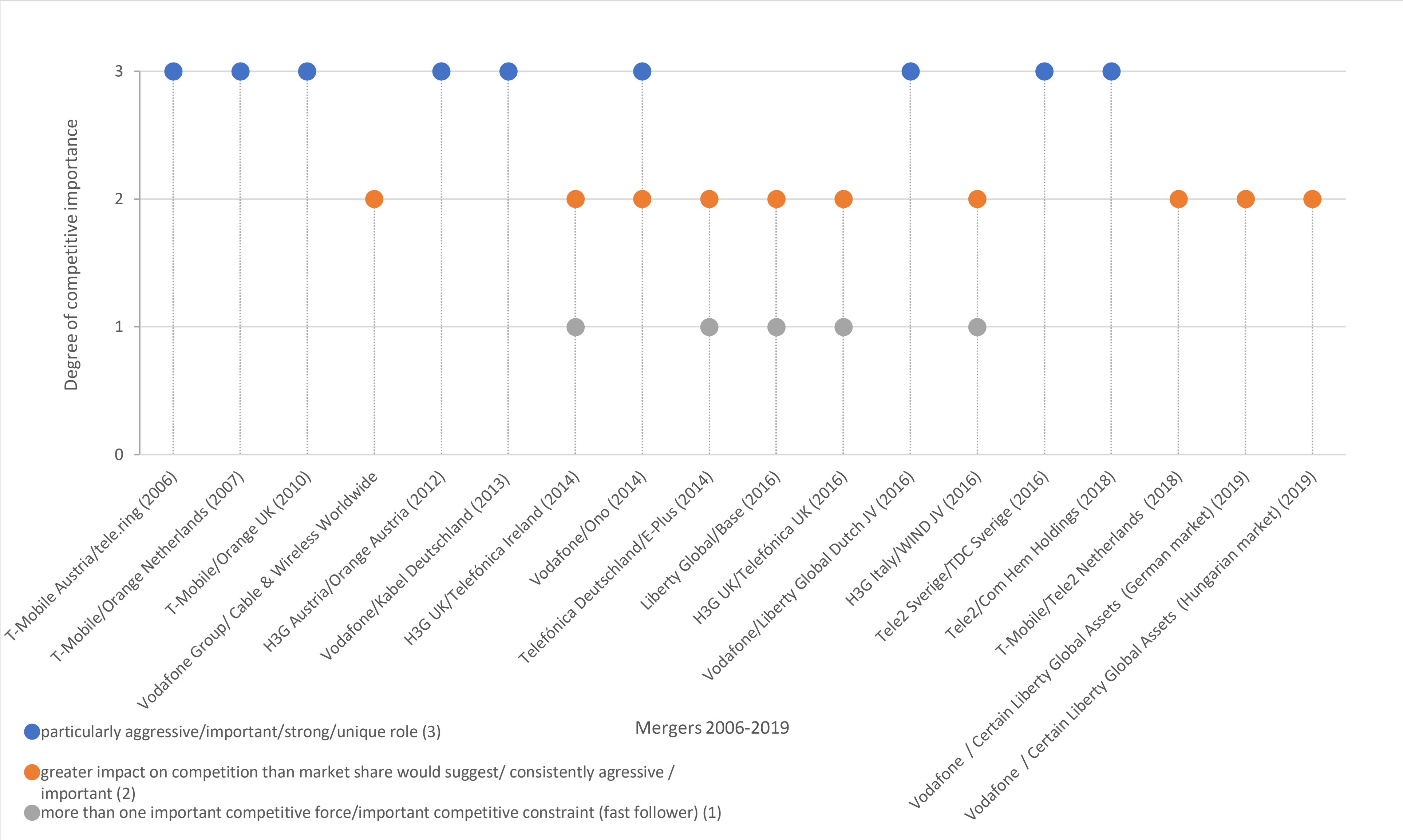
Guidelines[148] and played, together with the assessment of closeness of competition, a crucial role in the assessment of unilateral effects in gap cases.[149]

From the *T-Mobile Austria/tele.ring* merger onward, the Commission consistently identified, along with the removal of a close competitor, the elimination of an important competitive force as a second channel through which mobile telecom mergers may lead to unilateral effects. The concept of important competitive force has since become a pivotal filter in the Commission's analysis of unilateral effects in almost all mobile telecom merger cases.

Like the analysis of closeness of competition, the way the Commission interprets the concept of important competitive force also evolved considerably over time (Figure 6). In early telecom mergers, the Commission applied the concept only to particularly aggressive competitors,[150] which it occasionally labelled as 'maverick' firms.[151] More recently, the Commission inched towards a more expansive reading, according to which a firm does not have to stand out amongst its competitors to be treated as an important competitive force.[152] Rather, the concept was found to extend to any firm that has a greater influence on the competitive process than its market share suggests.[153] The Commission also highlighted that the characterisation of an important competitive force in para. 37 of the Guidelines as a recent entrant or innovator, which changes the competitive dynamics in the market, was only an illustrative 'example'[154] for an important competitive force. By no means could it be read as requiring a firm to act as a maverick in order for it to be considered as an important competitive force.[155] The Commission thus increasingly dissociated the concept of an important competitive force from that of a maverick firm as it is understood in the context of coordinated effects.

[148] Commission Guidelines on the assessment of horizontal mergers (n 32) para. 37.
[149] Monti (n 18) 17–18.
[150] Case No COMP/M.4748 T-Mobile/Orange Netherlands (n 114) para. 39; Case No COMP/M.3916 T-Mobile Austria/Tele.Ring (n 35) paras. 51, 72, 126; Case No COMP/M.4748 T-Mobile/Orange Netherlands (n 114) para. 35; Case No COMP/M.5650 T-Mobile/Orange UK (n 115) 60, 62, 63; Case No COMP/M. 6497 Hutchison 3 G Austria/Orange Austria (n 116) paras. 191-192, 283.
[151] Case No COMP/M.3916 T-Mobile Austria/Tele.Ring (n 35) paras. 72, 125, 126, 128.
[152] Case No COMP/M.6992 Hutchison 3G UK/Telefónica Ireland (n 121) paras. 206, 208, 451-456. Case No COMP/M.7612 Hutchison 3G UK/Telefónica UK (n 5) para. 318-326.
[153] Case No COMP/M.7018 Telefónica Deutschland/Eplus (n 77) para. 348. This definition of an important competitive force corresponds with the one in paragraph 37 of the Horizontal Merger Guidelines and already appears in some of the early cases where the Commission relied on the merging parties being 'particularly strong' or unique players' to identify the removal of an important competitive force. Commission Guidelines on the assessment of horizontal mergers (n 32) para. 37. Case No COMP/M.3916 T-Mobile Austria/Tele.Ring (n 35) para. 126; Case No COMP/M.5650 T-Mobile/Orange UK (n 115) para. 62; Case No COMP/M. 6497 Hutchison 3 G Austria/Orange Austria (n 116) para. 265.
[154] Case No COMP/M.7758 Hutchison 3G Italy/WIND/JV (n 77) para. 431-3. Case No. COMP/M.8792 T-Mobile NL/Tele2 NL (n 122) para. 352-353.
[155] Case No COMP/M.7018 Telefónica Deutschland/Eplus (n 77) para. 121-122; Case No COMP/M.7758 Hutchison 3G Italy/WIND/JV (n 77) para. 432.

Figure 5. The concept of important competitive force in mobile telecom mergers (2006-2019)



This trajectory can be explained by the type of anti-competitive effect the Commission seeks to capture under the concept of important competitive force in its analysis of unilateral effects in mobile telecom mergers. In most mobile telecom mergers since T-*Mobile Austria/tele.ring*, the Commission did not revert to the concept of important competitive force to challenge mergers resulting in a removal of a maverick firm that would otherwise disrupt a tacitly collusive equilibrium.[156] Instead, the Commission used the concept to account for the fact that the elimination of certain disruptive players will result in a situation where it is rational for all industry players to unilaterally raise prices without engaging in any form of tacit or overt concertation or collusion.[157]

This adverse unilateral effect resulting from the elimination of disruptive players is directly linked with the specific incentive structure of recent entrants in the mobile telecommunication market. When entering the market, a new mobile network operator incurs very high fixed (or even sunk) costs linked to the acquisition of spectrum, the building of network infrastructure, advertising, brand-image and regulatory entry barriers (e.g. licenses, building permissions). Once the network is established, the actual provision of telecom services generates very low variable costs.[158] A new entrant MNO thus has the initial incentive to exploit the full capacity of its network by increasing its customer base in order to recover its network investment costs and to cover its operating costs. At this stage of its activity, it is crucial for a new MNO to attract new customers via aggressive competitive strategies in order to achieve a sufficiently large customer base. The new MNO will hence have an incentive to pursue a market share growth strategy.[159]

Incumbent operators, by contrast, have a different incentive structure. Their incentives to compete aggressively varies depending on the size of their existing customer base. In the medium- to long-term, attempts by an established MNO to attract new customers by aggressive pricing and new offers will result in the cannibalisation of the profitability of its existing customer base.[160] Even if a MNO could differentiate between tariffs for new and existing customers in the short run, consumers are unlikely to accept this price-discrimination between old and new clients in the long-run. An incumbent telecom company thus faces a trade-off between expanding its market share by adopting an aggressive competitive strategy and the 'cannibalisation effect' that an aggressive pricing strategy has on the profitability of its existing customer base. Due to this cannibalisation effect, the incentives of an established MNO to increase its market share by attracting new customers through aggressive pricing decreases with the size of its existing customer base. If the size of the customer base reaches its critical point, the risk of lost income from existing customers would no longer be offset by the prospect of additional income from newly gained customers. In addition, once the customer base of a MNO has reached a critical size the flow of revenue from the existing customer base will allow it to

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[156] A rare example where the Commission considered the removal of an important competitive force and maverick firm with respect to both unilateral and coordinated effects is Case No COMP/M.7758 Hutchison 3G Italy/WIND/JV (n 77) paras. 972-981.

[157] Office of Communications (Ofcom), 'A cross-country econometric analysis of the effect of disruptive firms on mobile pricing' (2016) 1–2.

[158] Case No COMP/M.3916 T-Mobile Austria/Tele.Ring (n 35) para. 75.

[159] Case No COMP/M.3916 T-Mobile Austria/Tele.Ring (n 35) 75; Office of Communications (Ofcom) (n 156) 4–5.

[160] This cannibalisation effect follows the same logic as the Arrowan 'replacement effect' whereby the prospect of the cannibalisation of the existing sales base and pre-invention margins by new products entail a disincentive for the incumbent to innovate. K. J. Arrow, 'Economic Welfare and the Allocation of Resources for Invention' in National Bureau Committee for Economic Research (ed), *The Rate and Direction of Inventive Activity: Economic and Social Factors* (Princeton University Press 1962) 619–622; J. Tirole, *The theory of industrial organization* (MIT Press 1997) 392; C. Shapiro, 'Competition and Innovation: Did Arrow Hit the Bull's Eye?' in J. Lerner and S. Stern (eds), *The Rate and Direction of Inventive Activity Revisited* (University of Chicago Press 2012) 386. This replacement/cannibalisation effect also underpins what Christensen describes as 'innovator's dilemma' C. M. Christensen, *The innovator's dilemma: When new technologies cause great firms to fail* (Harvard Business Review Press 1997) 21, 228. See for an insightful attempt to apply Christensen's framework to the concept of a maverick firm T. M. Owings, 'Identifying a Maverick: When Antitrust Law Should Protect a Low-Cost Competitor' (2013) 66 Vand. L. Rev. 323 327.

recover its investment and operating costs. The MNO will then no longer have to attract new customers to break even.[161]

A merger between two MNOs automatically ensues the increase of their respective customer base and, hence, affects their incentive to compete aggressively. The merger will automatically magnify the cannibalisation effect, as it will, at least in the medium- to long-term, engender the combination of previously two separate customer bases of the merging parties. This 'cannibalisation effect' will inevitably dampen the merged firm's incentive to compete as fiercely as both parties would otherwise in the absence of the merger.[162] While this 'cannibalisation effect' is at work in any horizontal merger leading to an increase in the customer/sales base, it will be of a greater order of magnitude if one of the merging parties pursued an aggressive market share growth strategy prior to the merger.[163]

This cannibalisation effect lies at the core of the – at first sight counterintuitive – use of the concept of important competitive force in the Commission's unilateral effects analysis. The concept accounts for the fact that the magnitude of the cannibalisation effect depends on the extent to which one or both merging parties competed aggressively prior to the merger. The cannibalisation effect will hence have a particularly adverse effect on the overall competitive dynamics if it affects the incentive structure of relatively recent and disruptive entrants. Accordingly, the Commission underscored in a number of mergers that an increase of the merging parties' customer base and the resulting 'cannibalization effect' will dampen the incentives to compete of merging parties which prior to the mergers acted as important competitive forces in the retail[164] and wholesale market[165] for mobile telecommunication services.

It bears noting that this 'cannibalisation effect' will be at work irrespective of the degree of closeness of competition that existed between the merging parties prior to the merger. This means that the cannibalisation effect may result in unilateral price increases even if the merging parties are not necessarily close competitors. This observation is important because it underscores the importance of the concept of an 'important competitive force'. It serves as a complementary filter to account for a second channel through which a merger may lead to unilateral effects. This second channel would not necessarily be captured by the analysis of closeness of competition. This concern about the cannibalisation effect is also reflected in the Horizontal Merger Guidelines, which highlight that, next to the closeness of competition between the merging parties, the incentive of a merged entity to adopt an aggressive competitive

[161] Case No COMP/M.3916 T-Mobile Austria/Tele.Ring (n 35) para. 77. Case No COMP/M. 6497 Hutchison 3 G Austria/Orange Austria (n 116) para. 254-257. Case No COMP/M.6992 Hutchison 3G UK/Telefónica Ireland (n 121) para. 482, 519, 533; Case No COMP/M.7018 Telefónica Deutschland/Eplus (n 77) paras. 436-445.

[162] Case No COMP/M.3916 T-Mobile Austria/Tele.Ring (n 35) para. 77; Case No COMP/M. 6497 Hutchison 3 G Austria/Orange Austria (n 116) para. 256; Case No COMP/M.7018 Telefónica Deutschland/Eplus (n 77) paras. 468-469. Case No COMP/M.7758 Hutchison 3G Italy/WIND/JV (n 77) paras. 822-838; Case No COMP/M.7612 Hutchison 3G UK/Telefónica UK (n 5) paras. 880-884. The Commission also took the view that this cannibalisation effect is likely to offset any increase in the network capacity and, thus, the capacity to increase their output that the merger may create for the merging parties. Case No COMP/M.3916 T-Mobile Austria/Tele.Ring (n 35) para. 88; Case No COMP/M.7018 Telefónica Deutschland/Eplus (n 77) para. 539. The cannibalisation effect clearly takes the upper hand when the merger leads to the elimination of the network of one of the merging parties and, thus, to a reduction in the overall available network capacity and in the incentives to attract new customers by lower prices. Case No COMP/M.3916 T-Mobile Austria/Tele.Ring (n 35) para. 98.

[163] For a discussion of the underpinning economic intuition J. E. Kwoka, 'The private profitability of horizontal mergers with non-Cournot and Maverick behavior' (1989) 7(3) International Journal of Industrial Organization 403 407, 409, 411.

[164] Case No COMP/M.3916 T-Mobile Austria/Tele.Ring (n 35) para. 78-81; Case No COMP/M. 6497 Hutchison 3 G Austria/Orange Austria (n 116) para. 265-267; Case No COMP/M.6992 Hutchison 3G UK/Telefónica Ireland (n 121) para. 518-539; Case No COMP/M.7018 Telefónica Deutschland/Eplus (n 77) para. 446-478.

[165] Case No COMP/M.6992 Hutchison 3G UK/Telefónica Ireland (n 121) para. 715-722. Case No COMP/M.7018 Telefónica Deutschland/Eplus (n 77) para. 804-815. Case No COMP/M.7758 Hutchison 3G Italy/WIND/JV (n 77) paras. 1228, 1310-1313. Case No COMP/M.7612 Hutchison 3G UK/Telefónica UK (n 5) paras. 1834-1845, 2187-2203. In the wholesale market, this cannibalisation effects increases the closer the MVNO which seeks to obtain hosting services competes with the MNO downstream.

strategy importantly depends on the pre- and post-merger size of its customer base.[166] A horizontal merger in differentiated product markets can hence result in substantially higher prices, even if the merging parties are not close competitors. A recent cross-country econometric analysis of the effect of disruptive firms on mobile pricing by the UK telecom regulator Ofcom indicated that prices are between 10.7% and 12.4% lower in countries where a disruptive player is present compared to countries where no disruptive player is active.[167] These price effects arise regardless of whether the disruptive firm compete closely with the remaining players.[168]

This significant *stand-alone* impact of the cannibalisation effect on prices explains the important weight that the Commission attributed to the elimination of an important competitive force in its assessment of unilateral effects. Over the years, the Commission made the attempt to link the concept of an 'important competitive force' in the Guidelines with the reference to the removal of an 'important competitive constraint' which recital 25 of the EUMR[169] and paragraphs 24 and 25 of the Horizontal Merger Guidelines[170] identify as the primary source of unilateral effects. This interpretative move enabled the Commission to conclude that the removal of an important competitive force would be synonymous to a removal of an important competitive constraint and, hence, on its own sufficient to prove a SIEC due to unilateral effects.[171] In some cases – such as *H3G UK/Telefónica Ireland*[172] and the assessment of the impact of the *H3G UK/Telefónica UK* merger on the wholesale market for mobile services[173] – the Commission even relied exclusively on the elimination of an important competitive force to conclude that the mergers will lead to unilateral effects, without analysing the degree of closeness of competition between the merging parties.

Another important feature of the cannibalisation effect is that it is not an absolute but a relative one. This relative nature of the cannibalisation effect is the distinctive feature between the use of the concept of 'important competitive force' in the context of unilateral effects and the concept of a maverick firm in relation to coordinated effects. When analysing coordinated effects, a competition authority will have to assess whether the merger will eliminate a maverick player that is sufficiently aggressive to jeopardise a collusive equilibrium.[174] The concept of maverick is hence an absolute or binary one: either the firm is a disruptor or not. By contrast, the cannibalisation effect in the context of unilateral effects is a relative one. It operates even when the merger involves two incumbents. Its size, however, depends on the degree to which it brings about a change in the incentive structure of the merging firms. If the merger removes a recent, aggressive player the size of the effect is likely to be greatest, even if this player would not necessarily compete aggressively enough to disrupt a collusive equilibrium. This means that even if the firm is not necessarily the most aggressive player in the sector and does not qualify as a maverick firm, the cannibalisation effect can still give rise to a significant unilateral effect without facilitating tacit collusion.

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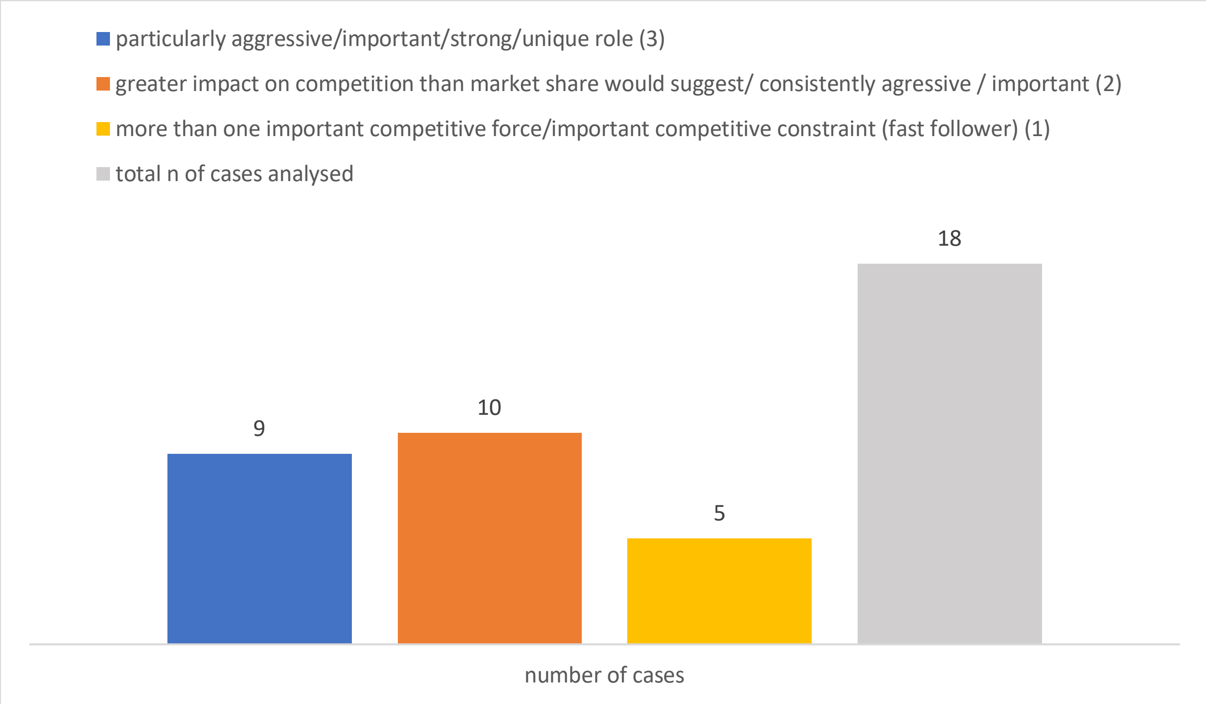
[166] Commission Guidelines on the assessment of horizontal mergers (n 32) para. 27, 32. Case No COMP/M.3916 T-Mobile Austria/Tele.Ring (n 35) para. 74.S. Vande Walle and J. Wambach, 'No magic number to dial - The Commission's review of mobile telecoms mergers' (2014) 1 Competition Merger Brief 10 12. Tyagi (n 137), 193, 195.
[167] Office of Communications (Ofcom) (n 156) 2.
[168] The important standalone effect of the removal of a disruptive player is also documented in the Ofcom study which shows that the *combined* effect of the removal of a disruptive player and the reduction of the number of MNOs below four leads to an even higher price effect of order between 17.2 and 20.5%. The removal of a close competitor (i.e. the reduction of the number of MNOs below four) will on its own increase prices between 7.3% and 9.2% regardless of whether the MNO is a disruptor or not. ibid 2, 17.
[169] Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (n 7) recital 25.
[170] Commission Guidelines on the assessment of horizontal mergers (n 32) paras. 24-25.
[171] Case No COMP/M.6992 Hutchison 3G UK/Telefónica Ireland (n 121) paras. 374, 531. Case No COMP/M.7018 Telefónica Deutschland/Eplus (n 77) para. 243.
[172] Case No COMP/M.6992 Hutchison 3G UK/Telefónica Ireland (n 121) 283–583.
[173] Case No COMP/M.7612 Hutchison 3G UK/Telefónica UK (n 5) paras. 1819, 1875, 1920, 2114, 2126, 2156-2162.
[174] Case T-342/99 *Airtours v Commission* (n 6) para. 62; Commission Guidelines on the assessment of horizontal mergers (n 32) paras. 55-56.

The relative nature of the cannibalisation effect explains why the Commission increasingly expanded the scope of the concept of an important competitive force beyond the concept of a maverick firm and applied it to firms which do not stand out as the most aggressive player in the market. This became, for instance, apparent in *Telefónica Deutschland/Eplus* where the Commission reached the conclusion that there can be more than one important competitive force in the market.[175] The notion of an important competitive force, the Commission held, not only applied to the aggressive challenger (Eplus), but also extended to the second-most aggressive 'fast follower' firm (O2). [176] In subsequent cases, the Commission pushed this expansive interpretation even further. The Commission increasingly adopted the view that the concept of an 'important competitive constraint' is broader than that of an 'important competitive force'.[177] In *H3G UK/Telefónica UK*,[178] *H3G IT/Wind IT*[179] and *Liberty Global/Base Belgium*,[180] the Commission found that the second-most aggressive firms, while not necessarily qualifying as an important competitive force, nonetheless exerted an 'important competitive constraint'. In *Liberty Global/Base Belgium*, the Commission went as far as suggesting that even a non-MNO may qualify as an important competitive constraint.[181]

Next to the removal of an important competitive force, the elimination of an important competitive constraint became hence an additional channel through which the Commission accounted for the cannibalisation effect. Considering the relative nature of the cannibalisation effect, this expansive approach makes economic sense. Indeed, all other things equal, the cannibalisation effect in a 4-to-3 merger involving the 'challenger' and 'fast follower' is likely to be greater than a merger involving only a challenger firm and a more established incumbent (or two established incumbents).

[175] Case No COMP/M.7018 Telefónica Deutschland/Eplus (n 77) para. 243.
[176] ibid paras. 243, 354, 381, 424-425, 434.
[177] This emerges for instance from the Commission's finding that 'Three constitutes an important competitive force […] pursuant to paragraph 37 of the Horizontal Merger Guidelines, or in any event it exerts an important competitive constraint on that market.' Case No COMP/M.7612 Hutchison 3G UK/Telefónica UK (n 5) para. 681, 777, 1170.
[178] ibid paras. 782, 786–787, 823, 872, 1182.
[179] Case No COMP/M.7758 Hutchison 3G Italy/WIND/JV (n 77) paras. 628, 650, 672, 770.
[180] Case No COMP/M.7637 Liberty Global/BASE Belgium (n 120) paras. 231-232, 243-260. See to this effect also Case No COMP/M.7612 Hutchison 3G UK/Telefónica UK (n 5) paras. 972-974.
[181] Case No COMP/M.7637 Liberty Global/BASE Belgium (n 120) paras. 243-260. In Hutchison3G UK/Telefonica UK the Commission even seems to accept that the non-MNO in the Belgian merger was an 'important competitive force' ibid paras. 972-974.

Figure 6. The varying standard for finding an important competitive force in mobile telecommunication mergers (2006-2019)



With this expansion of the scope of the concept of 'important competitive force' and its growing weight in the assessment of unilateral effects, the requisite standard for finding an important competitive force became increasingly elusive. Only in about half of the mobile telecom mergers in which the Commission assessed whether the merger removed an important competitive force from the market, the Commission applied the concept to a firm playing a 'particularly important', 'particularly strong' or 'unique' role in the market (Figure 7). [182].

Owing to this broad interpretation of the notion of important competitive force, the Commission asserted in a number of cases that all players in a highly concentrated market may qualify as an important competitive force. In *H3G UK/Telefónica Ireland* the Commission, for instance, tellingly held: 'In a concentrated market, […], all MNOs contribute to competition to a certain degree and are therefore arguably important. However, the fact that other MNOs are also competing aggressively on the market does not invalidate Three's role as an important competitive force.'[183] It therefore should not be a surprise that this broad interpretation of the notion of an important competitive force, encompassing potentially all players in an oligopolistic market, also increasingly fuelled criticism about a presumption of sorts against four-to-three mergers in highly concentrated markets.[184]

B. The tightening of the standard for finding an 'important competitive force' in *CK Telecoms*

[182] Note that in some of the 18 cases in which the removal of an important competitive force was assessed, the Commission referred to more than one standard. This explains why the sum of cases in which the Commission referred to either standard of 'particularly aggressive', 'greater impact than market share would suggest' or 'important competitive constraint' exceeds the total number of cases in which the existence of an important competitive force was considered.
[183] Case No COMP/M.6992 Hutchison 3G UK/Telefónica Ireland (n 121) para. 283.
[184] Caspary and Görlitz (n 113), 214, 217; T. Caspary and M. Küttner, 'The Recent Evolution in EU MNO Telecom Mergers' (2018) 9(2) Journal of European Competition Law & Practice 77 83-84, 89. For broader criticism about the concept P. McGeown and A. Barthelemy, 'Recent Developments in EU Merger Control' (2015) 6(6) Journal of European Competition Law & Practice 440 448–449.

This expansive interpretation of the concept of important competitive force by the Commission suffered a serious setback in *CK Telecoms*. The reasons why the General Court took issue with the Commission's application of the concept were twofold.

The first point of disagreement was the weight the Commission had attributed to the finding of a removal of an important competitive force. The General Court dismissed the Commission's position that the elimination of an important competitive would in itself be a sufficient basis for finding a SIEC.[185] It faulted the Commission for conflating the concept of 'important competitive force', as defined within the Horizontal Merger Guidelines, and 'important competitive constraint', as set out in recital 25 of the EUMR.[186] The General Court found that, by confounding the two concepts of 'important competitive force' and 'important competitive constraint', the Commission unduly expanded the scope of Art. 2 (3) EUMR. The Commission's expansive interpretation would lead to a situation where 'any elimination of an important competitive force would amount to the elimination of an important competitive constraint which, in turn, would justify a finding of a significant impediment to effective competition.'[187]

The General Court thus clearly ruled out that the Commission could automatically infer the existence of unilateral effects and a SIEC from the removal of an important competitive force. [188] Such an interpretation, the General Court held, would undermine legal certainty, as it would enable the Commission to find a SIEC on the mere basis that the merger led to a reduction of the 'competitive pressure on the remaining competitors', without analysing the 'possible elimination of the important competitive constraints that the merging parties exert upon each other.'[189]

The expansive scope that the Commission had assigned to the notion of an important competitive force was the second target of the General Court's criticism. The General Court unmistakably repudiated the Commission's standard for finding an important competitive force as being too low and, hence, over-inclusive. It found that the Commission had erred in holding that a firm did not have to stand out amongst its competitors to qualify as an important competitive force and, thereby, concluding that any firm in an oligopolistic market may qualify as an important competitive force.[190] Accordingly, the existence of an important competitive force cannot be established based on the mere fact that the firm's competitive role is more important than its market share suggests.[191] Rather, the status of an important competitive force has to be determined by way of comparison with its other competitors and having regard to the latter's reactions.[192]

The General Court thus put forward a much more restrictive definition of the concept of important competitive force compared to the one used by the Commission. To be considered as such, a firm must not only 'have more of an influence on competition that its market share would suggest, [but also] compete in a particularly aggressive way and force other players to

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185 Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) para. 171-172.
186 ibid paras. 172-173.
187 ibid para. 173.
188 The Commission had done so, for instance, in Case No COMP/M.6992 Hutchison 3G UK/Telefónica Ireland (n 121) para. 531.Case No COMP/M.6992 Hutchison 3G UK/Telefónica Ireland (n 121) para. 531. Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) para. 171.
189 ibid para. 175; with respect to the wholesale market see para. 453. This holding directly flows from the General Court's demanding test for finding a SIEC as a result of non-coordinated effects which requires (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' ibid para. 96.
190 ibid para. 174, with respect to the wholesale market see paras. 446, 452.
191 ibid para. 160; for the wholesale market see para. 446.
192 ibid paras. 170, 215-216. The General Court underscored that the Commission itself in its defence before the General Court agreed to this definition of 'important competitive force' ibid para. 170.

follow that conduct.'[193] Accordingly, for a firm to qualify as an important competitive force, it has to be shown that it was 'competing particularly aggressively in terms of prices and that it forced the other players on the market to align with its prices or that its pricing policy was capable of significantly altering the competitive dynamics on the market.'[194]

C. The restrictive definition of an important competitive force and the 'rule of law' account

The restrictive definition in *CK Telecoms* substantially raised the bar for the Commission to rely on the removal of an important competitive force to sustain a finding of unilateral effects. Some commentators have welcomed this restrictive interpretation and tightening of the standard as an overdue clarification of the 'law' which imposes limits upon the Commission's discretion to block 4-to-3 mergers and thus enhances legal certainty.[195] Yet again, the General Court provided little guidance on how this more demanding definition of an important competitive force ought to be operationalised in practice. Instead, the General Court confined itself to hold that modest gross subscriber additions ('gross adds'), [196] sustained, but modest market share growth,[197] the charging of lower prices for some, but not all services, [198] and evidence of the firm's historic role as disruptive force[199] would be insufficient to support a finding of an important competitive force. *CK Telecoms*, however, omits to set out critical evidentiary thresholds that clarify which levels of gross adds, market share growth, or pricing performance would indicate the existence of an important competitive force.

Devoid any further guidance, the General Court's 'clarification' that a firm has to be 'particularly aggressive' to be treated as an important competitive force fails to enhance legal certainty. The ruling tells us nothing about the type and respective weight of evidence that would allow the Commission to demonstrate that the firm's aggressive conduct 'forced the other players on the market to align with its prices' or that 'its pricing policy was capable of significantly altering the competitive dynamics on the market'. The General Court showed little interest in these evidentiary questions. As a result, *CK Telecoms* basically leaves it to the discretion of the Commission to devise new evidentiary filters to determine the existence of an important competitive force, albeit without providing any guidance as to how these filters should be designed. For better or worse, *CK Telecoms* thus also fails to meaningfully reduce the 'discretion' of the Commission in this respect.

An unintended consequence of the General Court's rejection of the evidence (e.g., modest gross adds, modest market share growth, limited price leadership) could be the declining use on the part of the Commission of economic evidence for finding an important competitive force.[200] To circumvent the strict evidentiary standards for quantitative economic evidence, the Commission might decide to rely on less 'objective' or more 'subjective' evidence. As a result, the Commission may end up using less reliable types of qualitative evidence, such as internal documents, market

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[193] ibid.
[194] ibid para. 216.
[195] Colomo, 'Case T-399/16, CK Telecoms v Commission: a new Airtours moment and the future of effects analysis' (n 9). Caspary and Bozhikov (n 9), 366; Kuhn and Thomas (n 10).
[196] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) paras. 182-187. Gross adds indicate a firm's share amongst newly acquired customers. The Commission used the comparison of gross adds with historic market shares as important benchmark to assess whether a firm's competitive importance exceeded what its market shares would suggest. For a similar reasoning on the wholesale market ibid para. 433-444.
[197] ibid paras. 192-196.
[198] ibid paras. 214-216.
[199] ibid paras. 219-224.
[200] This point has been raised in a CCP conversation by Kai-Uwe Kühn. Centre for Competition Policy, 'What are the appropriate standards for economic evidence in horizontal merger cases after Case T-399/16 CK Telecoms ('Hutchison/O2'): Kai-Uwe Kühn, Amelia Fletcher, Elias Deutscher' (n 94).

investigations (that is interviews with competing operators and other market participants), or business press reports to support the finding of an important competitive force.

D. The restrictive definition of an important competitive force and the 'more economic approach' account

From an economic perspective, the restrictive definition of an 'important competitive force' in *CK Telecoms* is best understood as an – ill-fated – attempt to re-align the concept with the notion of a 'maverick firm' as initially coined in the context of coordinated effects. This becomes apparent in the reasoning advanced by the General Court to strike down the Commission's expansive interpretation of the concept of an important competitive force. First, the General Court objected that the Commission's broad reading of the concept of important competitive force would 'lower the standard of proof required to prove a [SIEC], according to whether the Commission classifies the foreseeable effects of a concentration as 'non-coordinated effects' or as 'coordinated effects'.[201] Second, the General Court suggested that the possibility for the Commission to infer a SIEC from the mere elimination of an important competitive force would allow the Commission to find that a merger results in non-coordinated effects, without analysing the 'possible elimination of the important competitive constraints that the merging parties exert upon each other.'[202]

This attempt to limit the application of the concept of an 'important competitive force' to maverick firms, and the arguments advanced in support of this narrow definition, exhibit, however, a fundamental misunderstanding of the competitive dynamics in differentiated product markets. The proposed restrictive definition of an 'important competitive force' as a 'particularly aggressive' competitor will make it virtually impossible for the Commission to apply the concept to a firm, which is not necessarily the most aggressive *price* competitor across all product segments.[203] This is even as this firm were to impose, for instance, through its brand positioning, network quality, or innovative offers, important competitive constraints on the remaining players.

This price-centred approach disregards that price often does not constitute the only important parameter of competition in differentiated product markets where quality and innovative offers play a paramount role for brand positioning and product differentiation. This is in particular true in the mobile telecommunication sector where disruption takes place through aggressive price and non-price offers,[204] such as new tariff plans, innovative product offerings (such as data bundles), and aggressive branding. It is hence perfectly conceivable that a recent MNO entrant who makes an innovative offering in a specific segment, such as data-services, will force competitors to react and innovate without being the most aggressive price competitor across all segments. Conversely, this also means that a merger which dampens the incentives of a firm to act as a disruptor in a specific segment is capable of depriving consumers

[201] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) para. 173. The General Court also pointed out that the Commission had in its Statement of Objections also raised the concern that the merger would lead to coordinated effects, but later dropped this theory of harm. The General Court thus, at least implicitly, insinuated that the Commission used the concept of 'important competitive force' strategically to avoid the demanding standard set out by the General Court in *Airtours* with respect to coordinated effects. ibid para. 223. Yet, one might however wonder how relevant the Statement of Objections in this respect. After all, it is the Commission's final decision and not the Statement of Objections that are under review. For a similar claim that the Commission's increasing reliance on unilateral effects analysis constitutes an attempt to circumvent the stricter standards of coordinated effects see Venit (n 37), 294–309.
[202] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) para. 175. This holding is directly flows from the General Court's demanding test for finding a SIEC as a result of non-coordinated effects which requires (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' ibid para. 96.
[203] ibid paras. 214-216.
[204] Office of Communications (Ofcom) (n 156) 4–5.

of potentially game-changing offerings, even if the firm is not the most aggressive player across all segments.

The General Court's attempt to squeeze the concept of an important competitive force into the mould of a maverick firm shows little awareness of the competitive dynamics in differentiated product markets. It sets the analysis back to a model of oligopolistic competition with homogenous commodity products where price is the sole relevant parameter of competition and competition takes place at a market-wide level. The General Court's exclusive focus on aggressive price competition as the essential feature of an important competitive force markedly differs from – and looks somewhat impoverished compared to – the Commission's assessment of Three's performance across, in total, 12 (!) competitive parameters.[205]

Along with failing to grasp the dynamics of competition in differentiated product markets, the attempt to shoehorn the concept of an important competitive force into the notion of maverick firms also displays a fundamental misunderstanding of the economic rationale underpinning the Commission's use of the concept to tackle the 'cannibalisation effect' in the context of unilateral effects analysis. This becomes apparent in the General Court's criticism that a direct inference of unliteral effects and a SIEC from the elimination of an important competitive force would put the Commission into a position where it could challenge a merger without analysing the 'possible elimination of the important competitive constraints that the merging parties exert upon each other'[206].

This criticism ignores that mergers may, due to the cannibalisation effect, result in considerable price increases even if the merging firms are no close competitors (see discussion of standalone effect in Section V.1). The statement is also misleading because it discounts that the cannibalisation effect is likely to decrease the competitive pressure that a MNO exerted prior to the merger *both* on the other merging parties, as well as the remaining non-merging competitors in the market.[207] *CK Telecoms* suggests that the removal of an 'important competitive force' without the additional finding of closeness of competition between the merging parties would not suffice to support a finding of unilateral effects. It thus removes mergers which – on account of the standalone impact of the cannibalisation effect – are liable to result in material consumer harm from the scope of the EUMR.[208] Most importantly, the narrowing of the scope of the concept of 'important competitive force' to particularly aggressive players disregards the relative nature of the cannibalisation effect, which might operate even if the firm is not the most aggressive player across all market segments or if the firm is the second most aggressive firm in the market.

In sum, the restrictive interpretation of the concept of an important competitive force in *CK Telecoms* is economically misguided. It pays little regard to the specific competitive reality in differentiated product markets and fails to fully capture the 'cannibalisation effect'. Combined with the restrictive interpretation of closeness of competition, the demanding standard for finding an 'important competitive force' in *CK Telecoms* is hence likely to further curtail the ability of the Commission to address the adverse effects on localised competition in

[205] Namely 'a) Price; b) Network reliability: c) Network coverage; d) Network capacity; e) Average download speed; f) Peak download speed; g) Customer service; h) Brand; i) Handset subsidy; j) Alternative financing schemes for handsets; k) Product innovation (e.g. additional services, innovative tariffs, technology upgrades); l) Distribution.' Case No COMP/M.7612 Hutchison 3G UK/Telefónica UK (n 5) para. 687 fn. 611.

[206] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) para. 175. This holding flows directly from the General Court's demanding test for finding a SIEC as a result of non-coordinated effects which requires (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' ibid para. 96.

[207] Case No COMP/M.6992 Hutchison 3G UK/Telefónica Ireland (n 121) para. 531.

[208] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) paras. 171-175.

differentiated product markets. *CK Telecoms* thus further widens the gap in EU merger control the adoption of the SIEC test was supposed to close.

VI. PROPOSITION 5 – DETERMINING SIGNIFICANT ANTICOMPETITIVE EFFECTS: PRICE INCREASES ARE NOT ENOUGH

The fifth proposition introduced by *CK Telecoms* is that for a merger to be found to result in a SIEC it has to cause significant price increases. To demonstrate that the significance criterion is fulfilled, the Commission has to factor in an efficiency credit in its quantitative Upward Pricing Pressure (UPP) assessment of the predicted price effects of the merger. *CK Telecoms* thus considerably heightens the evidentiary standard for the use of quantitative evidence in the assessment of unilateral effects.

A. The Commission's quantitative analysis in mobile mergers

Mobile telecom mergers have long been at the forefront of the Commission's development of quantitative and econometric methods to assess mergers. In *H3G Austria/Orange Austria*, the Commission adopted for the first time in the history of EU merger control[209] an Gross Upward-Pricing-Pressure Index (GUPPI) test to support its finding of unilateral effects with quantitative evidence.[210] In *H3G UK/Telefónica Ireland*, the Commission deployed, in addition to the GUPPI test, a merger simulation (demand estimation) model to quantify the expected price increases.[211] From *Telefónica Deutschland/Eplus* onwards, the Commission also calculated indicative price rises (IPRs), carrying out a calibrated merger simulation on the basis of a more sophisticated version of the GUPPI test. This expanded GUPPI model also takes into account the price reactions of competitors to potential price increases by the merged firm.[212] In some cases, the Commission also complemented its UPP analysis with a Compensating Marginal Cost Reduction (CMCR) analysis which gauges the marginal cost reductions that merger-driven efficiencies would have to generate, in order to offset the merged entity's incentive to raise prices.[213]

Despite its growing reliance on quantitative evidence and methods, the Commission remained cautious about the potential limitations of econometric studies.[214] It emphasised that quantitative evidence would carry only limited weight in its overall analysis of the mobile telecommunication mergers. Accordingly, quantitative evidence merely serves as additional

[209] G. Drauz, P. McGeown and B. Record, 'Recent Developments in EU Merger Control' (2013) 4(2) Journal of European Competition Law & Practice 146 146, 153; Vande Walle and Wambach (n 165), 13; E.-J. Mestmäcker and H. Schweitzer, *Europäisches Wettbewerbsrecht* (Beck 2014) Kapitel 6 Rn. 110; Oldale and Padilla (n 105), 380–381. For the criticism that the standard UPP test does not take into account the effects of the merger on the parties incentives to invest, but unduly focuses on price effects. Caspary and Görlitz (n 113), 214; Tyagi (n 137), 198–199; Bühler and others (n 120), 22–25; M. Powell and K. Czapracka, 'The Shifting Sands of EU Merger Control: Un, deux, trois, piano' (2017) 3(4) Competition Law & Policy Debate 41 45. For a comprehensive analysis of the use of quantitative methods T. Klein, 'A Tale of Two Standards: Empirical Analyses in EUMR Investigations of Mergers between Mobile Network Operators' (2017) 3(4) Competition Law & Policy Debate 54 55–60; T. Büttner and Federico, Giulio, Szabolcs, Lorincz, 'The Use of Quantitative Economic Techniques in EU Merger Control' (2016) 31(1) Antitrust 68 68–70; T. M. Valletti and H. Zenger, 'Mergers with Differentiated Products: Where Do We Stand?' [2020] Review of Industrial Organization.

[210] Case No COMP/M. 6497 Hutchison 3 G Austria/Orange Austria (n 116) 308–364; Case No COMP/M.6992 Hutchison 3G UK/Telefónica Ireland (n 121) 741–745.

[211] Case No COMP/M.6992 Hutchison 3G UK/Telefónica Ireland (n 121) 583–613.

[212] Case No COMP/M.7018 Telefónica Deutschland/Eplus (n 77) para. 678-772. Vande Walle and Wambach (n 38), 13. Case No COMP/M.7612 Hutchison 3G UK/Telefónica UK (n 5) paras. 1192-1195. Case No COMP/M.7758 Hutchison 3G Italy/WIND/JV (n 77) para. 1198Annex A, p. 7; L. Manigrassi, E. Ocello and V. Staykova, 'Recent developments in telecoms mergers' (2016). Competition Merger Brief 3/2016 4–5.

[213] Case No COMP/M.7612 Hutchison 3G UK/Telefónica UK (n 5) para. 1222. Case No COMP/M.7758 Hutchison 3G Italy/WIND/JV (n 77) Annex A, p. 7.

[214] In some cases, the results of the demand estimation were eventually not taken into account, as they were deemed not sufficiently reliable. See for instance for the demand estimation model in Case No COMP/M.6992 Hutchison 3G UK/Telefónica Ireland (n 121) para. 623.

evidence supporting the Commission's finding of unilateral effects on the basis of qualitative (e.g. closeness of competition; removal of an important competitive force) evidence.[215]

However, the way the Commission used quantitative analysis and, in particular, the GUPPI test attracted considerable criticism from commentators and merging parties. The main attack levied at the Commission's UPP analysis is that the (G)UPP(I) test would in any horizontal merger absent efficiencies indicate a price increase.[216] Commentators therefore argued that the UPP analysis had led to a lowering of the standard of proof for finding a SIEC and biased merger assessment toward the finding of anticompetitive effects.[217] This bias was not only inconsistent with the 'significance' criterion of the SIEC test but also bestowed the Commission with unbridled discretion to decide which merger to challenge at the expense of legal certainty and predictability.[218] Lest the UPP analysis identifies anticompetitive effects in all horizontal merger cases, some commentators recommend the creation of a safe harbour for insignificant price increases[219] or the inclusion of a default 'efficiency credit' or 'efficiency allowance',[220] in the computation of the upward pricing pressure.

B. The significance of price increases and the requirement of an efficiency credit in *CK Telecoms*

The *CK Telecoms* ruling marks the first time that the General Court contemplated in depth when indicative price rises of a merger ought to be considered significant and how this significance threshold is to be determined. Thus far, the General Court had only touched upon this question in passing. In *Ryanair*, it had observed that a predicted price increase of 7 to 8% 'appears significant at first sight'.[221]

In *CK Telecoms* the General Court adopted a critical attitude towards the Commission's use of the UPP methodology. It largely seconded the methodological objection aired by commentators that the UPP analysis tends to indicate price increases in all horizontal mergers.[222] It also took issue with alleged inconsistencies in the conclusions the Commission drew from indicative price rises across mobile telecom cases. The Court objected to the Commission's decision to block the *H3G UK/Telefónica UK* merger, although its two baseline models had estimated segment-wide price rises (5.7 to 7.3%)[223] that were in between those predicted in previous mergers that the Commission had authorised (namely, *H3G UK/Telefónica Ireland* 6,6% and *Telefónica Deutschland/Eplus* 9.5%).[224] The General Court, therefore, took the view that the Commission had failed in *H3G UK/Telefónica UK* to show that this 'quantified price increase would be significant.'[225] *CK Telecoms* thus made it clear that the Commission could not simply rely on what the judges considered modest price increases as quantitative evidence to support a finding of a SIEC.

[215] Case No COMP/M. 6497 Hutchison 3 G Austria/Orange Austria (n 116) para. 366.
[216] For this point, see for instance R. Schmalensee, '"Should New Merger Guidelines Give UPP Market Definition?"' (1) 2009 International Competition Policy 4.
[217] Thomas (n 37), 350, 355.
[218] ibid 353–356.
[219] L.-H. Röller and De la Mano, Miguel, 'The Impact of the New Substantive Test in European Merger Control' (2006) 2(1) European Competition Journal 9 21, fn. 68; L.-H. Röller, J. Stennek and F. Verboven, 'Effiiency Gains from Mergers' (2000) 90–91 <https://ec.europa.eu/dgs/competition/economist/efficiency_gains.pdf> accessed 20 September 2020; O. Budzinski, 'An Institutional Analysis of the Enforcement Problems in Merger Control' (2010) 6(2) European Competition Journal 445 469.
[220] Thomas (n 37), 360 381-383. Farrell and Shapiro (n 16); Salop and Moresi (n 133).
[221] Case T-342/07 *Ryanair v Commission* ECLI:EU:T:2010:280 para. 162; Thomas (n 37), 354.
[222] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) paras. 263, 270.
[223] The exact predicted price increases contested before the General Court have been redacted for confidentiality reasons in the judgment ibid para. 273. This paper, therefore, relies on the indicative price rises reported by the Commission's two base lines models as relevant price increases Case No COMP/M.7612 Hutchison 3G UK/Telefónica UK (n 5) Annex A, paras. 326-327.
[224] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) paras. 262, 273.
[225] ibid para. 274.

CK Telecoms also set out how the significance of price increases ought to be determined. The General Court refrained from establishing a specific *de minimis* or safe harbour threshold, below which predicted price increases can be considered unproblematic.[226] It instead endorsed – yet without any reference to the relevant literature[227] – the inclusion of an 'efficiency credit' in the UPP analysis to operationalise the significance criterion. To demonstrate significant adverse price effects, the Commission could not only rely on a GUPPI-based analysis of indicated price rises. Instead, it would be required to factor at least some of the efficiencies claimed by the merging parties (what the General Court dubbed 'standard efficiencies'[228]) into its quantitative analysis.[229]

The way the General Court established the requirement of an efficiency credit is particularly intriguing. Instead of dwelling on the technical arguments to be made in support of the integration of an efficiency credit in the GUPPI analysis,[230] the Court grounded this requirement of the introduction of a default efficiency credit in bold considerations about the overall equilibrium effects of mergers. It asserted that just as mergers in oligopolistic markets 'tend to lead almost automatically to an increase in prices in the short term on account of the loss of competition between the merging parties',[231] so too 'any concentration will lead to efficiencies'.[232] These 'standard efficiencies'[233] originate from 'the rationalisation and integration of production and distribution processes by the merged entity' as the merged firm will be able to 'eliminate duplicate structures in the production and distribution chains, and will redeploy members of staff or make them redundant.'[234]

The General Court concluded that the Commission had erred in finding that these 'standard efficiencies'[235] could not be accounted for in its quantitative analysis of price effects, unless their existence is substantiated by the merging parties consistent with the requirements in the Horizontal Merger Guidelines.[236] In so doing, the Commission in the words of the General Court 'confuse [d] two types of efficiencies, namely those referred to [in the Merger Guidelines] and those specific to each concentration.'[237] By refusing to credit these 'standard efficiencies' in its UPP analysis, the Commission had failed to discharge its burden of proof to demonstrate 'with a sufficiently high degree of probability that prices would increase 'significantly' following the merger.[238]

C. The General Court's notion of 'significant' price rises and the 'more economic approach' account

The discussion of the significance of anticompetitive effects and the requirement of the inclusion of an efficiency credit in the UPP analysis constitute arguably the most controversial component of the *CK Telecoms* judgment. For several reasons, the General Court's discussion of the UPP analysis appear to be predicated on misconceptions about the economic rationale

[226] ibid para. 275.
[227] The General Court's solution closely followed the approach proposed by Professor Thomas in a recent article, without however providing any credit to the author. See in particular Thomas (n 37), 381–383.
[228] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) para. 278.
[229] ibid.
[230] Salop and Moresi (n 133) 25–26.
[231] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) para. 276.
[232] ibid para. 277.
[233] ibid para. 278.
[234] ibid paras. 276-277.
[235] ibid para. 278.
[236] ibid.
[237] ibid para. 279.
[238] ibid paras. 279, 281-282.

underpinning the UPP methodology, the comparability of estimated price increases across merger cases and their economic impact on consumers.

The first weakness of the General Court's discussion of the Commission's use of the UPP methodology is that it starts from a false premise. The Court posited as the starting point of its review of the Commission's quantitative analysis that the UPP methodology is normally used to 'assess the non-coordinated effects of mergers, which are usually observed in the case of *homogenous* products.'[239] This statement – which is not a translation error[240] – is puzzling. As it stands, it suggests a fundamental misunderstanding of the economic theory underpinning the unilateral effects analysis and the upward pricing pressure methodology. Both have been specifically developed to assess mergers in *differentiated* – not homogenous – product markets, typically characterised by Bertrand competition.[241] The very reason why the UPP test has been developed is that the standard tools of merger analysis, such as market shares and HHI ratios, turned out to be less informative for the analysis of mergers in differentiated product markets. The UPP test, which relies primarily on diversion ratios and profit margins as inputs to compute the impact of a merger on pricing incentives, has been designed as a more reliable tool to gauge anticompetitive effects in differentiated product markets where demand is usually asymmetric.[242] The General Court seems to either ignore or disagree with the economic principles underpinning the unilateral effect analysis and the UPP test, which are predicated on the presence of differentiated products.

A second shortcoming of the General Court's discussion of the significance of price increases in *CK Telecoms* is that it appears to be grounded in some misunderstanding about the type of information that can be inferred from the UPP methodology. Economic literature highlights that the UPP analysis is not designed to quantify the magnitude of post-merger price increases. Rather, it provides insightful information about the direction and strength of pricing incentives that the merger is likely to bring about.[243] A similar caveat applies to indicative price increases that are derived from the UPP methodology, using additional, often simplified assumptions about the pass-through rate (which is often assumed to be 50%) of the upward pricing pressure.[244]

Consistent with the economic literature, the Commission, therefore, highlighted in *H3G UK /Telefónica UK* that the 'results of the UPP analysis 'should *not* be interpreted as providing a *precise quantification of the exact increase in prices* expected following the Transaction but only as an *approximation of the change in pricing incentives* post-Transaction.'[245] The General Court, by contrast, discounted this conservative approach toward the informational content of indicative price increases. This emerges from the General Court's criticism that the Commission had blocked the merger although its quantitative analysis only predicted what the judges deemed as insignificant prices increases (i.e. 5.7% to 7.3%). This objection suggests that the Court perceived the GUPPI test and the derived indicative price rises as providing precise measurement of the unilateral price increases and, thus, of the anticompetitive harm brought about by the merger.[246] The principle established in *CK Telecoms* that a modest indicative price

[239] ibid para. 255 (emphasis added).
[240] The French version of the judgment equally refers to '*produits homogènes'*.
[241] Willig (n 14), 291–294, 299-305; Shapiro (n 64), 23–25. Shapiro (n 13), 712–713.
[242] ibid 705-706. 714.
[243] Farrell and Shapiro (n 16), 19.
[244] Anticipated merger between J Sainsbury PLC and Asda Group Ltd 2019 para. 8.258. Shapiro (n 13), 728-729, 732; Farrell and Shapiro (n 16), 9–10; R. D. Willig, 'Unilateral Competitive Effects of Mergers: Upward Pricing Pressure, Product Quality, and Other Extensions' (2011) 39 Review of Industrial Organization 19 26.
[245] Case No COMP/M.7612 Hutchison 3G UK/Telefónica UK (n 5) para. 1195, Annex A para. 250 (emphasis added).
[246] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) paras. 273-274.

rise would preclude the finding of significant price effects is, hence, predicated on a misconception of the informational content of the computational output of the UPP analysis.

The proposition in *CK Telecoms* that a (in the eyes of the General Court) small or modest indicative price rise – for instance, the lower bound value of 5.7% estimated in the baseline model in *H3G UK/Telefónica UK* – suggests that the merger does not give rise to significant or appreciable anticompetitive effects is also misleading on factual grounds. It fully disregards the possibility that the UPP analysis may generate false negatives as it tends to underestimate the overall anticompetitive harm resulting from a merger.[247] The (extended) UPP analysis only gauges the first-order effect and (feedback effects) of the merger: that is, the impact of the merger on the incentives of the merged entities (and non-merging parties) to raise prices due to the elimination of close competition between the merging parties. But the UPP analysis does not include other channels of upward pricing pressure (or adverse non-price effects), such as the cannibalisation effect, which is only captured by qualitative evidence suggesting that the merger removed an important competitive force.

The General Court's attempt to show the insignificance of the price effect identified in *H3G UK/Telefónica UK* by pointing to authorised mergers, such as *H3G UK/Telefónica Ireland* and *Telefónica Deutschland/Eplus*, that were predicted to give rise to greater price increases (6.6% and 9.5% respectively), is even less persuasive.[248] Contrary to what is implied by the General Court, there is, indeed, no inconsistency between the Commission's decisional practice in *H3G UK/Telefónica UK, H3G UK/Telefónica Ireland* and *Telefónica Deutschland/Eplus*. The Commission had also found that the latter two gave rise to a SIEC. Both mergers were only authorised after the parties had submitted complex and demanding remedy packages. The level of indicative price rises, was hence not determinative of the Commission's decision to clear the latter two mergers.[249] From an economic perspective, too, a comparison of indicative price increases across merger decisions is not very meaningful, even if the mergers took place in the same industry. Such comparisons across cases are difficult because the results of UPP models are highly case-specific. This is because the outcomes of the UPP analysis are highly contingent on the type and quality of information available, which both can vary considerably from case to case.[250]

Most importantly, any generalisation about the insignificance of low or modest indicative price rises disregards that the adverse impact of such price increases on consumers may heavily depend on the type of product concerned. Certain products, such as groceries or fuel, constitute non-discretionary expenditure absorbing a disproportionate share of household spending. For these products, even small increases in price (or equivalent effects on other parameters of competition) may inflict material harm on consumers. Price effects on these products also have important distributive effects, as they hit low-income households disproportionately harder than more affluent consumer groups.[251] For this reason, the CMA considered in the recent Sainsbury/Asda merger price increases of 1.5% (2.75% with the inclusion of an efficiency credit of 1.25%) on groceries[252] and fuel[253] to effectuate a 'substantial' or 'significant' harm to competition.

[247] Farrell and Shapiro (n 16), 23. This was also pointed out by the Commission before the Court Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) para. 272.
[248] ibid para. 273.
[249] This point has also been made by Monti (n 8), 454.
[250] Anticipated merger between J Sainsbury PLC and Asda Group Ltd (n 243) para. 8.260.
[251] ibid para. 8.283 and 14. 151.
[252] ibid paras. 8.270–8.296.
[253] ibid para. 14.152-14.153.

Similar considerations might apply to the expenses for mobile telecommunication services. Though (weekly) UK household expenses for telecommunication services represent a smaller fraction (approximately 1.7% in 2019) of household expenditure relative to groceries (10%) or fuel (3.7%) and are not classified as non-discretionary expenditure,[254] they nonetheless constitute an important component of household spending, exceeding, for instance, certain non-discretionary expenses for healthcare and education.[255] Given the importance of mobile internet and its affordability for consumers' ability to access internet services and reap the benefits of the digital economy,[256] even small price increases for mobile telecommunication services may have a significant adverse effect on consumers and, in particular, low-income households. Absent any more detailed analysis, the General Court's unqualified holding that the indicative price rise of 5.7% to 7.3% on mobile tariffs estimated by the Commission were insignificant remains unpersuasive.[257]

D. The requirement of an efficiency credit as part of the in-depth (phase II) merger analysis and the 'more economic approach' account

Along with being grounded in erroneous assumptions about the UPP methodology and the significance of predicted indicative price rises, *CK Telecoms* also disregards important legal and economic considerations that may militate against the introduction of a default efficiency credit as a central component of the Commission's UPP analysis.

Of particular concern is that the General Court in *CK Telecoms* offered very little explanation as to why an 'efficiency credit' is at all necessary as an evidentiary matter for the use of the UPP test in phase II of merger proceedings. The economic literature envisages the inclusion of an 'efficiency credit' or a safe harbour primarily for the use of the UPP analysis as a screening tool in the initial stage (phase I) of merger proceedings.[258] At this early stage, a default efficiency credit plays a similar role to that of market share and HHI ratios[259] in ensuring that non-problematic mergers are screened out.

An efficiency credit or safe harbour for the use of the UPP test as screening tool in phase I also introduces a 'confidence interval' or 'sensitivity check' of sorts that corrects for measuring issues. Such measuring inaccuracies in phase I result from the fact that the competition authority will have to rely on readily available data (e.g. market share-based diversion ratios, assumption of a 0.5 profit margin) as inputs for the UPP screening test. By contrast, the Commission's UPP analysis in phase II, at least in part, eliminates these inaccuracies, which counsel the use of an efficiency credit at the (phase I) screening stage. This was highlighted by the Commission in the *H3G UK/Telefónica UK* decision. The Commission argued that there was no need to build in an efficiency credit in its phase II UPP analysis to determine when an indicative price rise is significant because its UPP test in phase II relied on more refined and accurate inputs than those fed into the UPP analysis at the screening stage.[260]

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[254] Expenses for telecommunication also exceeds expenses for health (e.g. medical appliances, medicines), education or alcoholic drinks. Office for National Statistics, 'Family spending in the UK: April 2018 to March 2019'. <https://www.ons.gov.uk/peoplepopulationandcommunity/personalandhouseholdfinances/expenditure/bulletins/familyspendingintheuk/april2018tomarch2019> accessed 21 November 2020.

[255] See the classification of expenses and data in Office for National Statistics, 'More than one-fifth of usual household spending has been largely prevented during lockdown' <https://www.ons.gov.uk/peoplepopulationandcommunity/personalandhouseholdfinances/expenditure/articles/morethanonefifthofusualhouseholdspendinghasbeenlargelypreventedduringlockdown/2020-06-11>.

[256] International Telecommunication Union, 'Affordability' <https://www.itu.int/en/mediacentre/backgrounders/Pages/affordability.aspx> accessed 5 December 2020.

[257] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) para. 274.

[258] Farrell and Shapiro (n 16), 9–12; G. J. Werden and L. M. Froeb, 'Choosing Among Tools for Assessing Unilateral Merger Effects' (2011) 7(2) Euro Comp J 155 161–162; Röller, Stennek and Verboven (n 218) 90–91. This nuance is often disregarded by authors advocating the inclusion of an efficiency credit to operationalise the significance criterion of the SIEC test Thomas (n 37), 382; Kuhn and Thomas (n 10).

[259] Commission Guidelines on the assessment of horizontal mergers (n 32) paras. 14-21.

[260] Case No COMP/M.7612 Hutchison 3G UK/Telefónica UK (n 5) para. 252 A.

Instead of using market-share based diversion ratios and an industry-wide benchmark for profit margins which are relied upon for the UPP analysis in phase I, the Commission constructed more accurate survey-based diversion ratios and firm-specific profit margins as ingredients for its UPP test and extended UPP model in its phase II assessment.[261] Hence, the requirement of an efficiency credit in *CK Telecoms* simply ignores the fact that measurement issues militating for an inclusion of an efficiency allowance in a (phase I) UPP screen are at least in part alleviated by the use of more precise inputs for the GUPPI analysis in phase II. It also sheds a blind eye on the seven (!) sensitivity checks the Commission carried out in *H3G UK/Telefónica UK* to correct for various potential measurement issues.[262] Moreover, the Commission's complementary assessment of Compensating Marginal Cost Reductions (CMCRs) showed that the merger would entail substantial upward pricing pressure and indicative price rises even if it were to generate substantial efficiencies in the form of incremental network cost reductions amounting to the entire incremental network cost of the merging parties.[263] Ironically, the Commission's assessment of putative efficiencies as part of its quantitative (CMCR) analysis finds no mention in the *CK Telecoms* judgment.

The unqualified requirement of an efficiency credit in *CK Telecoms* also fails to account for the variations of the evidentiary weight that a competition authority may attribute to the results of the UPP analysis and quantitative evidence in general.[264] In some cases, a competition authority may use certain UPP thresholds as a decision-rule for the finding of the existence of anticompetitive effects. In this case, the results of the UPP analysis constitute the principal piece of evidence and are considered determinative for the finding of a SIEC (or SLC). The CMA had recourse to such a UPP-decision rule in cases where the sheer number of geographical overlaps made a market-specific analysis virtually impossible.[265] The inclusion of an efficiency credit may serve as an important reality check in such decision-rule cases. From a decision-theoretical perspective,[266] it might, indeed, appear sensible to impose a stricter evidentiary standard on quantitative economic evidence when the competition authority's intervention exclusively depends on a specific critical measure of UPP or indicative price rise.

The same considerations, however, do not necessarily apply to cases where the UPP analysis carries less evidentiary weight in the overall merger assessment. This has been the case in *H3G UK/Telefónica UK* and all previous mobile mergers where the Commission did not rely on quantitative evidence in isolation of available qualitative evidence.[267] Rather, the Commission considered the said quantitative evidence merely as 'further support' of its qualitative evidence showing that the merger would lead to unilateral effects.[268] The evidentiary weight attributed to the quantitative evidence in these cases is hence considerably lighter compared to a case where competition authorities rely on a UPP-based decision-rule. In these cases, decision-theory would not warrant the same precautious evidentiary standard for

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[261] ibid Annex A 253-254.
[262] ibid Annex A, paras. 190-239.
[263] ibid paras, 1222-1224, 2538, fn. 2188-2189 and CMCR analysis in Annex A–Section 3.4.1.
[264] In *H3G UK/Telefónica UK*, the Commission made it clear that the evidentiary weight of quantitative evidence may vary from cases to case ibid Annex A para. 252.
[265] Mergers in the grocery sector are one example where competition authorities rely on (G)UPP(I) based decision rules. See for instance: Anticipated merger between J Sainsbury PLC and Asda Group Ltd (n 243) paras. 8.245-8-248. See for a similar approach, the CMA's Ladbroke/Coral decision, involving an assessment of in total 634 local areas Ladbrokes and Coral A report on the anticipated merger between Ladbrokes plc and certain businesses of Gala Coral Group Limited 2016 para. 29. Statement of the Federal Trade Commission In the Matter of Dollar Tree, Inc. and Family Dollar Stores, Inc. (Joined by Chairwoman Ramirez, Commissioner Brill, Commissioner Ohlhausen, and Commissioner McSweeny) 2015.
[266] Decision theory suggests a sliding scale approach towards the height of the evidentiary burden. Accordingly, evidentiary standards should be calibrated to the reliability and costs of case specific evidence of Salop, 'An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards' (n 93) 3,10, 14-15, 17. A. I. Gavil and S. C. Salop, 'Probability, Presumptions and Evidentiary Burdens in Antitrust Analysis: Revitalizing the Rule of Reason for Exclusionary Conduct: [forthcoming]' (2020) 168(7) University of Pennsylvania Law Review 1 14.
[267] Case No COMP/M.7612 Hutchison 3G UK/Telefónica UK (n 5) Annex A, para. 248.
[268] ibid para. 886.

quantitative evidence. Yet, *CK Telecoms* misses this point and remains silent on why the same strict evidentiary standard requirements ought to apply to quantitative evidence regardless of whether it plays a determinative or only a subsidiary role in the assessment of mergers.

The most troublesome aspect of the discussion of an efficiency credit in *CK Telecoms* is that it devotes surprisingly little consideration to the under-inclusiveness and ensuing false negatives that might result from the inclusion of an efficiency allowance in the UPP analysis. This concern about type II errors has prompted various competition authorities to reject the inclusion of safe harbour thresholds in UPP tests. The example of the decisional practice of US authorities might be insightful in this respect. The 2010 US Merger Guidelines hint at the necessity of such a safe harbour for the quantitative analysis of mergers. The Guidelines state that if the value of diverted sales, which can be easily converted into a GUPPI index, is 'proportionately small', significant unilateral effects are unlikely.[269] Salop, Moresi and Woodbury have proposed to operationalise this rebuttable[270] safe harbour requirement through a GUPPI threshold of 5%. Accordingly, the unilateral effects of mergers resulting in a GUPPI below 5% will be considered insignificant.[271] At the same time, the authors, however, also advocate a rebuttable presumption of significant anticompetitive unilateral effects for GUPPI levels of 10% or above.[272]

The reference to a safe harbour in the 2010 Guidelines notwithstanding, the US Federal Trade Commission (FTC) refused to adopt a (irrebuttable) safe harbour threshold of 5% in several merger decisions.[273] It deemed such a threshold unnecessary, as it did not use the GUPPI results as a rigid presumption of harm, but relied on the GUPPI results in conjunction with other qualitative evidence.[274] The FTC further cautioned that the application of safe-harbour GUPPI threshold bears the risk of producing false negatives as the exact amount of upward-pricing pressure or indicative price rises that would qualify as 'proportionately small' varies across industries. This is because the pass-through rate and marginal cost efficiencies are most often industry-specific. They, indeed, depend, *inter alia*, on the slope of the marginal cost curve, the curvature of the price elasticity of demand and the intensity of competition prevailing in a given sector.[275] In an industry characterized by intense competition, the pre-merger profit margins are usually low. As a result, the GUPPI and indicative price rise values are also likely to be modest, despite high diversion ratios between the parties.[276] Even the inclusion of a very moderate

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[269] Antitrust Division of the US Department of Justice/Federal Trade Commission - Horizontal Merger Guidelines - 1992 (n 61) 21.
[270] Salop (n 96), 303.
[271] Salop, Moresi and Woodbury (n 135) 2. In his role as former Deputy Assistant Attorney General, Carl Shapiro also suggested that the Antitrust Division of the Department of Justice applied a 5% GUPPI-based safe harbour threshold. C. Shapiro, 'Update from the Antitrust Division: Remarks as Prepared for the American Bar Association Section of Antitrust Law Fall Forum November 18, 2010' (2010) 24–25 <https://www.justice.gov/atr/file/518246/download> accessed 20 October 2019. Note also that in more recent writings Salop seems to distance himself from the concept of an 'efficiency credit', advocating instead the elimination of GUPPI safe harbours. S. C. Salop and F. Scott-Morton, 'The 2010 HMGs Ten Years Later: Where Do We Go From Here?' (2021) 58(1) Review of Industrial Organization 81 86–87.
[272] Salop, Moresi and Woodbury (n 135) 2. Salop (n 96), 299–303.
[273] *Cerberus Institutional Partners V, LP. AB Acquisition LLC, and Safeway Inc. In the Matter of,* [2015] Docket No. C-4504 (Federal Trade Commission); Statement of the Federal Trade Commission In the Matter of Dollar Tree, Inc. and Family Dollar Stores, Inc. (Joined by Chairwoman Ramirez, Commissioner Brill, Commissioner Ohlhausen, and Commissioner McSweeny) (n 264). In this case, dissenting Commissioner Wright advocated a 5% GUPPI safe-harbour threshold Statement of Commissioner Joshua D. Wright Dissenting in Part and Concurring in Part - In the Matter of Dollar Tree, Inc. and Family Dollar Stores, Inc 2015.
[274] Statement of the Federal Trade Commission In the Matter of Dollar Tree, Inc. and Family Dollar Stores, Inc. (Joined by Chairwoman Ramirez, Commissioner Brill, Commissioner Ohlhausen, and Commissioner McSweeny) (n 264) 2–3.
[275] Röller, Stennek and Verboven (n 218) 94; G. Weyl and M. Fabinger, 'Pass-through as an Economic Tool' (2013) 121(3) Journal of Political Economy 528 4; L. M. Froeb, S. Tschantz and G. J. Werden, 'Pass-through rates and the price effects of mergers' (2005) 23(9-10) International Journal of Industrial Organization 703 709–711.
[276] Statement of the Federal Trade Commission In the Matter of Dollar Tree, Inc. and Family Dollar Stores, Inc. (Joined by Chairwoman Ramirez, Commissioner Brill, Commissioner Ohlhausen, and Commissioner McSweeny) (n 264) 3, see also fn,8; Farrell and Shapiro (n 16), 13–14; Salop (n 96), 301–303.

efficiency credit may therefore underestimate the unilateral effects resulting from the reduction of competition amongst the merging parties.[277]

The General Court's finding that the indicated price increases resulting from the *H3G UK/Telefónica UK* merger were insignificant entirely collapses if one were to apply an efficiency credit or safe harbour GUPPI threshold of 5% recommended by Salop, Moresi and Woodburry. [278] The Commission's two baseline models predicted that Three and O2 would post-merger adopt segment-wide price increases of 12,9% to 15,4% (Three) and 9% to 10,7% (O2), respectively.[279] If we assume linear demand and a pass-through rate of 50%, as did the notifying parties and the Commission in their models,[280] these price increases suggest that the GUPPI values for both parties would approximate 25,8% to 30,8% (Three) and 18% to 21,4% (O2) respectively. These GUPPI values not only exceed the recommended 5% safe harbour threshold by far. But they also lie far north of the 10% threshold[281] that Salop, Moresi and Woodburry envisage as critical benchmark for a presumption of significant unilateral price increases.[282]

VII. PROPOSITION 6 - 'ANY CONCENTRATION WILL LEAD TO EFFICIENCIES'

The discussion of efficiencies in *CK Telecoms* is nothing short of a judicial revolution. Instead of grounding the requirement of a safe-harbour or efficiency credit in a thorough review of the relevant economic literature, the General Court derived this requirement from the new distinction between 'merger-specific efficiencies' and efficiencies 'specific to each concentration'.[283] With the latter category, the General Court recognised an entirely new category of 'standard efficiencies' that have to be always incorporated in the quantitative analysis of the merger.

A. The recognition of 'standard efficiencies' and the 'rule of law' account

This creation of a new category of efficiencies by judicial fiat is likely to unravel the well-established sequencing of the analysis of and allocation of the burden of proof for efficiencies in merger proceedings. With the recognition of standard efficiencies, *CK Telecoms* subdivides and repartitions the burden of proof for efficiencies between the Commission and the merging parties. While the burden of proving merger-specific efficiencies continues to lie with the merging parties, the Commission will only discharge its initial burden of proof to sustain the finding of *prima facie* anticompetitive effects, by showing that the adverse effects of the merger outweigh a certain (which?) amount of standard efficiencies.

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[277] In Sainsbury/Asda, the CMA relied on a GUPPI threshold of 2.75% (1,25 % efficiency credit and 1,5% error margin) Anticipated merger between J Sainsbury PLC and Asda Group Ltd (n 243) paras. 8.270–8.296.. In Somerfield/Morrison the Competition Commission relied on a sensitivity check at 1%. Somerfield plc and Wm Morrison Supermarkets plcA report on the acquisition by Somerfield plc of 115 stores from Wm Morrison Supermarkets plc 2005. In Midcounties Co-ooperative/Tuffin the OFT relied on GUPPI values below 5% to support the finding of a SLC. Completed acquisition by Midcounties Co-operative Limited of Tuffin Investments Limited 2013. ME/5452/12.

[278] Farrell and Shapiro (n 16), 23.

[279] Case No COMP/M.7612 Hutchison 3G UK/Telefónica UK (n 5) Annex A paras. 326-327. These indicative price rises were also confirmed by the Commission's various sensitivity checks ibid Annex A, paras. 190-239. Even the sensitivity check assuming a 20% diversion ratio to an outside good indicated that Three and 02 would have the incentive to raise their prices by 10,3% and 6,4% respectively ibid Annex A Table 16 and paras. 226-227.

[280] ibid para. 2533 and fn, 2187. A 0.5 pass-through rate is also considered 'reasonable' by Farrell and Shapiro (n 16), 23.

[281] Case No COMP/M. 6497 Hutchison 3 G Austria/Orange Austria (n 116) para. 362.

[282] Even if we were to apply a conservative assumption of 100% pass-through rate (standard oligopoly models assume a pass-through rate below 100%) the indicative price increases in *H3G UK/Telefónica UK* would exceed both the safe harbour and presumption threshold proposed by Salop, Moresi and Woodburry. See for the discussion of pass-through rates Case No COMP/M.7612 Hutchison 3G UK/Telefónica UK (n 5) Annex B fn. 58.

[283] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) para. 279.

CK Telecoms thus introduces the efficiency credit as a burden-shifting device that determines when the burden of proving efficiencies shifts on the merging parties.[284] It clarifies that such a burden-shift occurs only after the Commission discharges its initial burden of proof by showing that the price effects arising from the merger outweigh the standard efficiencies. This clearly becomes apparent from the fact that the General Court considered the showing that the anticompetitive effects of the merger outweigh these standard efficiencies as an 'evidential matter relating to the existence of restrictive effects which arises prior to the overall competitive appraisal as provided for in para 76 of the Guidelines.'[285]

The *CK Telecoms* ruling thus does nothing less than inverting the burden of proof for some efficiencies. Instead of the parties being required to prove that these standard efficiencies are likely to eventuate and offset the anticompetitive harm of the merger, *CK Telecoms* imposes the burden of proving that these efficiencies are insufficient to outweigh the anticompetitive effects on the Commission. It thus introduces a new evidential hurdle that the Commission has to surmount in order to show that a merger is likely to lead to significant anticompetitive effects. This subdivision and recalibration of the burden of proof, thus, goes hand in hand with a heightened evidentiary burden for the showing of anticompetitive effects.

This proposed recalibration of the burden and standard of proof raises a number of legal issues as it blatantly conflicts with the EU Merger Regulation, the Horizontal Merger Guidelines and the existing case law. The General Court's discovery of a new category of standard efficiencies is devoid of any legal basis in the EU Merger Regulation. On the contrary, in recital 29 of the EUMR the EU legislator bestowed the European Commission with an unequivocal mandate to 'publish guidance on the conditions under which it may take efficiencies into account in the assessment of a concentration.'[286]

The fact that *CK Telecoms* neither puts forth a clear definition of efficiencies falling within the category of 'standard efficiencies'[287] nor affixes any evidentiary requirements to these efficiencies shows open disregard for the text of the EU Merger Regulation. The reference in recital 29 to '*substantiated* and *likely* efficiencies put forward by the undertakings concerned' and 'the *conditions* under which it may take efficiencies into account in the assessment of a concentration'[288] seem to preclude the introduction of a category of 'standard efficiencies' which are not subject to any evidentiary requirements. On the contrary, recital 29 unequivocally attaches evidentiary conditions to the efficiencies accounted for in merger analysis, as it suggests that the efficiencies must be substantiated and their likelihood must be demonstrated. Contrary to what has been argued elsewhere,[289] the fact that recital 29 refers to the merging 'undertakings concerned' as the parties that are expected to 'put forward' '*substantiated* and *likely* efficiencies' suggests that both the burden of production ('put forward') and persuasion ('substantiated and likely efficiencies') lies on the merging parties. Consistent with recital 29, the Horizontal Merger Guidelines allocate the burden of producing evidence and making a convincing case about the existence of efficiencies to the notifying parties. An efficiency defence is only available if the notifying parties substantiate the existence, timeliness, merger-specificity, and consumer benefit of the claimed efficiencies.[290] The recognition of a 'standard deduction' of certain categories of efficiencies in *CK Telecoms*, indeed, stands in open contrast with the principles set out in the EUMR and the Horizontal Merger Guidelines.

[284] The General Court here largely follows the proposed integration of efficiencies into the theory of harm and subdivision of the burden of production and persuasion for efficiencies between the competition authority and the merging parties Thomas (n 37), 369–385.
[285] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) para. 279.
[286] Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (n 7) recital 29.
[287] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) para. 277.
[288] Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (n 7) recital 29, emphasis added.
[289] Thomas (n 37), 378–379.
[290] Commission Guidelines on the assessment of horizontal mergers (n 32) paras. 76-88.

The recognition of this new category of 'standard efficiencies' is also difficult to reconcile with the existing case law of this very court. In *Ryanair* and *Deutsche Börse* the General Court had endorsed both the allocation of the burden of proof and evidentiary requirements for efficiencies set out in the Guidelines.[291] *Deutsche Börse* also seems to preclude any intermingling of the assessment of anticompetitive effects and efficiencies as it is proposed in *CK Telecoms*. On the contrary, in *Deutsche Börse* the General Court clearly supported a separate, two stage analysis of anticompetitive effects and efficiencies brought about by a merger. It held that in order to determine whether the anticompetitive harm caused by the merger to consumers is outweighed by efficiency gains 'it is possible, *indeed necessary*, for the Commission to evaluate them separately in two stages, and not necessarily and solely together.'[292]

Moreover, by requiring the Commission to demonstrate that 'efficiencies specific to each concentration'[293] are outweighed by the upward pricing pressure brought about by the merger, *CK Telecoms* creates an additional hurdle that the Commission has to overcome in order to discharge its burden of proving that a merger is *prima facie* anticompetitive. The category of 'standard efficiencies' thus crafts an implied presumption that mergers give rise to a default amount of efficiencies that has to be rebutted by the Commission in its quantitative (or qualitative) analysis.[294] This introduction of a presumption of the 'pro-competitiveness' of mergers through the backdoor is difficult to square with the symmetry of the requirements to prove the compatibility and incompatibility of mergers with the internal market. It thus stands in stark contrast with the existing case law excluding any form of presumption under the EU Merger Regulation. [295]

In light of the plethora of legal concerns the recognition of 'standard efficiencies' raises, attempts to portray *CK Telecoms* as a reaffirmation of the 'rule of law' in merger control lose all credibility.[296] Instead of aligning the Commission's alleged 'discretion' with the 'law' enshrined in the EUMR, the recognition of a new category of efficiencies by judicial fiat in *CK Telecoms* is in itself a paramount example of judicial activism, discretion, and law-making.[297]

B. The recognition of standard efficiencies and the 'more economic approach' account

The introduction of 'standard efficiencies' also raises a number of economic questions. Proponents of the inclusion of standard efficiencies in the UPP analysis are divided on the appropriate weight and sequencing of such a default efficiencies deduction in merger analysis. Farrell and Shapiro, for instance, suggest that a 'standard deduction' for efficiencies should be limited to the screening stage (phase I), while the merger-specific efficiencies have to be substantiated ('itemised') and thoroughly reviewed if the case reaches the later, in-depth analysis stage (phase II).[298] Salop and Moresi, by contrast, support – much like the General

[291] Case T-342/07 *Ryanair v Commission* (n 220) paras. 406, 427, 434; Case T-175/12 *Deutsche Börse v Commission* ECLI:EU:T:2015:148 para. 276.
[292] Case T-175/12 *Deutsche Börse v Commission* (n 290) para. 276 (emphasis added).
[293] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) para. 279.
[294] Thomas (n 37), 383–385.
[295] Opinion of Advocate General Kokott in Case C-413/06 P *Bertelsmann und Sony Corporation of America/ Impala* (n 79) paras. 212-224. Case C-413/06 *P Bertelsmann and Sony Corporation of America v Impala* (n 77) para. 48; Case T-79/12 *Cisco v Commission* (n 77) para. 46, 48.
[296] See in particular the section on 'Why this case was so important: it was law vs discretion, and the law won' in Colomo, 'Case T-399/16, CK Telecoms v Commission: a new Airtours moment and the future of effects analysis' (n 9).
[297] This is not to say that such judicial activism is objectionable as such. The point here is that *CK Telecoms* cannot support the law v discretion account.
Baker and Shapiro (n 12) 256.
[298] Farrell and Shapiro (n 16), 9–10; F. R. Warren-Boulton, 'Merger Policy and Enforcement at the Antitrust Division: The Economist's View' (1985) 54 Antitrust Law Journal 109 112. See also in support of a departure from the efficiency screen in cases where the parties fail

Court in *CK Telecoms* – the introduction of a standard deduction of non-substantiated efficiencies in addition to the potential inclusion of cognizable efficiencies in the GUPPI analysis.[299] They advance general efficiency considerations and optimal deterrence factors, that take into account the likelihood and magnitude of harm resulting from type I and II errors, as considerations supporting the inclusion of a 'standard deduction' in addition to cognizable efficiencies in the GUPPI analysis.[300] It bears, however, noting that Salop and Moresi at the same time support a presumption of anti-competitiveness for mergers leading to a GUPPI of 10% or more. [301]

The *CK Telecoms* judgment dispenses with discussing this literature or weighing technical arguments on the appropriate role and design of an efficiency credit for 'standard efficiencies.'[302] Instead, the General Court opted for grounding the requirement of the use of an 'efficiency credit' in the much bolder economic claim that 'any concentration will lead to efficiencies'.[303] This broad presumption of merger-driven efficiencies is neither supported by economic theory, nor empirical evidence. On the contrary, Röller et al. observe that 'there seems to be no support for a general presumption that mergers create efficiency gains'.[304] More recently, Rose and Salet also point out that '[t]he economic literature demonstrates that efficiencies are neither as ubiquitous nor as uniformly large as the notion of a standard efficiency credit suggests.'[305]

While it might be true that all mergers *may* generate efficiencies, this does not necessarily mean that all concentrations *must* generate efficiencies, as the General Court seems to suggest. On the contrary, if a merger engenders the reduction of the overall competitive pressure, it is unlikely that any merger-specific efficiencies will be passed on to consumers. For this reason, the US and EU Merger Guidelines require the merging parties to demonstrate that merger efficiencies are merger-specific, significant, and likely to be passed on to consumers.[306]

A majority of economic and legal scholars, starting with the mastermind of the efficiency defence, Oliver E. Williamson,[307] support this allocation of the burden of production and persuasion to the merging parties for three inter-related reasons. First, imposing the burden of proof on the merging parties accounts for the fact that merger-specific efficiencies are difficult to predict and often overstated.[308] This allocation of the burden of proof thus constitutes a low-cost filter to screen out inflated, theoretical or pretextual efficiency claims.[309] Second, allocating the burden of production and persuasion to the merging parties follows the principle of proof proximity, as the merging parties have better access to the relevant evidence. The

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to substantiate the efficiencies Schmalensee (n 215), 4. Baker and Shapiro also suggest that efficiencies should only be included in the assessment of anticompetitive effects if they meet the conditions of verifiability and merger specificity. Baker and Shapiro (n 12) 256.

[299] Salop and Moresi (n 133). See however for a more recent call for the elimination of GUPPI safe harbours Salop and Scott-Morton (n 270), 86–87.

[300] Salop and Moresi (n 133) 3-5, 25-26.

[301] Salop, Moresi and Woodbury (n 135) 2. Salop (n 96), 299-303.

[302] Salop and Moresi (n 133) 25–26.

[303] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) para. 277. The General Court, uncritically echoes here Thomas (n 37), 368, 371.

[304] Röller, Stennek and Verboven (n 218) 35. For a similar conclusion, see H. J. Hovenkamp and C. Shapiro, 'Horizontal Mergers, Market Structure, and Burdens of Proof' (2018) 127 The Yale Law Journal 1996 2008, fn. 49; Baker and Shapiro (n 12) 256–257. This cautious approach toward efficiencies is also shared by Moresi and Salop, despite their support of a 'standard deduction' of non-cognisable efficiencies in the GUPPI analysis. They observe that 'some economic scholarship might be read to suggest that mergers are not as driven by efficiencies as seems to have been assumed in the 1980s.' Salop and Moresi (n 133) 5.

[305] N. L. Rose and J. Sallet, 'The Dichotomous Treatment of Efficiencies in Horizontal Mergers: Too Much? Too Little? Getting It Right' (2019) 168 U. Pa. L. Rev. 1941 Rose and Sallet (n 305), 1981, for the empirical literature see 1962-1967. See for a similar criticism of the notion of a standard efficiency credit Kaplow (n 97) 39–41.

[306] Commission Guidelines on the assessment of horizontal mergers (n 32) paras 76-88.

[307] O. E. Williamson, 'Economies as an Antitrust Defense: The Welfare Tradeoffs' (1968) 58(1) The American Economic Review 18 24–27.

[308] ibid 24. A. I. Gavil, 'Chapter 5 - Burden of Proof in U.S. Antitrust Law' in Collins, Wayne D Collins and J. A. Angland (eds), *Issues in Competition Law and Policy* (American Bar Association. Section of Antitrust Law 2008) 156.

[309] Williamson (n 306), 24; Warren-Boulton (n 297), 113–114. F. M. Fisher, 'Horizontal Mergers: Triage and Treatment' (1987) 1(2) Journal of Economic Perspectives 23 36. L. J. White, 'Antitrust and Merger Policy: A Review and Critique' (1987) 1(2) Journal of Economic Perspectives 13 18; Baker and Shapiro (n 12) 256, 258, 266.

allocation of burden of proof thus reduces the information costs of gathering additional evidence.[310] Third, once the competition authority has discharged its initial burden of proving anticompetitive effects, the risk of false positives is considerably reduced.[311] Requiring the defendants to advance case-specific evidence to rebut the updated estimate of likely anticompetitive effects established by the competition authority thus also has an important deterrence function as it reduces the risk of false negatives.[312]

By recognising a 'standard efficiency' credit without any evidentiary requirements affixed to it and maintaining the simultaneous possibility for firms to mount an efficiency defence, *CK Telecoms* in part dispenses with the decision-theoretic and evidentiary considerations underpinning the existing burden-shifting framework for merger-specific efficiencies. *CK Telecoms* thus increases the risk of unwarranted double-counting and over-estimation of efficiencies and, hence, false negatives and under-enforcement.

By following such an approach, *CK Telecoms* also markedly diverges from the cautious approach of competition authorities which occasionally opted for the incorporation of an efficiency credit in their UPP analysis. These authorities have maintained the existing burden-shifting framework by attaching evidentiary requirements to the efficiencies accounted for in the efficiency deduction. By way of example, in *Sainsbury/Asda*, the CMA included only those efficiencies as an efficiency credit in the GUPPI analysis for which it was – after careful examination – satisfied that their likely existence, merger-specificity and consumer benefits were substantiated by the merging parties[313] Conversely, efficiency claims which did not meet the evidentiary standards of the Merger Assessment Guidelines were not incorporated as an efficiency credit in the GUPPI analysis.[314] In recent mobile mergers, the Commission adopted a similarly cautious approach by crediting only substantiated efficiency claims in its quantitative UPP-based analysis.[315]

CK Telecoms dispenses with such precautions. This is all the more surprising, as even a marginal amount of efficiency credit represents huge efficiency gains. As an illustration, the 1.25% efficiency credit used by the CMA in Sainsbury/Asda was equivalent to 500 million GBP. An efficiency credit of a GUPPI value of 5%, as it is advocated in some quarters, would have amounted to 2 billion GBP efficiencies.[316] The combined effect of the lack of any evidentiary requirements in *CK Telecoms* for standard efficiencies and the additional possibility for merging parties to plead an efficiency defence is likely to lead to inflated efficiency claims. This would skew the quantitative analysis of the mergers in favour of the merging parties and increase type 2 errors.

C. *CK Telecoms* as an example of the pitfalls and implications of the presumed 'standard efficiencies'

[310] Williamson (n 306), 24. Beckner, III and Salop (n 97), 46, 53, 64.65. Note that the marginal benefit of information on efficiency gains of a horizontal merger tend to be low, if the plaintiff (competition authority) has shown considerable market power effects ibid 60-61, 69. This is already recognised by Williamson who argues that the standard of proof for efficiencies should follow a sliding scale approach and be calibrated to the market power effects: 'evidence of distortion seriously debilitates a defense' Williamson (n 306), 24. Gavil (n 307) 156. Salop, 'An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards' (n 93) 19, 24, 46-47; Baker and Shapiro (n 12) 256, 258, 266.

[311] Gavil (n 307) 156.

[312] Salop, 'An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards' (n 93) 23-24, 45-46.

[313] Anticipated merger between J Sainsbury PLC and Asda Group Ltd (n 243) para. 8. 276-8.279 and 16.106–16.225.

[314] The CMA raised major concerns about the methodology used by the parties to quantify the efficiencies and only accounted for around 70% of the claimed efficiencies in its GUPPI analysis ibid paras. 16.219 - 16.223.

[315] Case No COMP/M.7758 Hutchison 3G Italy/WIND/JV (n 77) paras. 947, 1430, 1636, Annex A paras. 175-179.

[316] Anticipated merger between J Sainsbury PLC and Asda Group Ltd (n 243) para. 8.279.

The General Court's reasoning in *CK Telecoms* provides a striking example of how an unprincipled efficiency credit risks unsettling the existing framework and sequencing of merger analysis. During the administrative proceedings of the *H3G UK/Telefónica UK* merger the merging parties had claimed that a growing body of economic studies of industry consolidation and merger retrospectives in the mobile telecom sector suggested that 4-to-3 MNO mergers were pro-competitive. The Commission, by contrast, adopted a more cautious approach towards the evidentiary value of these studies, highlighting that it does 'not give significant evidentiary weight' to these studies[317] which cannot replace the specific assessment of mobile mergers.[318] The Commission nonetheless reviewed in total 9 studies in Annex B of its decision.[319] It came to the conclusion that a conservative interpretation of the ex-post studies would 'on balance…show that four to three mergers tend to lead to price increases.'[320]. With respect to the impact of merger-driven market concentration on investment, the Commission observed that the existing studies are less reliable and that they do not support a finding of an 'overall increase in industry wide investments'[321] and, hence, increases in network quality that would benefit consumers.[322]

The General Court, however, appeared unimpressed with the prudent approach of the Commission toward the evidentiary value of ex-post studies. Instead, the Court, relying on a, at best, cursory review of a single ex-post study by Genakos, Verboven and Valletti[323], held that

> it is apparent from the evidence submitted during the administrative procedure that, while a positive correlation may be established between concentrations which reduce the number of operators in the mobile telecommunications sector from four to three and result in price increases, a correlation may also be established between those concentrations and an increase in network investments by mobile network operators (see, in particular the Centre on Regulation in Europe (CERRE) Study by Genakos, C., Valletti, T., Verboven, F., CERRE, Brussels, 2015) entitled 'Evaluating Market Consolidation in Mobile Communications', which is referred to inter alia in paragraphs 1, 64 to 68, 71, 72, 76 to 80 and 108 of Annex B to the contested decision). '[324]

The *CK Telecoms* judgment thus suggests that ex-post studies of mergers showing a positive relationship between industry concentration and investment or innovation, would be sufficient evidence for standard efficiencies that must be factored in the UPP analysis and be rebutted by the Commission in order to demonstrate that the merger is likely to result in a SIEC.[325] Accordingly, should merging parties submit such studies as evidence during the administrative procedure that is capable of undermining the finding of anticompetitive effects, the Commission would have to credit this evidence in its quantitative analysis and rebut it

[317] Case No COMP/M.7612 Hutchison 3G UK/Telefónica UK (n 5) Annex B, para. 12.
[318] ibid Annex B, paras. 9, 11.
[319] ibid Annex B, para 12.
[320] ibid Annex B paras. 110 and 12.
[321] ibid Annex B, para. 10.
[322] This cautious view finds support in a recent empirical study by Ofcom which finds that industry consolidation has neither a positive impact on country-level infrastructure investment (capex per capita) nor network quality (4 G download speeds) Office of Communications (Ofcom), 'Market structure, investment and quality in the mobile industry' (2020). Economic Discussion Paper Series 1 6.2, 6.11, 6.22, 8.19-8.20.
[323] C. Geneakos, T. Valletti and F. Verboven, 'Market structure, regulation and the Speed of Mobile Network Penetration' (2015).
[324] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) para. 280.
[325] ibid para. 281.

before being able to legitimately conclude that the merger is *prima facie* leading to unilateral effects (and before assessing whether these unilateral effects are defeated or cancelled out by countervailing factors and merger specific efficiencies).[326] The sweeping conclusions that the General Court drew from the review of a single ex-post study[327] about the positive relationship between industry concentration, investment, and network quality, suggests that *CK Telecoms* does not attach any requirements whatsoever for economic studies to qualify as evidence that would have to be factored into the 'efficiency credit'.

The discussion of ex-post studies in *CK Telecoms* thus shows how the failure of the General Court to attach any specific evidentiary requirements to the newly crafted concept of 'standard efficiencies' to be credited as 'efficiency allowance' in the quantitative merger analysis opens the proverbial floodgates for generalised and unsubstantiated efficiency claims. The General Court's approach towards ex-post studies in *CK Telecoms* signals that it would be sufficient for parties during the administrative procedure to produce or refer to studies that find an empirical or theoretical positive relationship between industry concentration and investment (or other parameters of competition) to heighten the evidentiary burden for the Commission. The Commission's UPP analysis would then have to show that the adverse effects of the merger on prices are likely to outweigh the unsubstantiated positive consequences of market consolidation on investment or other parameters.

The implications of this unexacting evidentiary burden for standard efficiencies may reach far beyond mobile telecommunication mergers. As soon as the merging parties are in the position to produce studies that suggest that the effects of merger-driven industry consolidation on prices and other non-price parameters, such as innovation (investment or product quality), pull into different directions, the Commission would have to demonstrate that the adverse effects on prices outweigh or are not cancelled out by the opposite effect on other competition parameters. *CK Telecoms* is thus set to call into jeopardy the Commission's newly developed analytical framework to measure the impact of mergers on innovation.[328] The Commission acknowledged in cases such as *Dow/Dupont* that mergers may have a positive impact on innovation, as they may enhance the appropriability of the merged entity's R&D investments or produce R&D spill-overs and synergies. Yet, it treated this positive impact of mergers on innovation as a second-order effect that is in most cases outweighed by a negative first-order effect of the merger on prices and innovation.[329] When the Commission demonstrates the adverse first-order effect of the merger on innovation, any countervailing positive impact of industry concentration on the amount of investment in R&D could only be accounted if it is substantiated as a merger-specific efficiency for which the parties carry the burden of proof.[330]

By recognising the relevance of economic studies on the positive relationship between consolidation and investment as evidence that, if submitted during the administrative procedure, would have to be factored as an offsetting variable into the analysis of adverse (price) effects of the merger, the *CK Telecoms* judgment is likely to dismantle the burden-shifting mechanism that so far structures the Commission's analysis of multi-directional effects of industry consolidation on price and non-price competition. This will considerably heighten the

[326] The General Court's reasoning shows striking similarities with Case C-413/14 P *Intel v Commission* ECLI:EU:C:2017:632 para. 138.
[327] This sweeping conclusion entirely disregards the caveats raised by the authors of the study Geneakos, Valletti and Verboven (n 322) 45–46. The authors point out that the 'missing link' between increases in investment per MNO and consumer welfare needs further study. A recent study by Ofcom also casts doubt on the positive impact of concentration on investment and the link between investment and network quality (consumer welfare) Office of Communications (Ofcom) (n 321) 6.2, 6.11, 6.19-2.20.
[328] Case No COMP/M.7932 Dow/DuPont (n 101); Case No COMP/M.8084 Bayer/Monsanto 2018; Case M.8677 Siemens/Alstom (n 130).
[329] Case No COMP/M.7932 Dow/DuPont (n 101) paras. 2005, 2045, 3285. See in support of this view M. Motta and E. Tarantino, 'The Effect of Horizontal Mergers, When Firms Compete in Prices and Investments: Working Paper 1570, Department of Economics and Business, UPF' (2017); G. Federico, G. Langus and T. Valletti, 'Reprint of: Horizontal mergers and product innovation' (2018) 61 International Journal of Industrial Organization 590.
[330] Case No COMP/M.7932 Dow/DuPont (n 101) paras. 3264-3278.

evidentiary burden for the Commission to demonstrate the adverse effects of mergers on non-price parameters when the relationship between concentration and the non-price parameter of competition is potentially ambiguous. As a consequence, *CK Telecoms* is likely to curtail the Commission's ability to challenge mergers in 'complex' markets where price is not the only parameter of competition.

The ultimate consequence of the General Court's failure to establish any evidentiary requirements for the newly crafted category of 'standard efficiencies' is that *CK Telecoms* considerably lowers the evidentiary threshold or even relieves merging parties from demonstrating an allegedly positive relationship between a merger and the non-price parameter of competition, such as investment. This cavalier approach towards undermining or offsetting evidence submitted by the merging parties, markedly differs from the strict evidentiary requirements that the General Court imposed on the Commission's use of qualitative and quantitative evidence for demonstrating the existence of a SIEC. The broad presumptions of *CK Telecoms* about the efficiency-enhancing nature of mergers and industry consolidation pay little heed to the economic insights. Economic analysis suggests that the extent to which such positive effects of a merger on investment or other efficiencies benefit consumers largely depends on several factors, such as whether they engender marginal or fixed costs savings, the industry-specific marginal cost and demand curve, as well as the degree to which post-merger competition will be sufficient to force the parties to pass-on the presumptive gains to consumers.[331] The approach of *CK Telecoms* towards efficiencies appears to be less anchored in rigorous economic analysis than in the adherence to unsubstantiated tenets of the Schumpeterian[332] belief system which postulates the efficiency-enhancing virtues of industry concentration.

VIII. THE MEANING OF 'SIGNIFICANCE' IN THE SIEC TEST AND THE REJECTION OF PRESUMPTIONS AS THE *CANTUS FIRMUS* OF *CK TELECOMS*

Two recurrent and interrelated themes consistently cut across the *CK Telecoms* ruling: the concern about the significance or 'appreciability'[333] of anticompetitive effects and the fierce opposition to what the General Court perceived as an undue presumption against 4-to-3 mergers. The concern that the Commission had adopted too low evidentiary standards for finding a SIEC on the basis of unilateral effects percolates all parts of the *CK Telecoms* ruling. The tightening of the evidentiary standards for qualitative and quantitative economic evidence in *CK Telecoms* is informed by the fear that the Commission's analysis would otherwise find in virtually all horizontal mergers a SIEC on the basis of unilateral effects, however modest or insignificant they may be. This, in turn, would lead to a *de facto* presumption against horizontal 4-to-3 mergers. The *CK Telecoms* ruling thus can be seen as an attempt to preserve the meaning of 'S' in the SIEC by requiring the Commission to substantiate the significance of anticompetitive effects, lest the scope of the EUMR is expanded to the extent that any merger in highly concentrated markets is presumed unlawful.[334]

This concern about the significance of anticompetitive effects and its role in preventing undue presumptions of illegality underpin the General Court's decision to heighten the standard of proof beyond the balance of probabilities standard. It also informs the requirement for the

[331] Froeb, Tschantz and Werden (n 274), 709–711; Röller, Stennek and Verboven (n 218) 68-72, 93-94; Weyl and Fabinger (n 274), 531, 568; M. Fabinger and G. Weyl, 'Pass-Through and Demand Forms' (2012) <file:///C:/Users/HP/AppData/Local/Temp/Pass-ThroughAndDemandForms_preview-2.pdf> accessed 18 December 2020.
[332] J. A. Schumpeter, *Capitalism, Socialism and Democracy [1942]* (Harper & Row 1962) 82-88, Chapter VIII.
[333] A. V. Ruiz Feases, *Consistency and modernisation of EU competition law: A view from the concept of appreciability* (European University Institute 2020). Colomo, 'Case T-399/16, CK Telecoms v Commission: a new Airtours moment and the future of effects analysis' (n 9).
[334] Thomas (n 37).

Commission to show that the merging parties were 'particularly close' to support the finding that the merger will give rise to unilateral effects. The concern about the significance of anticompetitive effects also explains the General Court's holding that a firm has to be a 'particularly aggressive competitor' to qualify as an important competitive force and the inclusion of an efficiency credit for standard efficiencies in the quantitative analysis. Most importantly, the concern about significance also underlies the operationalisation of the SIEC test for non-coordinated effects in *CK Telecoms* as a two-limbed, cumulative standard which expressly precludes a finding of unilateral effects on the mere basis of the elimination of close competition between the merging parties or the removal of an important competitive force. Rather, *CK Telecoms* makes it clear that the Commission would have to proffer a substantial body of evidence demonstrating that the various channels through which the merger is alleged to harm competition, individually and taken as a whole, give rise to 'significant' non-coordinated effects and, thus, result in a SIEC.[335]

[335] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) paras. 288-290.

A. The heightened evidentiary burden as a safeguard of the 'significance' criterion

CK Telecoms hinges on the assumption[336] that the tightening of the evidentiary standards for qualitative (closeness of competition, important competitive force) and quantitative (UPP analysis) elements of merger analysis is the sole way to ensure that only mergers giving rise to significant anticompetitive effects are challenged by EU merger control. This assumption is, at best, unpersuasive. The EU merger control procedures and the institutional features of the Commission's merger assessment already have in place a number of filters that screen out mergers whose adverse effect on competition can be presumed to be trivial.

A first, albeit indirect, filter for the significance of the effects of a merger on competition are the turnover thresholds of the EUMR determining which mergers have to be notified to the European Commission. [337] Though these thresholds are primarily a jurisdictional tool and are not designed to assess the market power of the parties or the impact of the merger,[338] they *de facto* operate as '*de minimis*' filters.[339] The turnover thresholds, indeed, encode the basic economic insight that the impact of a merger on competition within the internal market is correlated with the size of the merging parties' turnover. Simply put, a price increase of 1% by a merged entity with a combined Union-wide turnover of 5 million EUR is likely to have an insignificant impact on competition within the internal market. By contrast, a price increase of similar order of magnitude by a merged entity with a combined Union-wide turnover of 500 million EUR is likely to have a more significant impact on competition and consumers. While the former merger falls outside the scope of the EUMR, the latter merger is likely to be reviewed by the Commission.

Market share filters and concentration ratios are a second screen accounting for the significance of the expected adverse effects of a merger on competition.[340] Both thresholds serve as administrative filters to discriminate between mergers, which will have an insignificant impact on competition and are, therefore, most likely efficiency-enhancing or neutral, and those that are likely to cause significant harm to competition.[341] Market shares and concentration ratios do not only indicate the likelihood of anticompetitive effects,[342] but also provide some preliminary measure of the competitive importance of the merging parties relative to their competitors.[343] Market share and HHI levels, indeed, offer a first indication as to whether the loss of direct competition resulting from a merger tends to be substantial.[344] They thus also embody a first estimate of the magnitude of anticompetitive harm relative to the potential efficiencies of the merger under review. A slight increase in post-merger market share and HHI levels signals that the anticompetitive effect of the merger is likely to be insignificant relative to the efficiencies.[345] By contrast, high concentration ratios suggest that the anticompetitive

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[336] For an excellent and candid exposition of this assumption Thomas (n 37).
[337] Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (n 7) Art. 1, recitals 8 and 10.
[338] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertaking. OJ [2008] C95/1 para. 127.
[339] For this argument Budzinski (n 218), 469.
[340] Commission Guidelines on the assessment of horizontal mergers (n 32) paras. 14-21. See for the argument that HHI safe harbours already encode a standard efficiency deduction Warren-Boulton (n 297), 112; L. Kaplow and C. Shapiro, 'Chapter 15 - Antitrust' in A. M. Polinski and S. Shavell (eds), *Handbook of Law and Economics: Volume 2* (2007) 1162–1163; Salop (n 96), 273, 276, 298-299; Rose and Sallet (n 304), 1954.
[341] Case T-282/06 *Sun Chemical Group* (n 129) para. 138, 140.
[342] Stigler (n 12) 55; G. J. Stigler, 'The Measurement of Concentration' 30–36. For the relationship between concentration ratios and the Lerner Index in homogenous product markets with Cournot competition and its limitations C. Shapiro and J. Farrell, 'Horizontal Mergers: An Equilibrium Analysis' (1990) 80(1) The American Economic Review 107 107–108; Ivaldi and others (n 14) 59–61.
[343] Commission Guidelines on the assessment of horizontal mergers (n 32) para. 14.
[344] C. Shapiro and J. Farrell, 'Scale Economies and Synergies in Horizontal Merger' (2001) 68(3) Antitrust Law Journal 685 686. See also for the judicial recognition of a correlation between market share size and competitive harm Case C-52/09 *TeliaSonera Sverige* (n 59) para. 81.
[345] This was first recognised in the US 1982 Merger Guidelines 29. Commission Guidelines on the assessment of horizontal mergers (n 32) paras. 18 and 21.

effect of the merger is likely to be significant absent any countervailing efficiencies.[346] To address the shortcomings of HHI and market share ratios in measuring unilateral effects, competition authorities also rely increasingly on (market-share based) UPP/GUPPI thresholds as initial screening devices to identify those mergers which are (un)likely to lead to significant post-merger price increases.[347]

The significance of anticompetitive effects of a merger is hence already accounted for through filters at the screening stage (phase I) of the Commission's analysis. The effectiveness of this screening in triaging mergers that have an insignificant impact on competition is reflected in the fact that a great majority of all notified mergers (88.63%) is unconditionally cleared in Phase I. What is more, about half (49,63%) of all notified mergers are cleared under the simplified procedure without any detailed analysis.[348] This data calls into doubt claims that the imposition of an additional threshold of appreciable price or non-price effects – for instance, through the introduction of an efficiency credit – at the stage of the in-depth analysis of mergers is necessary to ensure that the Commission only challenges or blocks mergers that have a significant adverse effect on competition.

This claim lacks any empirical basis. On the contrary, building in an additional significance filter – for instance, in the form of the requirement of showing that the merging parties were particularly (rather than close) competitors or of an efficiency credit – may lead to double-discounting of the same anticompetitive effects both at the screening and the in-depth analysis stages. This bears the risk of increasing the number of type 2 errors considerably. Our previous analysis indeed shows that the different tweaks of the evidentiary standards for the finding of 'closeness of competition', an 'important competitive force' and the UPP analysis introduced in *CK Telecoms* are likely to result in anticompetitive effects of mergers not being challenged and hence, false negatives. Considering the empirical fact (see Figure 8) that over the course of the last 30 years less than 10% (8.97%) of all notified mergers have been found to result in a SIEC and only 0.38% (i.e. on average 1 merger per year) have been prohibited, the claim that the Commission intervenes in too many mergers that have only an insignificant impact on competition sounds particularly hollow.[349]

[346] Shapiro and Farrell (n 343), 686.
[347] Farrell and Shapiro (n 16), 17; Shapiro (n 270) 24–25; Salop (n 96), 300–303; Case No COMP/M.7612 Hutchison 3G UK/Telefónica UK (n 5) Annex A, para. 253.
[348] EU Commission, 'Merger Statistics: 21 September 1990 to 31 October 2020' accessed 10 December 2020.
[349] These percentages are a conservative measures as they are not only based on the number of all phase I and II conditional clearances, prohibition decisions but also include phase I and II withdrawals ibid.

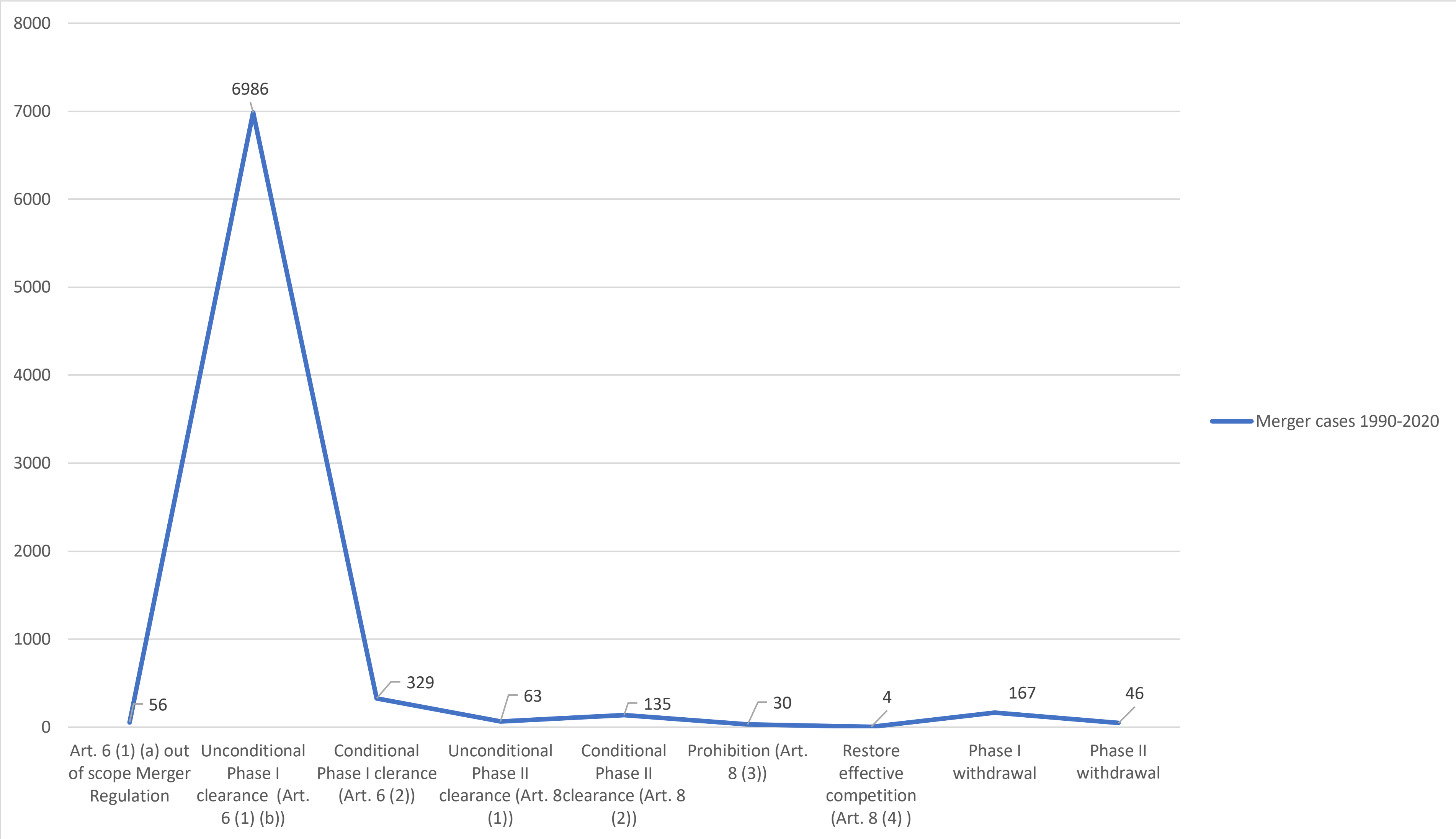

Figure 7. EU Commission merger decisions 21/09/1990-31/10/2020 – (Source EU Commission, 'Merger Statistics: 21 September 1990 to 31 October 2020)'

Calls in support of the inclusion of a significance threshold of anticompetitive effects within the in-depth analysis of mergers ignore that the cases reaching the in-depth analysis stage in phase II are not drawn from a random sample of mergers characterised by a normal distribution of pro- and anticompetitive effects.[350] Rather, mergers reaching the in-depth analysis stage form part of a quite narrow population of cases that have been identified at the screening stage to be likely to have significant effects on competition if additional information and evidence supports the finding of anticompetitive effects. The Commission looks here at the (long) tail of the distribution of pro- and anticompetitive effects that is skewed towards the latter (see in this respect, Figure 8). In Bayesian terms, the in-depth analysis of mergers (in particular phase II) does not involve an initial probability estimate of significant anticompetitive effects (prior). Instead, the Commission's analysis, here, already builds on an improved probability estimate (posterior) about the likely significant price effects of mergers that has been supported by the refined case selection and additional information gained at the screening stage.[351] An additional significance threshold in the in-depth analysis stage is hence not necessary to filter out mergers entailing insignificant effects on competition.

B. The rejection of a presumption against 4-to-3 mergers

A second cross-cutting theme in the argumentation advanced by the General Court in *CK Telecoms* is that a significance threshold and stricter standard for the establishment of closeness of competition, the finding of an important competitive force and the UPP test were necessary to avoid an undue presumption against 4-to-3 mergers. This argument is also implausible and raises a number of concerns.

Above all, the allegation that the Commission relied on such a blunt presumption against 4-to-3 mergers misrepresents the Commission's unilateral effects analysis in mobile telecom cases. It disregards that the Commission did not merely rely on the finding that the merging parties are close competitors, and/or an important competitive force and/or the merger's led to upward-pricing pressure to conclude that the merger will result in significant anticompetitive effects. On the contrary, the Commission assessed in a detailed manner (often spanning over hundreds of paragraphs) the extent to which repositioning and expansion of existing market players, entry of new MNOs or non-MNOs, or countervailing buyer power would be sufficient to defeat any unilateral price increases on the part of the merging parties. If the Commission's interpretation of 'closeness of competition' or 'important competitive force' or its use of the UPP analysis were to entail an implicit presumption against 4-to-3 mergers, this presumption would be, at best, a rebuttable one. In each mobile telecom merger, the Commission assessed countervailing evidence mounted by the parties to rebut the finding of unilateral effects. In some cases, the assessment of this countervailing evidence also successfully undermined any inference of unilateral effects from a finding of 'closeness of competition'[352] or that of an important competitive force.[353] The fact that the Commission's broad interpretation of 'closeness of competition' or 'important competitive force' indicated in all, or more precisely almost all,[354] 4-to-3 mobile mergers the existence of unilateral effects does not automatically

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[350] See in this sense also Kaplow (n 97) 38. This implied assumption of a normal distribution of the occurrence of anti- and pro-competitive effects underpins the assertion that any merger entails both a loss in competition and efficiencies Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) paras. 276-277; Thomas (n 37), 366-369, 371, 376; Colomo, 'Case T-399/16, CK Telecoms v Commission: a new Airtours moment and the future of effects analysis' (n 9).

[351] For the use of Bayesian probabilities in the context of antitrust and mergers Salop (n 96), 288. Beckner, III and Salop (n 97); Salop, 'An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards' (n 93).

[352] Case No COMP/M.4748 T-Mobile/Orange Netherlands (n 114) paras. 41-42; Case No COMP/M.5650 T-Mobile/Orange UK (n 115) paras. 55-58; Case No. COMP/M.8792 T-Mobile NL/Tele2 NL (n 122) 661–668; Decision in Case COMP/ M.7978 - Vodafone/ Liberty Global/ Dutch JV 2016 paras. 384, 386.

[353] Case No COMP/M.4748 T-Mobile/Orange Netherlands (n 114) paras. 35-40; Case No COMP/M.5650 T-Mobile/Orange UK (n 115) paras. 59-63. Decision in Case COMP/ M.7978 - Vodafone/ Liberty Global/ Dutch JV (n 351) para. 382. Case No. COMP/M.8792 T-Mobile NL/Tele2 NL (n 122) paras. 404-408, 431-565.

[354] Case No COMP/M.4748 T-Mobile/Orange Netherlands (n 114). Case No. COMP/M.8792 T-Mobile NL/Tele2 NL (n 122).

mean that the Commission relied on a blunt, irrebuttable presumption against these types of mergers.

Behind the hostility against presumptions underpinning the *CK Telecoms* case looms an even more fundamental question. Why is it that the General Court considers a presumption against 4-to-3 mergers to be bad law or economics? The General Court, alas, does not put forward any reason for its repudiation of a presumption against 4-to-3 mergers, other than that it is a presumption. This reasoning, of course, boils down to an entirely circular argument: a presumption is bad simply in virtue of it being a presumption.

Yet, this proposition is a *non-sequitur*. Even if the Commission's broad concept of 'closeness of competition' or 'important competitive force' was to give rise to some form of a *de facto* presumption against 4-to-3 mergers, this would not necessarily mean that a presumption against such mergers constitutes the wrong diagnostic tool. It suffices to cast one's gaze across the Atlantic to realise that presumptions against horizontal mergers in concentrated markets are not an anomaly. On the contrary, the *Philadelphia National Bank* (PNB) presumption, which creates a *prima facie* presumption against mergers 'resulting in a significant increase in […] concentration' is still good law and continues to structure the analysis of horizontal mergers, despite various judicial attempts to reduce its scope and alleviate its weight.[355]

Decision theory and economic analysis alike suggest that such a presumption cannot be automatically shunned as being economically irrational or inherently prone to error costs. Instead, relying on prior assumptions about the likelihood of certain mergers to effectuate anticompetitive harm and their updating by additional, case-specific evidence throughout the merger proceedings makes administrative and judicial decision making more efficient.[356] This is especially the case if one accounts for the marginal costs and benefits of gathering additional information in a world characterized by information asymmetries.[357] A number of prominent economists and lawyers have, therefore, repeatedly expressed their support of an updated, economically grounded version of the *PNB* presumption as an efficient way to structure merger analysis.[358]

Recent merger retrospectives[359] and a number of economic studies of merger-driven consolidation in telecom mergers also cannot support the proposition that a presumption against 4-to-3 mergers is economically unfounded. While these studies have methodological limitations[360] and do not lend unambiguous support for an irrebuttable presumption, a majority of studies suggests that 4-to-3 mergers more often than not give rise to price increases (Table 2). By way of example, a recent cross-country study by Ofcom finds that the combined effect of the elimination of a disruptive mobile operator (10.7% to 12.4%) and a reduction of the

[355] *United States v Baker Hughes, Inc* 908 F. 2d 981 (D.C. Cir. 1990); *FTC v H.J. Heinz Co.* (n 17); J. B. Baker, *The Antitrust Paradigm: Restoring a Competitive Economy* (Harvard University Press 2019) 74–80.
[356] Salop, 'An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards' (n 93) 19.
[357] Salop (n 96), 281. Beckner, III and Salop (n 97); Salop, 'An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards' (n 93).
[358] Baker and Shapiro (n 12) 256–257; C. Shapiro and J. B. Baker, 'Detecting and Reversing the Decline in Horizontal Merger Enforcement' (2009) 22(3) 29 34–35. Salop (n 96); Hovenkamp and Shapiro (n 303).
[359] A comprehensive survey study analysing 49 studies of mergers in 21 industries over a period of 30 years for instance suggests that mergers reducing the number of players in the industry to four or three are likely to lead to price increases due to coordinated and unilateral effects O. Ashenfelter, D. Hosken and M. Weinberg, 'Did Robert Bork Understate the Competitive Impact of Mergers? Evidence from Consummated Mergers' (2014) 57(3) The Journal of Law and Economics 67 96.
[360] For an insightful discussion P. Ormosi and others, 'A review of merger decisions in the EU: What can we learn from ex-post evaluations?' (2015) <https://ec.europa.eu/competition/publications/reports/kd0115715enn.pdf> accessed 20 August 2020.

number of mobile network operators below four (7.3% to 9.2%) may engender on average price increases of an order of magnitude between 17.2% and 20.5%.[361]

Table 3. Economic studies of the impact of mobile consolidation on prices and non-price parameters

Positive effect of mobile consolidation on price and investment (6)	No clear effect of mobile consolidation on price and investment (3)	Negative impact of mobile consolidation on price/non-price factors (10)
Affeldt /Nitsche (2014)[362] Houngbonon /Jeanjean (2014)[363] Houngbonon/HSBC (2015)[364] Lear, DIW Berlin, Analysis Mason (2017)[365] Bahia/ Castells/ Pedros (2017)[366] Genakos/Valletti/Verboven (2015) (but negative impact on prices)[367]	Frontier Economics GSMA' (2015)[368] WIK Ofcom (2015)[369] DG Comp (2015 – T-Mobile Austria/Tele.ring)[370]	Li /Lyons (2012)[371] Csorba / Papai (2014)[372] Sung (2015)[373] Genakos/Valletti/Verboven (2015) (but positive impact on investment)[374] Ofcom (2016)[375] BWB (2016)[376] RTR (2016)[377] DG COMP (2015) (T-Mobile Netherlands/Orange)[378] BEREC (2018)[379] Ofcom (quality and investment) (2020)[380]

In light of the rich body of merger retrospectives and studies on the impact of market consolidation on price and non-price competition in the mobile telecom sector, the General Court's cursory and – as it has been argued above – simplistic reading of a single study in support of its rejection of presumptions against 4-to-3 mergers appears somewhat feeble.[381] Apart from pointing to the positive correlation between market consolidation, prices, and investment, the General Court provides no explanation of why it deems a *de facto* (and rebuttable) presumption against 4-to-3 mergers objectionable.

The circularity of the General Court's reasoning with respect to presumptions against 4-to-3 mergers becomes clear if applied, for instance, to its rejection of the Commission's broad interpretation of the concept of closeness of competition. Suppose for a moment that the

[361] Office of Communications (Ofcom) (n 156) 2, 17.
[362] P. Affeldt and R. Nitsche, 'A Price Concentration Study on European Mobile Telecom Markets: Limitations and Insights' (2014). ESMT Working Paper No. 14-07.
[363] G. V. Houngbonon and F. Jeanjean, 'Is there a level of competition intensity that maximizes investment in the mobile telecommunications industry?' (2014).
[364] G. V. Houngbonon, 'The Impact of Entry and Merger on the Price of Mobile Telecommunications Services' (2015).
[365] Lear, DIW Berlin, Analysys Mason, 'Economic impact of telecoms markets in the EU on the functioning of Final report competition policy enforcement' (2017) <https://publications.europa.eu/en/publication-detail/-/publication/5a579e1c-969e-11e7-b92d-01aa75ed71a1> accessed 20 May 2019.
[366] K. Bahia, P. Castells and X. Pedros, 'Assessing the impact of mobile consolidation on innovation and quality' (2017).
[367] Geneakos, Valletti and Verboven (n 322).
[368] Frontier Economics, 'Assessing the case for in-country mobile consolidation: A report prepared for the GSMA' (2015).
[369] Wissenschaftliches Institut für Infrastruktur und Kommunikationsdienste (WIK), 'Competition & investment: An analysis of the drivers of investment and consumer welfare in mobile telecommunications: A study for Ofcom' (2015).
[370] L. Aguzzoni and others, 'Ex-post analysis of two mobile telecom mergers:: T-Mobile/tele.ring in Austria and T-Mobile/Orange in the Netherlands' (2015).
[371] Y. Li and B. Lyons, 'Market structure, regulation and the Speed of Mobile Network Penetration' (2012) 30(6) International Journal of Industrial Organization 697.
[372] G. Csorba and Z. Papai, 'Does one more or one less mobile operator affect prices? A comprehensive ex-post evaluation of entries and mergers in European mobile telecommunication market' (2015). MT-DP – 2015/41.
[373] N. Sung, 'Market concentration and competition in OECD mobile telecommunications markets' (2015) 46(26) Journal of Applied Economics 3037.
[374] Geneakos, Valletti and Verboven (n 322).
[375] Office of Communications (Ofcom) (n 156).
[376] Bundeswettbewerbsbehörde (BWB), 'The Austrian Market for Mobile Telecommunication Services to Private Customers: An Ex-post Evaluation of the Mergers H3G/Orange and TA/Yesss!' (2016). Sectoral Inquiry BWB/AW-393 Final Report.
[377] Rundfunk & Telekom Regulierungs-GmbH (RTR), 'Ex-post analysis of the merger between H3G Austria and Orange Austria' (2016).
[378] Aguzzoni and others (n 369).
[379] Body of European Regulators for Electronic Communications, 'BEREC Report on Post-Merger Market Developments: Price Effects of Mobile Mergers in Austria, Ireland and Germany' (2018). BoR (18) 119.
[380] Office of Communications (Ofcom) (n 321).
[381] Geneakos, Valletti and Verboven (n 322). Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) paras. 280, 370.

Commission henceforth applies the General Court's stricter standard of 'particularly close' competitors. Assume further that the Commission, under this new standard, consistently finds that all 3-to-2 mergers will give rise to unilateral price increases, thereby creating what could be deemed as a *de facto* presumption against 3-to-2 mergers. If the General Court were to follow its reasoning in *CK Telecoms* that the existence of a *de facto* presumption is in itself problematic, it would have to strike down the 'particular close' standard and require the Commission to show in the future that the merging parties are each other's 'closest' competitors.

Against this backdrop, one might of course, wonder whether it is really the insufficient predictive accuracy of a rebuttable presumption against four-to-three mergers or, rather, its accuracy that explains the General Court's misgivings. The Commission's analysis in *H3G UK/Telefónica UK* and previous mergers consistently demonstrates that 4-to-3 mergers tend in a majority of cases to result in adverse price effects of consumers. This conclusion finds further support in a substantial number of ex-post studies which showed that these mergers lead to short-term consumer welfare losses, *even* in cases where the Commission adopted merger remedies.[382] From a decision-theoretical point of view, the regularity of these anticompetitive effects findings in 4-to-3 mergers, as well as the additional empirical evidence of ex-post studies, might counsel in favour of an update of the Commission's initial probability estimate of anticompetitive effects (prior) in 4-to-3 mergers. A moderate rebuttable presumption against 4-to-3 mergers – albeit carrying less weight (i.e. being more easily rebuttable) than similar priors for 3-to-2 or 2-to-1 mergers – may indeed make economic and decision-theoretical sense given the existing policy learning in mobile telecom mergers. [383]

The Commission's decisional practice in mobile telecom mergers thus unveils the fundamental paradox of the more economic approach in merger control. The Commission's enforcement practice in mobile telecom sectors shows that the principal goal of the introduction of the SIEC to enable the Commission to challenge 'gap mergers' resulting in unilateral effects without creating a dominant position has been clearly achieved. The mobile mergers also bear testimony to the fact that the Commission had adopted a more economic analysis which engages in a detailed and sophisticated assessment of unilateral effects. Yet, the hope of some proponents of the 2004 reform that the adoption of the SIEC test and the shift towards a more economic approach would purge EU merger control from structural presumptions and show that most mergers are pro-competitive remained unfulfilled.

The unexpected and counterintuitive outcome of the more effects-based or more economic analysis in mobile telecom cases is that it, at least in part, seems to confirm the validity of rebuttable structural presumptions against horizontal mergers in concentrated markets. The experience gathered during the last one-and-a-half decades under the more effects-based approach has yielded empirical results that may support a partial reversal of the effects-based analysis to the benefit of a greater role of updated structural presumptions in merger control. The irony here is that the shift toward a more economic approach vindicates the assumptions underpinning (economically updated) structural presumptions. Such a recalibration would neither be a fallback into the dark ages of the rigid application of the precepts of the Structure-Conduct-Performance (SCP) paradigm,[384] nor would it be irrational, inefficient or economically illiterate. To the contrary, such an update of the priors of merger

[382] Geneakos, Valletti and Verboven (n 322); Bundeswettbewerbsbehörde (BWB) (n 375); Rundfunk & Telekom Regulierungs-GmbH (RTR) (n 376); Body of European Regulators for Electronic Communications (n 378).
[383] See for an overview of theoretical and empirical economic arguments in support of a moderate presumption of illegality for mergers with high combined market shares in highly concentrated markets Salop (n 96), 276–278.
[384] J. S. Bain, 'Relation of Profit Rate to Industry Concentration: American Manufacturing, 1936-1940' (1951) 65(3) The Quarterly Journal of Economics 292; J. S. Bain, *Industrial Organization* (John Wiley & Sons 1959).

control, based on the evidence gathered over the previous 15 years, would be the outcome of a trial-and-error process that follows the logic of Bayesian inference and learning.

It is this 'policy learning' or 'inconvenient truth' emerging from the Commission's analysis of mobile mergers that seem to upset the General Court in *CK Telecoms*. The rejection of any form of presumptions against 4-to-3 mergers in *CK Telecoms* is not grounded in its falsification and lack of accuracy. Rather, the concern about the significance of anticompetitive effects and the hostility against the use of presumptions transpiring from *CK Telecoms* is deeply grounded in the preoccupation about false positives, which at the end of the day boils down to the fear about the undue interference of the Commission with negative entrepreneurial liberty.[385] The real problem with a presumption against 4-to-3 mergers is that it seemingly contradicts some ideological beliefs in the virtues of industry concentration and external growth that some proponents of the 'effects-based' or 'more economic approach' appear to cherish. The tragedy here is that instead of testing whether these ideological priors still fit reality,[386] it is actually reality that has to fit the belief system. The logic underpinning *CK Telecoms* is, in a nutshell, the following: The Commission's effects-based analysis and economic studies show that a majority of 4-to-3 mergers in the mobile telecommunication markets lead to anticompetitive effects. There must, therefore, be something wrong with the Commission's analysis. Let's hence raise the bar for the Commission to find unilateral effects in horizontal mergers.

IX. CONCLUSION

Without a doubt, the General Court's *CK Telecoms* judgment is a watershed case with the potential to fundamentally reshape the application of the EUMR to mergers leading to unilateral effects in the absence of dominance. *CK Telecoms* advances six propositions or 'first principles' as building blocks of a new frame of reference for the analysis of unilateral effects:

(i) A SIEC in cases involving unilateral effects arises only if the merger leads to (a) a removal of an important competitive constraint between the merging parties *and* (b) a reduction of competitive pressure on the non-merging parties.
(ii) In horizontal merger cases involving complex economic analysis, the Commission has to demonstrate the existence of a SIEC to a standard of proof that is stricter than the standard of balance of probabilities.
(iii) The merging parties must be 'particularly close' competitors for their combination to lead to unilateral effects.
(iv) A firm must be a 'particularly aggressive' competitor to qualify as an important competitive force.
(v) The Commission has to demonstrate the significance of anticompetitive price increases by including a 'standard efficiencies' credit in its UPP analysis.
(vi) Any merger creates 'standard efficiencies' that must not be proven by the merging parties, but rebutted by the Commission to find a SIEC.

This new frame of reference has been well-received by commentators.[387] They herald *CK Telecoms* as a long-overdue recognition that 'the law' trumps the undue administrative discretion of the Commission and a vindication of the 'more economic approach'. Based on a thorough review of 15 years of merger enforcement in the mobile telecommunication sector,

[385] Bailey (n 78), 875–878. Vesterdorf (n 78), 28–29. Reeves and Ninette (n 78), 1040–1046; Opinion of Advocate General Tizzano in Case C-12/03 P *Commission v Tetra Laval* (n 82) paras. 77-80; Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) para. 88. Interestingly, significance, in the context of medical testing designates the concer about 'vulnerability to false positives'. J. Kay and M. King, *Radical Uncertainty: Decision-making for an unknowable future* (The Bridge Street Press 2020) 206.
[386] Several authors suggest that the opposite is the case Salop (n 96), 297–298.
[387] For an exception see Monti (n 8).

this article challenges this account by debunking both the 'rule of law' and the 'more economic approach' arguments. It shows that each of these six principles advanced by *CK Telecoms* neither constitutes a reaffirmation of the 'law', nor aligns EU merger enforcement with the economic analysis of unilateral effects.

The opposite is the case. As to the 'law': *CK Telecoms* is difficult to reconcile with the letter and spirit of the EUMR, injects a decent amount of legal uncertainty into the well-established burden-shifting framework of merger assessment and constitutes a paramount example of judicial discretion. In terms of economics: *CK Telecoms* exhibits a profound misunderstanding of the analysis of unilateral effects and is grounded in misconceptions about the significance of anticompetitive effects and the costs of legal presumptions.

Despite its flaws, *CK Telecoms* is an instructive and informative judgment. It constitutes an insightful example of the difference between economics as a belief system (ideology/theology) and analytical tool.[388] The new framework of reference for unilateral effects crafted by the General Court in *CK Telecoms* is the offspring of the former. By showing that 4-to-3 mergers more often than not lead to anticompetitive outcomes, the Commission's merger analysis in the mobile telecommunication sector challenged the belief that *any*[389] form of merger-driven industry concentration constitutes an efficiency-enhancing exercise of entrepreneurial liberty. Instead of revisiting and updating the underpinning assumptions of the belief system in light of the available empirical evidence, the General Court decided to contest the accuracy and validity of the Commission's analysis by raising the bar for finding anticompetitive effects. It remains to be seen whether the Court of Justice agrees with this logic. It is respectfully submitted that it should not.

This however does not mean that the General Court's quest for limiting principles, as well as the widespread unease over the Commission's allegedly arbitrary discretion or excessively interventionist approach on which it is premised, should not be taken seriously. One and a half decades after the introduction of the SIEC test and the adoption of the Horizontal Merger Guidelines *CK Telecoms* thrusts into the light an urgent need for further clarification of the Commission's analysis of unilateral effects in gap cases.[390] Regardless of the outcome of the appeal before the Court of Justice, the General Court's *CK Telecoms* offers a welcome window of opportunity to consider a revision of the Commission's Horizontal Merger Guidelines. In critically examining this judgment against the backdrop of the Commission's enforcement practice in mobile mergers, this article constructively contributes to the discussion about the future shape of unilateral effects analysis in Europe. It sketches the building blocks of an alternative frame of reference for the analysis of unilateral effects which could inform the revision of the existing Horizontal Merger Guidelines. The proposed framework eschews the legal and economic shortcomings of *CK Telecoms*. It envisages a more promising and significant future for the unilateral effects analysis in Europe than does the restrictive straightjacket endorsed by the General Court. The framework revolves around the following seven propositions or principles.

Operationalising SIEC - One condition is better than two: Without a doubt, the operationalisation and scope of the SIEC test merit further clarification. Yet, as the analysis in Section II shows, the cumulative reading of the SIEC test in *CK Telecoms*, which requires proof that the merger will eliminate competition between the merging parties *and* reduce the competitive pressure on non-merging parties, is not only at loggerheads with the legislative

[388] J. J. Flynn, 'The Misuse of Economic Analysis in Antitrust Litigation' (1980) 12 Sw. U. L. Rev. 335 344–354; E. M. Fox, 'The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window' (1986) 61 N.Y.U. L. Rev. 554 567–585.

[389] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) para. 277.

[390] For a similar conclusion, Monti (n 8), 467–468.

intent of the EUMR but it also bears the risk of creating false negatives. In addition, Section II also emphasises that an interpretation of the SIEC test compelling the showing that a merger will entail anticompetitive effects of a similar order of magnitude as a merger creating or strengthening a dominant firm runs counter the economic and legal rationale of the SIEC test. Instead, to maintain the effectiveness of the EUMR, the Commission should continue to be able to challenge mergers based on their first-order unilateral effects without being required to show that the merger will also reduce the competitive pressure on non-merging parties. Also, the scope of the SIEC test should continue to cover mergers that entail localised effects in specific market segments without creating quasi-dominant pricemakers able to raise prices across the entire market.

The standard of proof - 'Less likely than not' is sometimes likely enough: A clarification of the vexing question of the requisite standard of proof in merger control is long overdue. For the reasons set out in Section III, the 'strong probability standard' proposed in *CK Telecoms* should be avoided as it sets too high a bar for the Commission to successfully challenge horizontal mergers in concentrated markets. This standard would result in too many anticompetitive mergers going unchallenged. Decision theory postulates that the choice of the standard of proof should be geared towards minimising error costs.[391] Taking error costs seriously may counsel against choosing a 'uniform' and 'static' formulation of the standard of proof, such as the 'balance of probabilities' standard. Rather, decision theory suggests that the standard of proof should be commensurate to both the expected likelihood and magnitude of the potential harm caused by the merger. This implies that in certain merger cases, which can be expected to result in anticompetitive effects with a (i) high probability and/or (ii) a high magnitude of harm, the standard of proof should even be set below the 'balance of probabilities standard'.[392]

Inferring unilateral effects – Close is sometimes close enough: Any future frame of reference for the analysis of unilateral effects would have to specify the requisite standard of closeness of competition between the merging parties that indicates likely unilateral effects. Section IV shows that the 'particularly close competitor' standard endorsed by the General Court in *CK Telecoms* is underinclusive and out of kilter with the economics of unilateral effects. This may also explain why the CMA explicitly departs from the *CK Telecoms* judgment in its newly revised Merger Assessment Guidelines.[393] It would be in keeping with economic theory to align any revised EU Horizontal Merger Guidelines with their US[394] and UK counterparts[395] and to clarify that it may be sufficient for the merging parties to be one another's 'close competitors' for unilateral effects to occur, as long as there is no indication that countervailing competitive pressure by the remaining players or entry may defeat any price increase. Conversely, the mere fact that non-merging parties are competing more closely with the merging firms than the latter with one and other should not be sufficient to automatically prevent the Commission from identifying unilateral effects. Rather, the sliding-scale approach towards closeness of competition of the existing Guidelines, according to which the likelihood of unilateral effects increases with the degree of substitutability between the merging parties,[396] appears to be economically sound and should be maintained.

Any revised merger guidelines should, however, provide a better explanation of the economic rationale underpinning this sliding-scale approach to enhance the acceptance of this

[391] Beckner, III and Salop (n 97), 61–62.
[392] Kaplow (n 97) 46–47.
[393] Revised Merger Assessment Guidelines - Summary of responses to the consultation 2021. CMA129resp paras. 2.38 (b), 2.45; Merger Assessment Guidelines (n 136) paras. 4.8-4.10.
[394] Antitrust Division of the US Department of Justice/Federal Trade Commission - Merger Guidelines 2010 (n 64) 21.
[395] Merger Assessment Guidelines (n 136) paras. 4.8 - 4.10.
[396] Commission Guidelines on the assessment of horizontal mergers (n 32) para. 28.

standard. To promote legal certainty, the revised Guidelines should also explicate that, absent evidence to the contrary, low diversion ratios and pre-merger margins may be considered as an indication for the absence of unilateral effects. Moreover, future Merger Guidelines should consider additional metrics that might allow greater interpretability of the importance of substitution and the significance of the competitive relationship between the merging parties gauged by diversion ratios. One such metric can be constructed by comparing and weighing the observed with market-share-based benchmark diversion ratios. The greater the margin between actual and benchmark diversion ratios, the higher the degree of substitutability, the closer the competition between the parties and the more market shares will tend to underestimate the actual competitive constraints the firms impose upon each other.[397]

Identifying an important competitive force - aggressive is sometimes aggressive enough: The concept of 'important competitive force' also warrants further clarification. Section V shows that the General Court's attempt in *CK Telecoms* to align the definition of 'important competitive force' with the notion of a maverick firm disregards the competitive dynamics in differentiated product markets. It fails to acknowledge that the removal of disruptive players may entail an important standalone ('cannibalisation') effect on competition, even though the player does not act as the most aggressive price competitor across all market segments. The Guidelines should therefore clarify that an important competitive force does not have to act as a maverick or to be the most aggressive player in the market. To account for the 'cannibalisation effect' and non-price competition in differentiated product markets, a definition of an important competitive force should encompass firms that 'contribute[…], substantially and consistently, to the competitive process on the market, based on parameters such as price, quality, choice and innovation.'[398] This standard can be operationalised by the existing test in paragraph 37 of the Horizontal Merger Guidelines which requires a firm to exert more influence on the competitive process than its market share would suggest.[399] Yet, future Guidelines should do a better job in clearly explaining the 'cannibalisation effect' and the importance of non-price competition in specific market segments of differentiated product markets as underpinning rationale for the application of the concept of 'important competitive force' in unilateral effects cases. The reformed Guidelines should also provide more information on the type of qualitative and quantitative evidence, such as gross adds or pricing studies, the Commission relies on to determine the existence of an important competitive force.

What is wrong with priors or presumptions? Aside from clarifying the requisite standard for finding 'closeness of competition' and the removal of an important competitive force, the future framework should also elucidate their evidentiary weight and interplay with the various other parameters forming part of the unilateral effects analysis. Consistent with economic theory, future Guidelines should state that in the absence of entry, repositioning and/or countervailing efficiencies, the finding of closeness of competition or an important competitive force would indicate likely unilateral effects. As argued in Section VIII, in *CK Telecoms,* the General Court failed to put forward any compelling economic or legal reason for its repudiation of a presumption against 4-to-3 mergers, other than that it is a presumption.[400] From a decision-theoretical point of view, however, the frequent findings of adverse price effects in a majority of 4-to-3 mobile mergers since 2006, as well as a majority of recent economic studies of market consolidation in the mobile telecommunication industry,[401] seem

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[397] Case No COMP/M.7637 Liberty Global/BASE Belgium (n 120) paras. 227-230; Case No COMP/M.4748 T-Mobile/Orange Netherlands (n 114) para. 58 and fn. 28.
[398] Case No COMP/M.7758 Hutchison 3G Italy/WIND/JV (n 77) para. 432.
[399] Commission Guidelines on the assessment of horizontal mergers (n 32) para. 37.
[400] Case T-399/16 *CK Telecoms UK Investments v Commission* (n 41) para. 249.
[401] See Table 3.

to lend some support to an update of the Commission's initial probability estimate of anticompetitive effects (prior) in 4-to-3 mergers.

Given the existing policy learning in mobile telecom mergers, any reform of the Horizontal Merger Guidelines should involve a serious discussion of whether a moderate rebuttable presumption against 4-to-3 mergers – albeit carrying less weight (i.e., being more easily rebuttable) than similar priors for 3-to-2 or 2-to-1 mergers – may indeed make economic and decision-theoretical sense.[402] Along similar lines as the CMA's newly adopted Merger Assessment Guidelines, the revised Guidelines could clarify that in markets where competition is primarily driven by a few significant players, any of these significant players can be considered as a close competitor and an important competitive force, unless case-specific evidence suggests otherwise. Accordingly, the smaller the number of significant pre-merger players, the higher will be the *prima facie* expectation that the merger may give rise to unilateral effects.[403] Should such a presumption be introduced, the revised Guidelines would have to clearly explain how this *prima facie* expectation can be rebutted by proffering undermining (e.g., a counterfactual analysis showing that the merging parties will cease to be close competitors in the near future) or off-setting evidence (e.g., entry, repositioning and efficiencies).[404]

The appropriate role of UPP analysis as quantitative evidence: Any revised Merger Guidelines should account for the growing importance of quantitative merger analysis in unilateral effect cases. Section VI discusses a number of misconceptions pertaining to the UPP analysis and the significance of estimated price increases that underpin the General Court's requirement of the inclusion of an efficiency credit in *CK Telecoms*. Above all, the judgment lays bare how urgently the appropriate role of and requisite standard for quantitative evidence (notably the different types of UPP techniques) in the analysis of unilateral effects need to be clarified. The revised Merger Guidelines should therefore contain a clear exposition of the basic parameters and underpinning assumptions of the Commission's UPP analysis, the type of information that can be inferred from various UPP indexes, as well as their limitations. Consistent with economic theory and the decisional practice of the Commission, it should be clearly stated that GUPPI values and indicative price increases derived from extended UPP models provide an indication of the magnitude of the merging firms' incentive to increase prices, but not a precise quantification of their price effect.

The evidentiary weight attributed to the quantitative evidence would also merit further consideration. This relates in particular to the question of whether the (G)UPP(I) analysis should only be used as 'circumstantial evidence' together with other case-specific evidence (e.g., market shares, important competitive force, entry, repositioning) or, whether, and if so when, it can also serve as the basis of a decision-rule. The evidentiary weight of quantitative evidence should also inform the height of the evidentiary standard it has to meet. If the GUPPI/UPP-derived evidence is considered together with other factors, such as closeness of competition, the likelihood of entry and repositioning, there is no obvious need to build any default efficiency credit or tolerance level into the UPP analysis. Accordingly, only efficiencies substantiated to the requisite legal standard should be incorporated in the quantitative analysis. By contrast, in cases where specific GUPPI values are used as the basis of decision-rules, the inclusion of a standard efficiency credit or GUPPI 'standard error term' may be indicated. The use of GUPPI thresholds as decision-rules should, however, be limited to the screening stage

[402] See for an overview of theoretical and empirical economic arguments in support of a moderate presumption of illegality for mergers with high combined market shares in highly concentrated markets Salop (n 96), 276–278.
[403] Draft Revised Merger Assessment Guidelines (n 61) para. 4.10.
[404] For the distinction between undermining and offsetting evidence Salop, 'An Enquiry Meet for the Case: Decision Theory, Presumptions, and Evidentiary Burdens in Formulating Antitrust Legal Standards' (n 93) 3; P. R. Rice and S. S. Cutter, 'Problems with Presumptions: A Case Study of the "Structural Presumption" of Anticompetitiveness' (2002) 47(4) The Antitrust Bulletin 557 560.

of phase I and to mergers where the sheer number of markets affected by a merger makes a detailed market-by-market analysis impractical.

Efficiencies reconsidered. The *CK Telecoms* judgment exhibits the need for clarifying and revising the appropriate analysis of efficiencies in merger cases. For the reasons discussed in Section VII, the creation of the distinct category of 'standard efficiencies' as envisaged in the *CK Telecoms* judgment should be resisted, as it is at odds with the letter and spirit of the EUMR and is likely to result in false negatives and under-deterrence. Any revised Guidelines should therefore maintain the existing allocation of the burden of proof which, as argued in Section VII, assigns the burden of production and persuasion for proving efficiencies to the merging parties. Given the extremely low success rate of efficiency claims, the standard of proofing efficiencies should, however, be reviewed and, if necessary, reconsidered. One way of lowering the standard of proving efficiencies would consist of relaxing the strictly cumulative reading of the existing requirements of substantiality, merger specificity, consumer benefits and timeliness. For instance, efficiency claims that are plausible but do not meet all criteria could be at least to some extent accounted for, for instance by crediting a discounted value of these efficiencies in the UPP analysis. Another elegant way to scrutinise the merging parties' efficiency claims, although they are not all substantiated to the requisite standard, would consist of a more frequent use of Critical Marginal Cost Reductions (CMCR) which allows for a comparison of the merging parties' plausible efficiency with the minimum amount of efficiencies necessary to set off estimated anticompetitive price effects. Even if the cumulative standard for showing efficiencies remains unchanged, the revised Guidelines should clearly set out how cognisable efficiencies will be factored into the quantitative analysis. Further, reflection on the assessment and quantification of non-price efficiencies is also warranted.

Unlike the restrictive framework advanced by the General Court in *CK Telecoms*, the foregoing seven principles may serve as building blocks of a revised frame of reference for the analysis of unilateral effects that is more in keeping with the legislative intent underpinning the 2004 reform and the economic theory of unilateral effects. In proposing the clarification and codification of key parameters of the decisional practice of the Commission since 2004 and taking on board the insights of recent economic literature and *ex-post* studies of EU merger decisions, this alternative framework would be grounded in policy learning. By making the legal and economic premises underpinning the analysis of unilateral effects more explicit, this framework would also enhance legal certainty and render the Commission's merger more accountable. Most importantly, in contrast to the straightjacket espoused in *CK Telecoms*, a revision of the Merger Guidelines along the proposed principles would preserve the effectiveness of EU merger enforcement in unilateral effects cases.