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EU Merger Regulation: Limited Judicial Review of Complex Economic Assessments

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Oslo 5 November 2022

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Agenda

- The Commission as an administrative enforcer of the EU Merger Regulation (EUMR)
- The doctrine of limited judicial review of complex economic assessments
- Judicial review of the Commission's application of the SIEC-test – law, fact and complex economic assessments
 - Application of limited judicial review
 - Scope of limited judicial review



The Commission's enforcement of the EUMR

- All mergers with a 'Union Dimension' shall be notified to the Commission prior to implementation
- Notifications are submitted to and assessed by the Commission, (Including DG Comp: lawyers and economists)
 - Phase I: 15 working days
 - Phase II: 90 working days (15+20)
- Approval or prohibition depending on whether the proposed merger is 'likely to impede effective competition, in particular as the result of the creation or strengthening of a dominant position' (Art. 2 (2) and (3) EUMR)
 - **SIEC**



The powers of the Commission

- Deciding whether to initiate investigations into a proposed merger
- Deciding whether a proposed merger should be approved or prohibited (SIEC)
- Investigatory powers: documents, interviews, visits
- Final decision:
 - **Approval**
 - **Conditional approval** if SIEC can be remedied through behavioural or structural remedies offered by the parties
 - **Prohibition**



Judicial review as remedy for accountability

Article 263 TFEU

(ex Article 230 TEC)

The Court of Justice of the European Union shall **review the legality** ... of acts ... of the Commission ...
... on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the
Treaties or of any rule of law relating to their application, or misuse of powers.

...

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, **institute proceedings against an act addressed to that person or which is of direct and individual concern to them**, ...



- General Court in the first instance
 - Law
 - Fact (evidence review)
 - Application of law
- The European Court of Justice (ECJ) as appeal court
 - Law
 - Application of law
 - No evidence review, only whether GC distorted the evidence
- Standard of judicial review:
 - In principle, comprehensive judicial review, in law and in fact
 - Limited judicial review of complex economic assessments in the Commission's application of substantive competition rules



High intensity or low intensity review

- High intensity review
 - Interpretation of law
 - 'simple' or 'primary facts'
- Low intensity review of assessments subject to a margin of discretion ('complex facts')

44. However, according to well-established case-law, **some deference to the EU institutions is granted where they enjoy a degree of discretion** in applying the relevant provisions. In this context, I would define discretion as **the room for manoeuvre given (expressly or implicitly) by EU primary or secondary law to the EU institutions, to choose between various lawful courses of action when applying a given rule in order to pursue a specific objective.**

Opinion of AG Emiliou in Case C-389/21 P, *ECB v Crédit Lyonnais*,
27 October 2022, (43-44)



Limited judicial review of complex economic assessments in Article 2 EUMR

‘[T]he basic provisions of the Regulation, in particular **Article 2 thereof, confer on the Commission a certain discretion**, especially with respect to **assessments of an economic nature**.

Consequently, **review by the Community judicature of the exercise of that discretion**, which is essential for defining the rules on concentrations, **must take account of the discretionary margin implicit in the provisions** of an economic nature which form part of the rules on concentrations.’

Joined Cases C-68/94 and C-30/95, *France and Others v Commission (Kali & Salz)*, paragraph 223–224; Case T-370/17 *KPN v Commission*, paragraph 58; Case T-210/01 *General Electric v Commission*, paragraph 60.



Limited judicial review summarised

Advocate General Kokott in Case C-376/20 P *CK Telecoms*, (50):

- The Commission' margin of discretion concerns...
 - 'forward-looking economic assessments in the context of merger control'
 - 'economic matters for the purposes of applying ... Article 2 EUMR'
- Limited judicial review consists in...
 - Whether facts are accurately stated
 - Manifest error of assessment ('manifest error-test')
 - No substitution of Court's economic assessment for that of the Commission
 - The Courts must not refrain from reviewing the Commission's interpretation of information of an economic nature



NB: Interpretation of *law* is not affected!

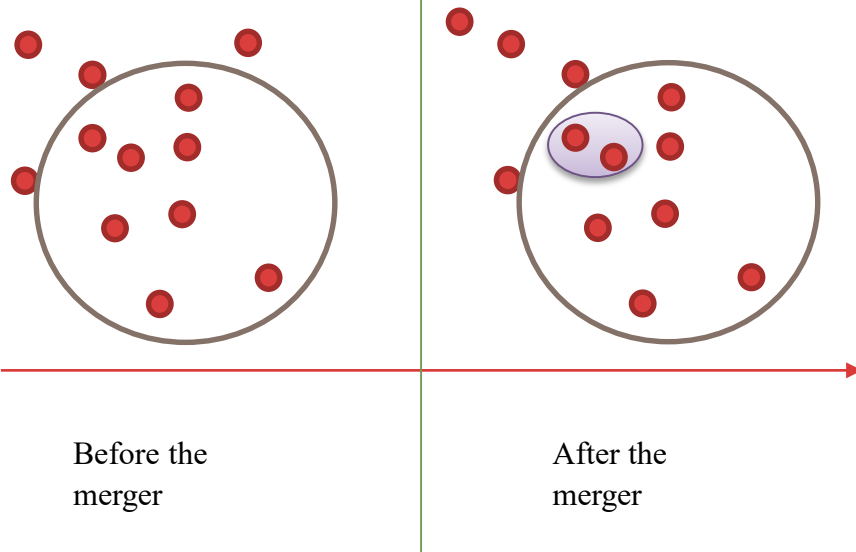
Substantive judicial review of SIEC-test by the General Court

- Is the merger likely to result in a ‘significant impediment of effective competition, in particular as a result of the creation or strengthening of a dominant position’?
 - Interpretation of law
 - Fact-finding (evidence review)
 - Application of law



The problem ...

- The assessments required for applying the SIEC-test are forward-looking, complex and economic, as well as (to some extent) being guided by a legally binding structure ('legal tests')
- What is *law*?
- What is *fact*?
- What are *economic matters/ complex economic assessments*?



The problem (cont.)

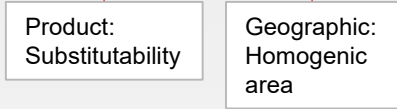
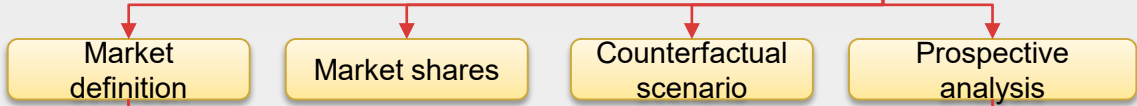
- Application of SIEC on a case-by-case basis by Commission
- Six Commission decisions annulled (Whish and Bailey 2021)
- ‘SIEC’ in ‘gap’ cases interpreted for the first time in *CK Telecoms* (2020)
- Has the Commission been granted ‘de facto discretion’ by the reviewing courts over the years?



'significant impediment to effective competition'

Theory of harm (i.e. price increase, reduction of quality because merger is likely to lead to SIEC)

- Legal concepts vs. economic concepts
- Choice of factors
- Choice of approach
- Choice of data/facts
- Interpretation of data/facts



Anti-competitive effects

Counter measures

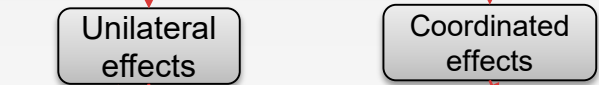
Horizontal mergers

Non-horizontal mergers

Buyer power

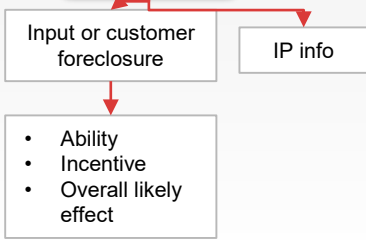
Entry

Efficiencies



- Large market shares
- Close competitors
- Customer switching
- Competitors' ability to increase supplies
- Hindering expansion
- Merger eliminates important competitive force

- Terms of coordination
- Monitoring
- Deterrent mechanisms
- Reactions of outsiders



- Terms of coordination
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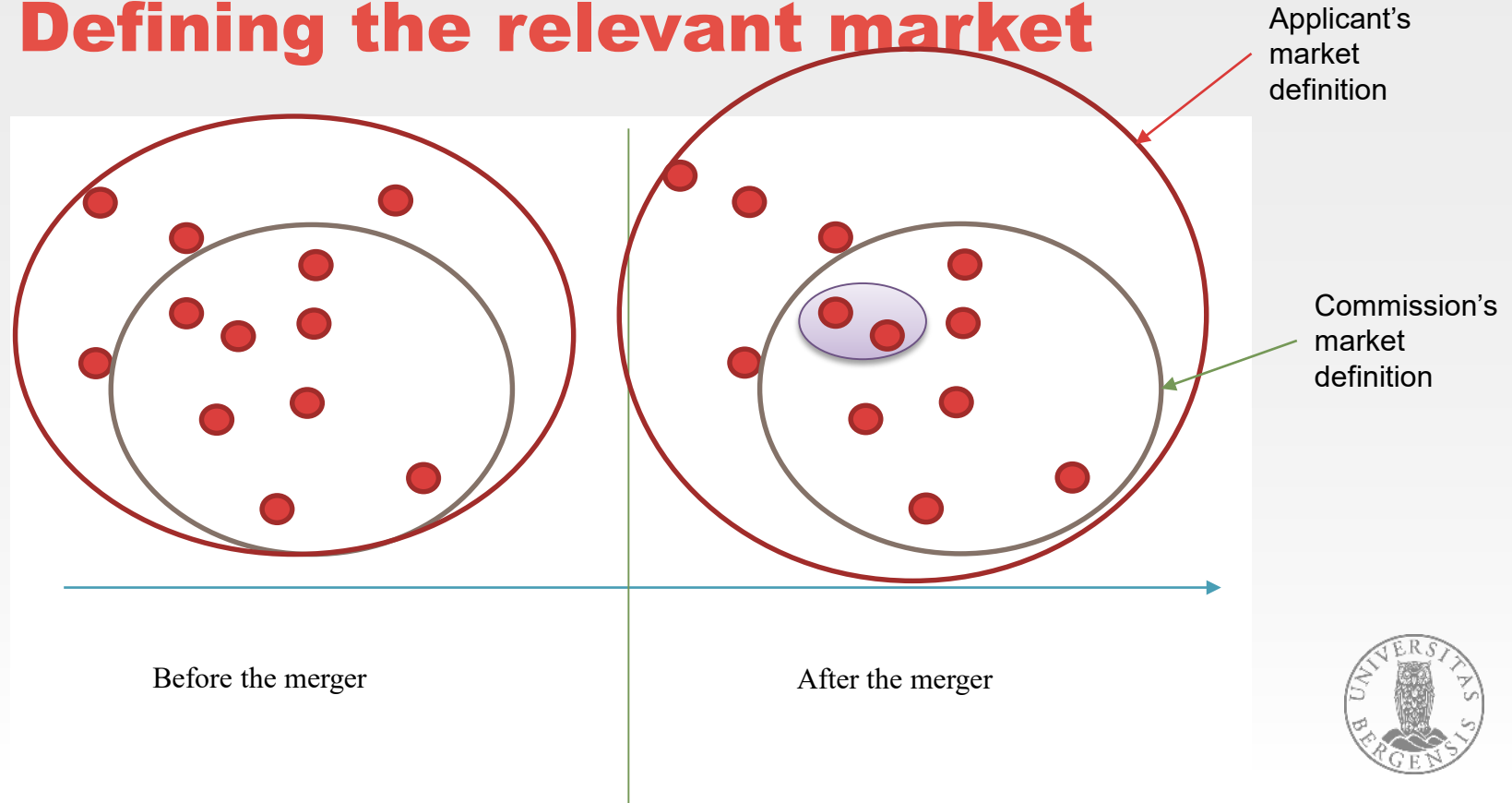
The Commission's margin of discretion

- Market definition (*Heidelberg Cement*)
- Assessment of risk of input foreclosure (*KPN*)
- Whether merger eliminates important competitive force (*CK Telecom*)


- No systematic overarching way of identifying complex economic assessments by the General Court or ECJ
- Judicial review: Considers whether Commission's assessment suffers from manifest error, based on pleas and arguments from applicant (usually no manifest error)



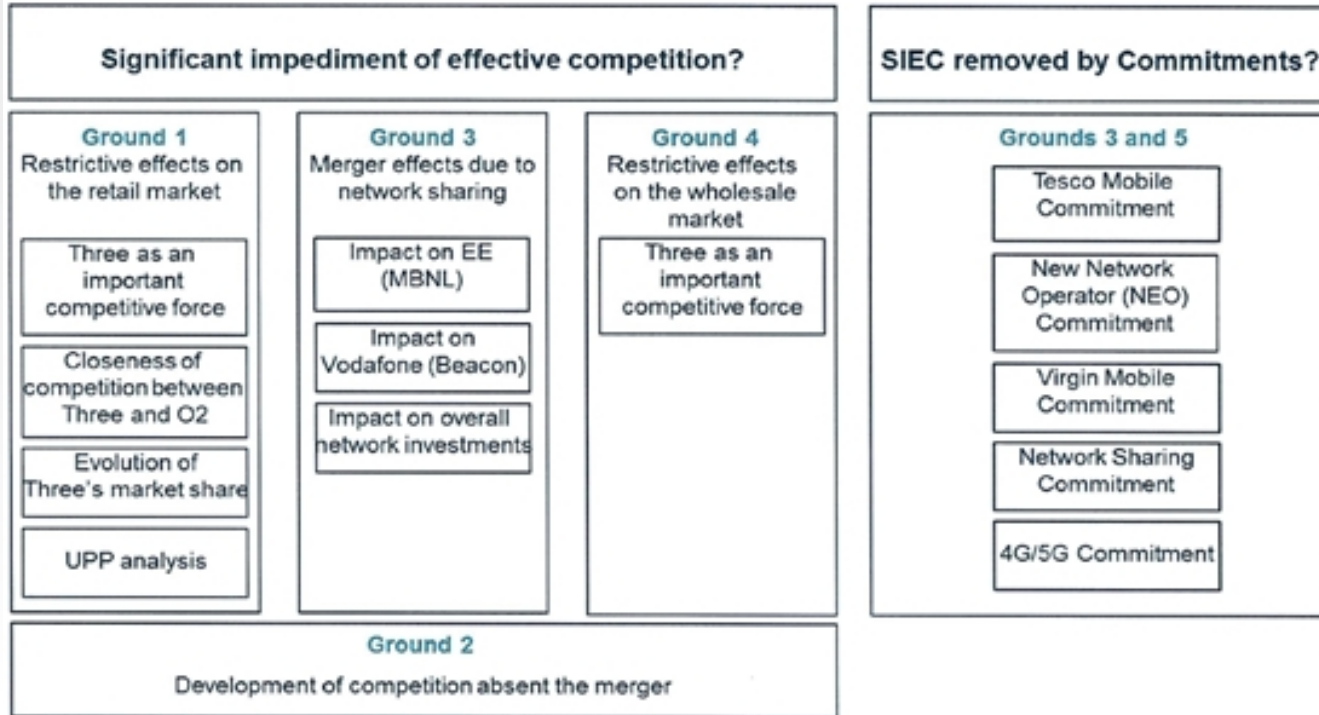
Defining the relevant market



Assessment of horizontal unilateral effects

Main factor	Large market shares	Merging firms are close competitors		Customer switching		Competitors are unlikely to increase supply if prices increase		Merged entity able to hinder expansion by competitors		Merger eliminates an important competitive force	
		Degree of substitutability between merging firms' products	Few alternative suppliers	Switching costs	Binding capacity constraints and costs	Existing excess capacity is significantly more costly to operate than capacity in current use	Rising cost of expansion	Rising cost or decrease quality of interoperability or access to IP-protected supplies	Market is already concentrated	Innovation is an important competitive force in a market or two important innovators are merging	
Sub-factor 1		Degree of substitutability between merging firms' products		Few alternative suppliers	Switching costs	Binding capacity constraints and costs	Existing excess capacity is significantly more costly to operate than capacity in current use	Rising cost of expansion	Rising cost or decrease quality of interoperability or access to IP-protected supplies	Market is already concentrated	Innovation is an important competitive force in a market or two important innovators are merging
Sub-factor 2		<ul style="list-style-type: none"> - Customer preference surveys - Purchasing patterns - Cross-price elasticities - Diversion ratios 	High pre-merger margins			Factors similar to those on entry, section VI in guidellines		Control or influence over supply inputs or distribution possibilities	Control over patents or other IP	HHI?	

T-399/16 *CK Telecoms*



- Horizontal
- 4 actors in defined market before merger
- No dominant position



CK Telecoms appeal case

- Who gives the final interpretation of concepts such as ‘close competitors’ and ‘important competitive force’?
- Commission: economic concepts within the margin of discretion
- Advocate General Kokott (86): ‘**when those concepts are derived from or dependent on legal concepts** of primary or secondary EU law, **the situation is different.** In the case of legal concepts which have not been delimited, including the concept of ‘significant impediment to effective competition’, the EU Courts have an exclusive and definitive power of interpretation.’



So, where are we?

- The meaning of 'SIEC' is a question of law
- Assessment of whether a proposed merger is likely to lead to a SIEC requires complex economic assessments
- The more detailed legal tests, the less is the room for discretion (E.g. Commission guidelines and Case law)
- The applicant is responsible of proving a manifest error of law or fact
 - Provide sufficient evidence
 - Provide sufficient and precise reasoning



Case C-295/12 P, *Telefónica*

58 In the present case, the appellants simply claim, by means of general assertions alleging that the General Court erred in law in its examination of the evidence adduced by the Commission, and **do not specifically identify the nature of any such error**, inter alia by reference to the requirements set out at paragraph 54 above. Accordingly, **they do not maintain that the General Court failed to establish whether the evidence put forward is factually accurate, reliable and consistent or that the evidence reviewed by that court does not contain all the relevant data** that must be taken into consideration in appraising a complex situation. Moreover, **they fail to explain how the General Court erred in law in the conclusions set out at paragraphs 211, 220, 223, 244, 251 and 263 of the judgment under appeal and in the reasons given for those conclusions.**



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The standard of judicial review: the degree of deference granted to the deciding body

41. **Article 263 TFEU sets out the *scope* of judicial review to be carried out** by the Court of Justice of the European Union **when the legality of an EU act is challenged**: an action for annulment may be brought ‘on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers’.

42. **However, the Treaties are silent with regard to the *standard* of judicial review to be applied by the EU Courts**. The concept of ‘standard of review’ refers, generally, **to the *intensity* of review** that courts may exercise when reviewing the lawfulness of the challenged acts. Approached from another angle, **the standard of review corresponds to the degree of deference accorded by courts to the bodies** which adopted the challenged acts. Obviously, **the higher the intensity of review, the lower the degree of deference** accorded to the body in question and vice versa.



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