EU Merger Control After the Grand Chamber's Judgment in *Commission v. CK Telecoms Investments*

Giorgio MONTI*

The Grand Chamber set aside the judgment of the General Court in CK Telecoms having found eight errors in law. This paper dissects the judgment of the Grand Chamber to illustrate and explain the differences between the two judgments as well as the significance of these differences. The Grand Chamber clarifies the standard of proof and confirms that the analysis of unilateral effects in oligopoly markets requires a holistic analysis of a number of factors none of which is decisive. While it ratifies the analytical stance of the Commission this does not necessarily indicate that the Commission will prevail as the appeal is heard again at the General Court. Furthermore, the judgment as well as the new techniques used by the Commission suggest that a review of the Horizontal Merger Guidelines is much needed. More generally, the clash between the two courts reveals a fundamental difference between judges in the two courts about the role of EU competition law.

Keywords: EU Merger Regulation, Horizontal Merger Guidelines, unilateral effects, oligopoly, judicial review, telecommunications market, significant impediment of effective competition, standard of proof, competitive constraint, closeness of competition

1 INTRODUCTION

The General Court's judgment in *CK Telecoms* had made merger analysis more challenging for the Commission.[1] The standard of proof was set very high for complex cases, the scope of the EU Merger Regulation was read restrictively, an efficiency credit was required when carrying out certain diagnostic quantitative tests, and the General Court was very critical of the Commission's assessment of the evidence. The judgment received praise in the academic literature for curtailing the Commission's discretion and for its economic

* Tilburg Law and Economics Center (TILEC) and Tilburg Institute for Law, Technology and Society (TILT), Tilburg University. This paper has benefited from the comments from several economists when presented at TILEC and Oxera and from the input of researchers at the EUI's Competition Law Working Group. I am grateful for their input buy any errors remain mine. On the basis of the ASCOLA Declaration of Ethics, no funding was received for the writing of this article.
Email: G.Monti@tilburguniversity.edu.

1 Case T-399/16, *CK Telecoms UK Investments v. Commission*, EU:T:2020:217.

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insights.[2] Some were less convinced.[3] The Commission's appeal against this judgment was heard by the Grand Chamber of the Court of Justice.[4] In its judgment released on 13 July 2023, it found eight errors in law,[5] three instances where the General Court distorted the Commission's decision,[6] and one instance where the General Court distorted the Commission's written pleadings.[7] As a result, the General Court's judgment was annulled in very strong terms: 'having regard to the breadth, nature and scope of the errors made by the General Court, identified in the present judgment, which affect the General Court's reasoning as a whole, the judgment under appeal must be set aside'.[8]

This paper explains the judgment of the Grand Chamber, highlights the differences between it and that of the General Court, and explores the significance of this judgment for the specific case and for merger control more generally. The devil is in the detail and therefore much of the discussion starts with a close

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2 *See* e.g., M. Furse, *Locking down the Meaning of SIEC in the EUMR – CK Telecoms* 41(9) Eur. Competition L. Rev. 427 (2020), P. Ibáñez Colomo, *EU Merger Control Between Law and Discretion: When Is an Impediment To Effective Competition Significant?* 44(4) World Competition 347 (2021), doi: 10.54648/WOCO2021021, D. Auer & N. Petit, *CK Telecoms v. Commission: The Maturation of the Economic Approach in Competition Case Law* 11(5–6) J. Eur. Competition L. & Prac. 225 (2020), doi: 10.1093/jeclap/lpaa038.

3 E. Deutscher, *Prometheus Bound? The Uncertain Future of the Unilateral Effects Analysis in EU Merger Control after CK Telecoms* 18(2) J. Competition L. & Econ. 323 (2022), doi: 10.1093/joclec/nhab012 and G. Monti, *EU Merger Control after CK Telecoms UK Investments v. Commission*, 43(4) World Competition 447 (2020), doi: 10.54648/WOCO2020023.

4 Case C-376/20 P, *Commission v. CK Telecoms Investments Ltd*, EU:C:2023:561.

5 (1) error in the standard of proof (para. 88); (2) error in the interpretation of Art. 2(3) of the Merger Regulation (para. 114); (3) error in defining the concept of important competitive force (para. 168); (4) error in setting a requirement that the parties to the merger must be particularly close (para. 192); (5) error in comparing the price increase here with the price increases in other cases (para. 220); (6) error requiring an efficiency credit when carrying out certain economic tests (para. 246); (7) error in failing to carry out an overall assessment of the relevant factors (para. 270); (8) error in raising of its own motion an issue that did not correspond with the complaint made by the applicant in the segment of the decision relating to the impact of the merger on network sharing agreements (para. 335). Paragraph numbers refer to the judgment of the Court of Justice referred to in n. 4. Each of these is discussed in the sections that follow.

6 (1) the General Court's view that the Commission was of the opinion that the elimination of an important competitive force would be sufficient to prove a significant impediment to effective competition (paras 142–150); (2) the General Court's statement that the Commission took the view that the closeness of competition between Three and O2 was sufficient to find that the merger would lead to a significant impediment to effective competition (paras 194–196); (3) the General Court's statement that the possible degradation of the network was not considered (paras 308–310). These factual errors which are 'obvious from the documents in the Court's file' (para. 142) are not discussed further here but the criticism of these by the AG is worth noting. Paragraph numbers refer to the judgment of the Court of Justice referred to in n. 4.

7 Commission did challenge CK Telekom's price increase estimate (paras 213–214). Paragraph numbers refer to the judgment of the Court of Justice referred to in n. 4.

8 Case C-376/20 P, *supra* n. 4, para. 337. The judgment is discussed in depth by S. Thomas, *Structure and Enforcement of the SIEC Test: Analyzing the CK Telecoms Judgment of the Court of Justice* (13 Sep. 2023), SSRN, https://ssrn.com/abstract=4570304 (accessed 17 Jan. 2024).

account of the factual and economic issues at play before reflecting more generally on the significance of the points made by the Grand Chamber. The paper is structured in a manner that aligns with the order in which the points were treated by the Grand Chamber followed by concluding remarks setting out the main takeaways in the final section.

A brief account of the facts and the Commission decision is necessary to explain the economic and legal issues.[9] The merger would affect the UK retail market. Pre-merger, there were four mobile network operators offering retail services: BT/EE (30–40% market share), O2 (20–30% market share), Vodafone (10–20% market share) and Three (10–20% market share).[10] There are also a range of mobile virtual network operators (e.g., Tesco Mobile and Virgin Mobile) who do not own a network and operate by having an access agreement with a mobile network operator: these actors have a limited impact on competition. By the notified transaction, Three would take sole control of O2. The merged entity would be the largest player in the UK retail market but it would not hold a dominant position.

In addition, the upstream market for the mobile network was organized by way of two network sharing agreements, one between BT/EE and Three (the MBNL joint venture) and one between Vodafone and O2 (the Beacon agreement). These agreements, which predated the merger, were not anticompetitive and were designed so that the operators would share the costs of developing and maintaining the network while continuing to compete downstream in the retail market. If the merger were to be allowed, the merged entity would have a foot in both of these network sharing agreements and in the long term the merged entity planned to concentrate on one or the other of these networks.

The Commission considered that the merger would have three adverse effects.[11] First, in the retail market, the elimination of one mobile network operator would reduce competition leading to higher prices and less choice for consumers. Second, in the upstream market where network sharing agreements were in place the merger would lead to reductions in the quality of networks and lead to fewer investments, both effects would lead to harm in the retail market. Third, post-merger, virtual mobile network operators would have one fewer mobile network operator to provide hosting services and this would weaken their bargaining position of and hinder their expansion, reducing competition further. Considered cumulatively, these three effects would lead to a significant

[9] Case M.7612, *Hutchison 3G UK/Telefónica UK* (decision of 11 May 2016).

[10] Case C-376/20 P, *supra* n. 4, Opinion of AG Kokott, para. 6. The market shares are calculated based on the number of subscribers. The precise market shares are confidential so the Commission and Courts customarily provide a range as reported here.

[11] The Court treated these as three theories of harm, *supra* n. 4, para. 30.

impediment of effective competition in the retail market. In reaching these conclusions, the Commission drew on its extensive experience in this market, having now rendered a number of decisions as consolidation of the mobile telecom industry players took place in many European countries.[12] However, this was the first time a merger was blocked in this market, prompting an appeal. On the merits the General Court quashed the decision. As we will see below, little of the General Court's judgment survived on appeal to the Court of Justice.

This case was the first time the EU courts had to confront the assessment of a merger where the Commission found that there would be unilateral effects even if the merged entity did not hold a dominant position. The Merger Regulation had been amended in 2004 specifically to allow the Commission the capacity to regulate these mergers. Before 2004 the Commission could only intervene when a merger would create or strengthen a single or collective dominant position and a result of which competition would be significantly impeded. After 2004, the Commission could intervene if the merger was likely to cause a significant impediment of effective competition even if no dominant position was created.[13] Given this innovation, the Commission was required to issue guidance to provide a 'sound economic framework' for the assessment of mergers.[14] The Horizontal Merger Guidelines issued in 2004 made a first attempt at explaining how such competition risks were to be assessed.[15] This part of the Guidelines was not a codification of the Commission's practice or the Court's case-law (no cases were available since the Regulation had just come into force) so the Commission drew on existing economic studies to explain how such unilateral effects could be established and listed a number of factors that would be relevant for this assessment.[16] The significance of the appeal lies therefore also in how far the EU courts considered that the Guidelines were an appropriate implementation of the new merger rules.

2 STANDARD OF PROOF

The General Court held that while the ordinary standard of proof under the Merger Regulation requires that the Commission show that a significant impediment of effective competition was more likely than not on the balance of

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12 These are discussed in G. Monti, *Horizontal Mergers – Refining the Commission's Assessment Standards* TILEC Discussion Paper No. 2023–11 and Deutscher, *supra* n. 3.

13 Council Regulation 139/2004 on the control of concentrations between undertakings [2004] OJ L 24/1.

14 *Ibid.*, Recital 28.

15 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5.

16 Of particular importance was the report commissioned by DG COMP: Marc Ivaldi, Bruno Jullien, Patrick Rey, Paul Seabright, Jean Tirole, *The Economics of Unilateral Effects: Interim Report for DG Competition, European Commission* (2003) To my knowledge a final report was not published.

probabilities, some complex merger assessments, like the one in this case, which was based on several theories of harm and which relied on a large body of evidence, require that the Commission should 'produce sufficient evidence to demonstrate with a *strong probability* the existence of significant impediments following the concentration'.[17]

The Grand Chamber disagreed: there is one standard of proof under the Merger Regulation irrespective of the type of merger and the type of decision and this is that the Commission must gather 'a sufficiently cogent and consistent body of evidence' to demonstrate that 'it is *more likely than not* that the concentration concerned would or would not significantly impede effective competition in the internal market or in a substantial part of it'.[18]

How the Grand Chamber reaches this conclusion is worth examining because it may have an impact on how the Court might approach issues pertaining to the standard of proof elsewhere. First, the Court recalls a distinction between the standard of proof and the requirements pertaining to the quality of the evidence.[19] Second, the complexity of a theory of harm is 'a factor which must be taken into account when assessing the plausibility of the various consequences' that a merger may have but complexity is not relevant for the standard of proof.[20] In other words, while the standard of proof is the same in all cases, it is legitimate for the Commission to present relatively less evidence in a merger where the dominant player merges with the only other rival, where entry barriers are clearly high, and there is no buyer power. Conversely, in a setting like the one in this case one would expect a more granular analysis of the markets to be convinced that on the balance of probabilities the merger will be incompatible with the internal market. The standard of proof does not change but the quality and quantity of evidence required is greater the more complex the case is. These points are well-established in the case-law.

The third observation which the Grand Chamber makes relates to the standard of review. The Grand Chamber starts by noting that the Merger Regulation provides for an 'ex ante review of concentrations'.[21] This matters because '[t]hose prospective analyses, which, more often, are complex, are necessarily more uncertain than ex post analyses'.[22]

It follows that when the Commission engages in this kind of ex ante analysis, this 'falls within the margin of discretion with regard to economic matters which is

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17 Case T-399/16, *supra* n. 1, para. 118 (my emphasis).
18 Case C-376/20 P, *supra* n. 4, para. 87 (my emphasis).
19 *Ibid.*, paras 76–77. Thomas, *supra* n. 8, at 8–9.
20 Case C-376/20 P, *supra* n. 4, para. 78.
21 *Ibid.*, para. 82.
22 *Ibid.*, para. 83.

available to the Commission for the purposes of applying the substantive rules' of the Merger Regulation.[23] In this context, the standard of review 'is confined to ascertaining that the facts have been accurately stated and that there has been no manifest error of assessment'.[24] It is the prospective nature of the assessment that the Commission has to carry out under the Merger Regulation which 'precludes a requirement for that institution to meet a particularly high standard of proof in order to demonstrate that a concentration would or would not significantly impede effective competition'.[25] This is the central argument that the Grand Chamber uses to motivate its conclusion on the standard of proof.

The finding is a welcome clarification as the proper standard of proof has not been articulated in earlier judgments. AG Kokott's reflections help support this approach by observing that 'it is not possible to provide "objective" proof of a forecast or for it to be free of uncertainties and doubts'.[26] It follows that a balance of probability standard is appropriate given the inherent uncertainty in a predictive exercise. To require a strong probability would ask more than the economic analysis can deliver.

For the purposes of judicial review of mergers, this does not mean that the Commission can win cases easily, however. As the Advocate General remarked in response to a concern raised by CK Telecoms that the standard of proof should be higher because otherwise the Commission could prohibit systematically horizontal mergers in oligopoly markets, this is not so since the Commission has to assess a considerable number of factors to establish the existence of unilateral effects.[27] Moreover, even if the Commission enjoys a margin of discretion, we have seen that the EU courts can engage in fairly detailed assessments of the Commission decision even with the existing standards or review: the court can decide that the evidence is not consistent, that relevant facts have been left out, or that the complexity of the theory of harm requires more comprehensive evidence than that which has been provided.[28] The sole caveat is that the EU courts can quash a Commission decision only if the errors are manifest, not when the court merely considers that a different approach was preferable.[29] This seems justifiable: the Commission has expertise in its ranks to carry out a thorough analysis of a merger. An appeal court should not be able to quash a decision of an expert body simply because it has a different view as to what the correct approach to assessing the

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23 *Ibid.*, para. 84.
24 *Ibid.*
25 *Ibid.*, para. 86.
26 Case-376/20 P, Opinion of AG Kokott, *supra* n. 10, para. 58.
27 *Ibid.*, para. 63.
28 *See* e.g., Case T-342/99, *Airtours plc v. Commission* EU:T:2002:146.
29 Case C-376/20 P, Opinion of AG Kokott, *supra* n. 10, para. 52 where she also observes that in her view the General Court had carried out a more far-reaching review than that which it was allowed to make.

merger should be unless it considers that the expert body has made major mistakes. At the same time the EU courts' capacity to review the evidence and to determine what is a relevant economic fact affords sufficient powers to intervene when errors are spotted.[30]

However by distinguishing ex ante merger analysis from ex post analysis under Articles 101 and 102 TFEU,[31] the Grand Chamber leaves the option open for it to say that the standard of proof for these types of case is higher given that one is assessing past facts.

But this distinction between ex ante and ex post is weak. In an Article 101 or 102 case where the Commission assesses the effects of a practice, this is also often a prospective analysis because normally a competition authority will seek to intervene before the anticompetitive effects have manifested themselves on the market. This is particularly the case when it comes to exclusionary practices where early intervention is necessary to ensure that the dominant undertaking does not succeed in foreclosing market access. At the same time, the judgment is sufficiently vague to allow the court in a subsequent judgment to offer a more nuanced approach to the standard of proof in Articles 101 and 102, possibly affording a similar margin of discretion in effects cases which would also preclude a very high standard of proof. However, this might be in tension with the fundamental rights of undertakings in what are seen as criminal proceedings, so a complex balance needs to be struck in antitrust law as regards the standard of proof.

3 THE PROPER INTERPRETATION OF ARTICLE 2(3) OF THE MERGER REGULATION

The two Courts differed as to the requirements for establishing a significant impediment of effective competition. Before we discuss the judgment it may help to explain why the distinction matters.[32] Suppose there is a market with four firms (A, B, C and D) all of which have similar market shares but sell a differentiated good. If A and B merge, competition authorities might worry if consumers of A see B as the next best substitute. This would allow the merged entity to raise the price of brand A, knowing that some consumers will stay loyal to it and most others will migrate to brand B which it now owns. A price increase that was unprofitable pre-merger becomes worthwhile post-merger. This is

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30 N. Forwood, *The Commission's 'More Economic Approach' – Implications for the Role of the EU Courts, the Treatment of Economic Evidence and the Scope of Judicial Review* in *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (C-D Ehlermann & M. Marquis eds, Hart 2011).

31 Case C-376/20 P, *supra* n. 4, para. 81.

32 *See* generally C. Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years,* 77 Antitrust L. J. 701 (2010), doi: 10.2139/ssrn.1675210.

referred to as a first-order effect. Then, as the competition between A and B is eliminated, it may well be that the rivals, C and D will also consider raising prices, for example because some consumers now switch to their brands. This is a second-order effect.[33] The question for EU competition law is whether the significant impediment of effective competition should be identified when competition between A and B ceases or when competition among the merged entity AB and firms C and D is also reduced. It has been argued that the economic literature would recommend intervention as soon as competition between A and B is eliminated.[34]

The General Court had held that where a merger does not create or strengthen a dominant position, the Commission must prove two things: '(i) the elimination of the important competitive constraints that the merging parties had exerted upon each other and (ii) a reduction of competitive pressure on the remaining competitors'.[35] Translated into economics, one should establish first- and second-order effects. This looks correct when considering Recital 25 of the Merger Regulation, where this two-stage test is set out, but the Grand Chamber had other ideas. In its view it should be possible to find a significant impediment of effective competition even if the merger just eliminates competitive constraints that the parties to the merger exerted on each other without showing a market-wide effect.[36] Its interpretative approach that led to this conclusion is relevant for any and all aspects of EU Law.

The Grand Chamber opens with two general statements about the role of recitals. On the one hand, they are 'important elements' to interpret a Regulation and 'may clarify the intentions' of the legislator.[37] On the other hand, they are not binding and cannot be read as 'a ground either for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner that is clearly contrary to their wording'.[38] While these two statements are uncontroversial, the Grand Chamber implicitly introduces a third interpretative criterion: that recitals have to be read all together all at once and always by reference to the primordial interpretative approach under EU Law: effectiveness. It is this which allows the Grand Chamber to disagree with the General Court and for the Advocate General to chastise the General Court for its 'formalistic and reductionist reading of the concept of "significant impediment of effective competition."'[39]

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[33] Deutscher, *supra* n. 3, at 328–329.
[34] *Ibid.*, at 342, but *see* Thomas, *supra* n. 8, at 15–17.
[35] Case T-399/16, *supra* n. 1, paras 95–96.
[36] Case C-376/20 P, *supra* n. 4, para. 110.
[37] *Ibid.*, para. 104.
[38] *Ibid.*, para. 105.
[39] Case C-376/20 P, Opinion of AG Kokott, *supra* n. 10, para. 73.

Here is how the reasoning unfolds: (1) By reference to Recitals 6 and 24, the Grand Chamber finds it apparent that the reason for having a Merger Regulation is to 'establish effective control of all concentrations in terms of their effect on the structure of competition in the European Union'.[40] This suggests a wide reading of Article 2(3). (2) This reading is supported by reference to Recital 5 by which the legislator determined that because corporate reorganization may damage competition, EU Law 'must therefore include provisions governing those concentrations which may significantly impede effective competition in the common market or in a substantial part of it'. (3) It follows that Recital 25 cannot be interpreted narrowly to only apply in cases that a merger between two firms in an oligopoly results in market-wide anticompetitive effects:

> Such a restrictive interpretation of Article 2(3) of Regulation No 139/2004 would be incompatible with the objective of that regulation … which is to establish effective control of all concentrations which would significantly impede effective competition, in the internal market or in a substantial part of it, including those giving rise to non-coordinated effects.[41]

At this point, it is worth reproducing Recital 25 to illustrate how the two courts could disagree so fundamentally:

> In view of the consequences that concentrations in oligopolistic market structures may have, it is all the more necessary to maintain effective competition in such markets. Many oligopolistic markets exhibit a healthy degree of competition. *However, under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition*. The Community courts have, however, not to date expressly interpreted Regulation (EEC) No 4064/89 as requiring concentrations giving rise to such non-coordinated effects to be declared incompatible with the common market. **Therefore, in the interests of legal certainty, it should be made clear that this Regulation permits effective control of all such concentrations by providing that any concentration which would significantly impede effective competition, in the common market or in a substantial part of it, should be declared incompatible with the common market.** The notion of "significant impediment to effective competition" in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned.

The General Court focused on the italicized sentence. This makes it clear that there are two effects: elimination of an important competitive constraint between the parties and a reduction of competitive pressure on the remaining competitors.

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[40] Case C-376/20 P, *supra* n. 4, para. 106.
[41] *Ibid.*, para. 113.

The Grand Chamber instead focuses on the sentence in bold type and by emphasizing that the purpose of the Merger Regulation is to allow the Commission to address all sorts of anticompetitive effects.[42] Observe that the Grand Chamber does some violence to the Recital however: in the underlined portion of the passage in bold type reference is made to 'such concentrations': this can only refer to the concentrations that have the effects described in the sentence in italics. The sentence in-between refers to 'such non-coordinated effects' which also refers to those described there. But this disregard for the Recital's precise meaning is allowed because it would undermine the effectiveness of the Regulation, as discussed above.

A much easier route for the Grand Chamber would have been to refer to the last sentence of Recital 25. Recall that at the time of the reform of the merger regulation (2004) cases where the Commission found that there would be coordinated effects in oligopoly markets were already found to be within the scope of the dominance test because the Court of Justice had confirmed that the creation of a collective dominant position fell within the scope of the 1990 version of the Merger Regulation.[43] The gap in merger control which was being debated in 2004 pertained only to unilateral effects which may result without coordination: the last sentence of Recital 25 is there precisely to limit the scope of the new test to this specific set of cases. However, even this approach could be questioned because the specific setting in the italicized sentence is not offered as an example but as the clearest explanation in all of that Recital of the types of effects that the legislator had in mind.

The general lesson to take away from this discussion is the following. Those who think that a literal interpretation is superior to a purposive one because it is more certain are bound to be disappointed: Recital 25 is just not written well enough to afford a singular reading. This does not make purposive interpretation necessarily superior. The reform of the Merger Regulation was controversial: not all Member States were keen to widen the scope of merger control (e.g., the German delegation resisted the change).[44] From this perspective, the second sentence of Recital 25 might have been a compromise to afford a slight widening of the Commission's powers and have therefore been deliberately reductionist and formalistic. However, the Grand Chamber was keen to promote a certain idea of competition which is well explained by AG Kokott: the reason why the

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42 *Ibid.*, para. 109 where the court states that the penultimate sentence of recital 25 is key.

43 Joined cases C-68/94 and C-30/95, *France and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v.* Commission. EU:C:1998:148.

44 U. Böge & E. Müller, *From Market Dominance Test to the SLC test: Are there any reasons for change?* [2003] 10 ECLR 495. At the time the authors were, respectively, the President and Head of Unit of the Bundeskartellamt.

Commission should be able to find a significant impediment of effective competition when the merger reduces competitive pressure between the merging parties alone is that this pressure is 'an integral part of any analysis for the purposes of applying the EU competition rules'.[45] For example, when discussing anticompetitive foreclosure the emphasis is on the effect that a dominant firm has on its rivals. From this perspective, the purposive interpretation used by the EU courts yields a degree of certainty once one acknowledges that the Court does not try and give expression to legislative intent but because of the Court's constant reference to the importance of interpreting competition law to safeguard the competitive process. This can be traced back to the early cases like *Continental Can* where the question was whether a merger could be considered an abuse of a dominant position. The Court went back to the 'spirit, general scheme and wording' of Article 102 and the 'system and objectives of the Treaty' to find that a dominant firm acquiring a rival could be found to abuse its dominant position.[46]

How significant is the difference of opinion of the two courts on the nature of the harm required in practice? On the facts of the case the Commission had established market-wide effects under the first theory of harm and indeed in all other similar cases before the Commission has shown how increased concentration would lead to higher prices in the retail market as a whole.[47] The impact is thus minimal here, unless the Commission sees this as an opportunity to focus on first-order effects only moving forward. This is unlikely because by considering the second-order effects the Commission is able to assess the possible counter-strategies of the merged entity's rivals and assess if the harm is likely to be durable. According to AG Kokott, the approach of the General Court would have prevented the Commission from running the second theory of harm successfully. The second theory of harm is about the effect that the merger would have on the network sharing agreements where the Commission feared that depending on the strategic choices made by the merged entity on which network to invest in, this could harm either Vodafone or Three: reduced investment by the merged entity in one of the two networks would lead to the partner being less competitive on the retail market.[48] This was a novel theory of harm which had not been run in other cases but it illustrates that there may be scenarios where anticompetitive effects may materialize when there is no need to show a market-wide effects, even if here this foreclosure was said to ultimately have a market-wide effect at retail level. In sum,

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45 Case C-376/20 P, Opinion of AG Kokott, *supra* n. 9, para. 75.

46 Case 6/72, *Europemballage Corporation and Continental Can Company Inc. v. Commission* EU:C:1973:22, para. 25.

47 Monti, *supra* n. 12. Commission, *supra* n. 9, para. 1226.

48 Case C-376/20 P, Opinion of AG Kokott, *supra* n. 10, para. 74. *See* in this respect the conclusions of the Commission, *supra* n. 9, paras 1777–1784.

it is unlikely that there will be many cases where this disagreement between the two courts makes a difference. The divergences discussed below are much more significant.

4 SUBSTANTIVE ASSESSMENT: THE MEANING OF KEY CRITERIA

4.1 Justiciability of guidelines

One general theme that underpins the General Court's judgment in this case is its scepticism of the approach taken in the Horizontal Merger Guidelines followed by its reformulation of what it perceived to be the correct standard for assessing unilateral effects. Specifically, the General Court held that the Commission must show that the two firms merging exercised important competitive constraints on each other and it was insufficient to establish merely that the target firm was an important competitive force.[49] Related, it held that the fact that the two parties to the merger competed against each other was insufficient to establish a competition risk: they must be particularly close rivals.[50]

The Commission advanced a very bold plea against this:

> 'the Commission submits that the General Court has neither the jurisdiction nor expertise to depart from the economic concepts contained in the Horizontal Merger Guidelines and to follow an economic approach which differs from that set out in those guidelines. According to the Commission, the General Court's jurisdiction is limited to reviewing the lawfulness of those guidelines'.[51]

This was probably said more in hope than in expectation. The Grand Chamber reminds us that guidelines bind the Commission unless it explains why it departs from them but the EU Courts retain the power to interpret these when the Commission relies on them.[52] More importantly, the EU Courts 'cannot be bound by the Horizontal Merger Guidelines as such'.[53] Neither the margin of discretion which the Commission enjoys nor the fact that the Guidelines were written at the request of the Council prevents the EU courts 'from reviewing the Commission's interpretation of concepts of EU law requiring an economic analysis when they are implemented'.[54] As AG Kokott observed, 'the EU Courts have an exclusive and definitive power of interpretation' when it comes to legal concepts that have not been delimited by secondary law.[55] This does not preclude the Court

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[49] Case T-399/16, *supra* n. 1, para. 174.
[50] *Ibid.*, para. 242.
[51] Case C-376/20 P, *supra* n. 4, para. 119.
[52] *Ibid.*, para. 123.
[53] *Ibid.*, para. 125.
[54] *Ibid.*, para. 126.
[55] Case C-376/20 P, Opinion of AG Kokott, *supra* n. 10, para. 86.

from deciding that the Commission's approach in its Guidelines is correct, which seems to be what has happened in this case as we show below.

4.2 Important competitive force

The General Court held that the meaning of the concept of important competitive force found in the Guidelines should be limited to a situation where 'the undertaking concerned must stand out from its competitors in terms of the impact of its pricing policy on competitive dynamics on the market concerned and, in particular, must compete particularly aggressively in terms of price and force the other players on the market to align with its prices'.[56]

In contrast, the Grand Chamber found this interpretation of the concept was mistaken. It based this on three grounds. First, by reference to the notion of effectiveness, it suggested that the approach was overly restrictive.[57] As AG Kokott put it, the interpretation favoured by the General Court 'would risk underestimating from the outset the competitive forces present within an already concentrated oligopolistic market'.[58] Second, it stated that the point of merger control is to examine if the merger would harm competition and it is not decisive that the target is a particularly aggressive undertaking.[59] Third, price is not the only relevant parameter for assessing competition.[60] As a result, the better interpretation of the concept of an important competitive force is that found in the Horizontal Merger Guidelines: the firm 'has more of an influence on the competitive process than its market share or similar measures would suggest'.[61] However, this may not be a particularly useful generalization. Consider a setting where pre-merger there are four firms each with 25% market share. A merger of two of these would likely raise competition concerns but these would not depend on the target being the firm with a greater influence on competition.

4.3 Closeness of competition

According to the General Court a merger can only be condemned if the two parties to the merger are particularly close competitors.[62] The Grand Chamber disagreed, preferring to align itself to the Commission's Guidelines. According to

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56 Case C-376/20 P, *supra* n. 4, para. 154, referring to Case T-399/16, *supra* n. 1, para. 216.
57 Case C-376/20 P, *supra* n. 4, para. 161.
58 Case-376/20 P, Opinion of AG Kokott, *supra* n. 10, para. 110.
59 Case C-376/20 P, *supra* n. 4, para. 162.
60 *Ibid.*, para. 165.
61 *Ibid.*, para. 167. *See* Horizontal Merger Guidelines, *supra* n. 15, para. 37.
62 Case T-399/16, *supra* n. 1, para. 242.

these the closeness of competition between the parties to the merger is only one factor among others which allows to determine if the merger has significant anticompetitive effects.[63] The Grand Chamber agreed that a higher degree of closeness may be a strong indicator that the merger will harm competition but that even if the parties are not very close there may still be anticompetitive effects even if the parties are not particularly close. It gives as an example a situation where the two parties to the merger are not particularly close rivals but where the other firms on the market are even more remote competitors. In this setting the parties to the merger may have an incentive to increase prices post-merger.[64] More generally, as the Advocate General explained, the closeness of competition between the merging parties is but one of a range of factors that the Commission must consider in determining whether the merger will significantly impede effective competition.[65] If so the requirement that the rivals must be particularly close is meaningless because there can be other factors that lead to a competition concern and compensate for the lack of particular closeness.

5 QUANTITATIVE TESTS AND THE EFFICIENCY CREDIT

Modern economic techniques allow one to estimate a likely price increase from a merger.[66] One of these estimation techniques was used by the Commission as a basis to identify whether there was a competition risk.[67] This followed a detailed qualitative analysis and was used as a means of further verifying the likely effects of the merger. In reacting to this approach, CK Telecoms made two points which the General Court accepted and the Grand Chamber did not.

First, the General Court observed that the estimated price increase here (which is confidential) was less than the price increase in two earlier merger cases in comparable markets in Ireland and Germany, where the Commission authorized these mergers, and that as a result the price increase here was not significant. Here, the General Court's argument suffered from two errors. First, the estimated price that was used was one which the Commission had contested, a fact the Court ignored.[68] But even if the estimated price increase had not been

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63 Case C-376/20 P, *supra* n. 4, para. 187. *See* Horizontal Merger Guidelines, n. 15, para. 26 explaining that each of the factors listed (including closeness of competition at paras 28–20) is one of several potential factors to be considered.

64 Case C-376/20 P, *supra* n. 4, para. 189.

65 Case C-376/20 P, Opinion of AG Kokott, *supra* n. 10, para. 122. *See* Thomas, *supra* n. 8, at 25–28.

66 A. Oldale & J. Padilla, *EU Merger Assessment of Upward Pricing Pressure: Making Sense of UPP, GUPPI, and the Like,* 4(4) J. Eur. Competition L. & Prac. 375 (2013), doi: 10.1093/jeclap/lpt042. Danish Competition and Consumer Authority, 'Economic Analysis In Danish Merger Investigations' (Jul. 2021), https://www.kfst.dk/media/wa4glcvr/20210706-economic-analysis-in-danish-merger-investigations.pdf.

67 It is discussed fully in Annex A of the decision, *supra* n. 9.

68 *See supra* n. 7 above and Case-376/20 P, Opinion of AG Kokott, *supra* n. 10, para. 145.

contested, the Court's argument was completely wrong on its face because it ignored the fact that in the Irish and German cases the parties had offered commitments which were accepted so that one could not compare them to the case at hand.[69] The Commission must have taken the view that the commitments resolved the competition concern and avoided the price increase. From this it cannot be inferred that the price increase in the CK Telcom case was insignificant. The Grand Chamber also added for completeness that previous decisions do not provide 'a legal framework for merger control and can only give an indication'.[70]

The second point made by the General Court is that when one runs a quantitative test to estimate price changes post-merger, these normally estimate a price increase because a merger increases concentration. It took the view, supported by economic literature, that this could lead to false positives and that therefore an efficiency credit should be inserted in the estimate. In its decision the Commission stated that it would consider efficiencies in carrying out the quantitative test only if these were first demonstrated by the parties.[71] However, the Court held that these 'standard' efficiencies were not the same as the efficiencies the parties could claim under the Horizontal Merger Guidelines but were a separate consideration that was necessary to make sure that the quantitative analysis was more accurate.[72]

The Grand Chamber was not convinced. By reference to the Merger Regulation, the Horizontal Merger Guidelines and the procedural rules for mergers,[73] it held that these so-called standard efficiencies have no place in EU merger control and that there is no presumption that all mergers lead to efficiencies. Conversely, it is for the parties to the merger to demonstrate efficiencies.[74] The Grand Chamber added that to follow the General Court would reverse the burden of proof in respect of a given category of efficiencies and this would risk making merger control ineffective.[75]

With respect, the Grand Chamber's fears are overstated. The economic test that the Commission applied here was a diagnostic to identify a competition risk and not a test that would decide if there is a competition problem. Indeed, the Advocate General, while denying the possibility of including an efficiency credit under the law as it stands does agree that '[a]t most, it is the Commission's task, in

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69 Case C-376/20 P, *supra* n. 4, para. 218.
70 *Ibid.*, para. 219.
71 Case M.7612, *supra* n. 9, Annex I para. 36.
72 Case T-399/16, *supra* n. 1, paras 277–279. *See also* the point made by CK Telecoms (Case C-376/20 P, *supra* n. 4, para. 229).
73 Regulation 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2004] OJ L133/1, Annex I, s. 9.
74 Case C-376/20 P, *supra* n. 4, paras 241–242.
75 *Ibid.*, para. 244.

the exercise of its discretion in this area, particularly in the context of a possible revision of the Guidelines, to ascertain whether it is necessary to carry out such an analysis on its own initiative'.[76] Having said that, it has been argued that an efficiency credit might help in a phase 1 merger analysis while in phase 2 cases the Commission is more able to gather evidence to ensure that the quantitative assessment is more precise and there is no need for an efficiency credit.[77]

In sum, the General Court was more bold in its integration of its understanding of economics, while the Grand Chamber appears to prefer a more cautious stance and follow the approach in the Merger Regulation and the Guidelines. This division between the courts raises a question as to whose task it is to reflect on the best alignment of merger control with economics. On the one hand, the EU courts have the exclusive and definitive power to interpret concepts. However, on the other hand, the Commission, armed with expert economists, is better placed to explore the economic literature and consider how to best use this to develop legal standards.

6 THE TOTALITY OF THE EVIDENCE

The Commission claimed that the General Court examined a selection of the factors that the Commission had used to determine the competition risk but failed to assess whether all relevant factors supported the Commission's finding. The complaint was that the General Court considered only four factors (the size and evolution of market shares, Three's classification as an 'important competitive force', the closeness of competition between Three and O2 and the quantitative analysis of the effects of the concentration) and then asked whether each was sufficient to find harm to competition. However, the correct approach in its view was to examine if all relevant elements combined could lead one to fear that the merger would lead to a significant impediment of effective competition..[78]

The Grand Chamber agreed with the Commission, but this presents a challenge for the General Court because frequently appellants will challenge only parts of the Commission decision. The Grand Chamber explained the duty of the General Court in this way: first the General Court should review all the appellant's complaints and examine whether certain aspects of the Commission decision can and cannot stand. Then, it has to examine whether all the facts that have not been disputed and all those that have survived judicial review 'are sufficient to demonstrate the existence of a significant impediment of effective competition'.[79]

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[76] Case C-376/20 P, Opinion of AG Kokott, *supra* n. 10, para. 155.
[77] Deutscher, *supra* n. 3, at 382.
[78] Case C-376/20P, *supra* n. 4, paras 248–250.
[79] *Ibid.*, para. 262.

On the facts the General Court's failure to do so amounted to an error in law.[80] This error follows from the different perspectives that the two courts have on the kind of analysis required by the Merger Regulation. This was observed by the Advocate General: in a number of competition cases, the Commission bases its case on a number of factors and the decision rests on a holistic assessment of all of these factors.[81] However she observes that there may well be certain situations where 'certain factors or evidence may be particularly important, or even decisive'.[82] In these situations, a finding that the Commission has failed to establish one such decisive element may be enough to quash the decision even without considering the remainder of the evidence. In the General Court's view, two factors appeared to be particularly important in assessing this case: the concept of an important competitive force and the closeness of competition.[83] It felt entitled to stop its review having quashed to decisive factors. However, according to the Grand Chamber these two elements were to be defined more broadly than the General Court did and were two elements of a wider analysis of the likely effects of the merger.

This approach to judicial review raises three issues worth discussing. The first is whether this criticism of the General Court is fair as one segment of the General Court's judgment is a criticism of the overall analysis of the anticompetitive effects.[84] However the Advocate General considered that this part of the General Court judgment was not a re-examination of the probative nature of the Commission decision and so was not sufficient to discharge the task it has as a review court.[85]

The second is a practical one: parties who appeal against a Commission decision and simply take pot shots at certain weak aspects of the decision will not do themselves any favours if, even if they succeed, the EU courts find that what remains of the Commission decision suffices to condemn the parties.

The third is a wider policy issue as to the respective role of the Commission and the EU courts. If the Commission decides that a merger is likely to impede effective competition because of an overall assessment of say five factors and the General Court finds that two of these factors have not been proven sufficiently, is it really fair to ask the court to consider if the remaining three elements still suffice to affirm the decision of whether the decision can no longer stand? Should it not be for the Commission to reconsider its case in light of the gaps identified by the court and redetermine if the remaining features suffice?

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80 *Ibid.*, paras 269–270.
81 Case C-376/20 P, Opinion of AG Kokott, *supra* n. 10, para. 163.
82 *Ibid.*, para. 164.
83 *Ibid.*, para. 166.
84 Case T-399/16, *supra* n. 1, paras 284–291 This is discussed in Monti, *supra* n. 3, at 459–460.
85 Case C-376/20 P, Opinion of AG Kokott, *supra* n. 10, para. 174.

7 EFFECTS OF THE MERGER ON THE NETWORK SHARING AGREEMENTS

Most of the issues discussed so far pertained mostly to the first theory of harm: the elimination of Three as a competitor on the retail market. The second theory of harm was the impact that the merger would have on network sharing agreements. One particular concern that the Commission raised was that as a result of the merger there would be a reduction in investments in the networks as a result of increased transparency: the merged entity would be present in both networks and use the information it has about the planned investments of Vodafone and BT/EE to reduce or postpone its investments if this would maximize its profits.[86] This was a new theory of harm but the Commission had observed that the existing network sharing agreements had been a key reason for innovation and competition in the UK markets and wished to ensure that the transaction did not disrupt this.

On appeal, CK Telecoms raised two points. First, that this theory of harm was wrongly classified as a non-coordinated effect while in its view the Commission was really assessing the likelihood of coordinated effects because transparency would lead to a market-wide reduction in investments. Second, that the Commission did not consider the commitments offered by CK Telecoms properly.[87] However, rather than addressing these points the General Court considered that this theory of harm was faulty for a different reason: that the Commission had not considered the long-term developments in the market, in particular the fact that in the long term the merged entity would only support one of the two networks. The Grand Chamber recalled that while the General Court may raise an issue of its own motion if it is a matter of public policy,[88] this was not the case here and so the reasoning of the General Court was a mistake of law.[89] During the hearing the General Court had asked the parties about the time frame for competitive assessment, but this is not enough to bring the matter into the judgment.[90]

8 EU MERGER CONTROL AFTER THIS JUDGMENT

The most immediate question is: what will happen when the General Court rehears the appeal? It is not a certainty that the Commission will prevail: many points of the appeal were not addressed by the General Court,[91] and while the

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86 Case M.7612, *supra* n. 9, para. 1297.
87 Case C-376/20 P, *supra* n. 4, para. 326.
88 *Ibid.*, para. 325 for a treatment of this.
89 *Ibid.*, paras 333–335.
90 Case T-399/16, *supra* n. 1, para. 409.
91 *Ibid.*, paras 454–455.

Grand Chamber agreed with the standard of assessment used by the Commission, it is for the General Court to assess whether on the facts the Commission's analysis is sufficiently sound. Obviously, a lower standard of proof and a more elastic reading of the factors at play helps the Commission but ultimately it comes down to whether the evidence stands up to scrutiny.

A more general question is: what impact this judgment has on the Commission's merger policy, irrespective of the result of the appeal in this case? Insofar as the Commission's current approach has been largely approved, it seems that the answer is that the Commission will continue its current approach to mergers exhibiting non-coordinated effects. In particular, the Grand Chamber clarified that as a general principle no one economic factor is necessary to establish an anticompetitive risk and that the Commission is authorized to examine a range of economic indicators to verify whether or not the merger would significantly impede effective competition. The pattern of increasingly detailed and economically informed analysis will hold.

Some intriguing issues arise when it comes to the respective powers of the Court and the Commission. The Grand Chamber, on the one hand, clarified its competence to interpret secondary law and to override soft laws that it deems are not a faithful application of EU Law. Its approach to legal interpretation draws on effectiveness as a key device, a long-standing approach which allows the Court to expand the reach of competition law. However, when it comes to the power to review guidelines there is a dissonance: the Court may have the legal power to challenge these, but the Commission holds superior economic resources to explore how to best apply the law and has much more experience with merger reviews having seen several cases in a range of industries. The General Court's judgment in *CK Telecoms* is a good illustration of the difficulties that may arise if a court decides that the guidelines are not sufficiently sharp: the court held that quantitative tests need an efficiency credit, that competitors must be particularly close and that the target firm must be an important competitive force but without giving guidance on how to operationalize these requirements.[92] The General Court called for a revision of the Guidelines but implicitly delegated this to the Commission through its failure to articulate precise standards. Here the interpretative power of the court did not lead to a clear set of legal standards. The EU Courts can be more helpful, for example in both *Airtours* and *Tetra Laval* in the context of coordinated effects and conglomerate mergers respectively there is a clear steer to the Commission on how to test for these anticompetitive effects which are now elaborated on more fully in Guidelines.[93] But even when the EU courts are more constructive, detailed implementation is left to the Commission.

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[92] *See* Deutscher, *supra* n. 3, for a close exploration of this.

[93] *Airtours*, *supra* n. 28, Case C-12/03 P, *Commission v. Tetra Laval* EU:C:2005:87.

The Commission counters the weak legitimacy of soft law by consultation exercises and by updating the Guidelines regularly. In this context the Commission's failure to update the 2004 Guidelines is of some concern as they may not necessarily always reflect the Commission's own practice or more significantly, recent developments in economics.[94] Elsewhere, I have suggested that some fairly fundamental changes are required to improve the analytical framework.[95] Whatever happens in the appeal in this specific case, the time is ripe for a reassessment of the continued validity of the guidelines.

Finally, why did the two courts differ so fundamentally? Are the eight errors uncovered by the Grand Chamber evidence of a poor judgment by the General Court? A legal formalist lawyer will say yes by dint of the fact that the Court of Justice applied a superior interpretative method geared to maximize the effectiveness of EU Law. However, in my view to address this question it is useful to contrast the background assumptions that underpin the General Court and the Grand Chamber judgments. There are five divergent perspectives applied by the two courts that account for all the differences about what the law is. In a way, this clash between the two courts reveals that economic convictions drive legal interpretation.

First, the two courts differ on the best way to operationalize the legal standard that allows for a finding that a merger's adverse effect on competition is significant. The General Court's formal tests (i.e., its conceptualization of important competitive force and closeness of competition) serve to exclude from the scope of the Regulation mergers where the impact on competition is unlikely to be significant. Conversely, the Grand Chamber considers that the way to determine whether the effect is significant is by an overall analysis of all facts, without any screens that exclude certain cases.

Second, throughout its judgment the General Court is fearful of Type 1 errors and of the Commission utilizing any discretionary power to get its way. In two instances the General Court opts for a more restrictive interpretation because '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'.[96] At one moment the fear is pitched in tones that hint that the Commission is an agency driven by self-interest and not the protection of the public interest: when discussing the standard of proof the General Court states that this is the same for all mergers because '[i]f that were not the case, the Commission might classify the facts in such a way as to

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[94] In particular the literature on the upward-pricing pressure tests discussed in s. 5 above. *See* e.g., J. Farrell & C. Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition,* 10(1) The B.E. J. Theoretical Econ. Art. 9 (2010), doi: 10.2202/1935-1704.1563.

[95] Monti, *supra* n. 12, *see also* Deutscher, *supra* n. 3, at 2 for a useful list of recommendations.

[96] Case T-399/16, *supra* n. 1, para. 249. A similar point at para. 345.

benefit from the most favourable rules of evidence before the General Court'.[97] It is this concern about over-enforcement that led the General Court to try and reduce the breadth of coverage of the Merger Regulation, build an efficiency credit, require that criteria like close competitors and important competitive force be read restrictively, that in the upstream market one should look for long term effects, and to raise the standard of proof. All these are concerted efforts to reduce the risk of error. In contrast, the Grand Chamber has a different view of what makes merger control effective: allowing the Commission the flexibility to assess each case on its own merits and to delve deeply into a range of factors in order to avoid anticompetitive risks. The Grand Chamber is more trustful of the Commission, going so far as generally ratifying the approach that the Commission developed in its guidelines. The fears of the General Court and CK Telecoms about overenforcement are dismissed by the Advocate General as they have 'not adduced any convincing evidence'[98] of this risk.

Third, there is another difference of perspective which is less explicit but inherent in the reasoning. The General Court considers intervention is appropriate when consumer welfare on the relevant market is adversely affected. This accounts for its view that a significant impediment of effective competition requires both a reduction of competition between the parties to the merger and a reduction of competition from rivals – that way all consumers suffer. It states that 'the fact that rivals may be harmed because a merger creates efficiencies cannot in itself give rise to competition concerns'.[99] Conversely, the Grand Chamber is satisfied if the competitive process is distorted by the elimination of competition between the two parties to the merger or the foreclosure of one rival in a tight oligopoly market. In practical terms this difference is relatively small: it is not as if the latter approach allows the Commission to intervene in many more mergers than the former, indeed in most cases the Commission looks for harm to consumer welfare in the market as a whole anyway, but it serves as a reminder that the competitive process, according to the Grand Chamber, relies on the presence of competitors and their anticompetitive exclusion is of concern.

Fourth, there is a further split in economic vision between the two courts. The General Court's statement that 'any concentration will lead to the efficiencies'[100] reveals a perspective that is out of sync with the role of efficiencies in the EU legal order, but it is consistent with a view that markets perform best when left to themselves, and that rivals to a merger will react in ways to compete aggressively. Conversely, the Grand Chamber sticks to the burden of proof

[97] Case T-399/16, *supra* n. 1, para. 109.
[98] Case C-376/20 P, Opinion of AG Kokott, *supra* n. 10, para. 63.
[99] Case T-399/16, *supra* n. 1, para. 362.
[100] *Ibid.*, para. 277.

allocation found in the Merger Regulation. Moreover, it values the role of merger control and sees real risks that certain mergers may 'result in lasting damage to competition'.[101]

Fifth, in discussing the impact of the merger on Vodafone or BT/EE, the Commission feared that the merger would disrupt one of the rivals because of the impact on telecom networks. However, the General Court objected in part because the 'contested decision appears to be based on rather improbable assumptions concerning the absence of any reaction by BT/EE, which, it is claimed, would simply cease to invest, following an increase in its costs'.[102] In other words, a competitive setback resulting from the merger will find a reaction from rivals – in the long run the market solves many competition problems because 'competition is hardier than you think. The desire to make a buck leads people to undermine monopolistic practices'.[103] The Grand Chamber instead reveals greater concerns about foreclosure.

It is not clear how far this clash between the two courts is one about divergence in economic analysis and how much about different political commitments about how to best regulate markets. It strikes me that it is more the latter.[104] The General Court believes that concentrated markets are no barrier to lively competition and that the use of economic analysis should be curtailed by restrictive reading of the Merger Regulation to save the Commission from itself, revealing a greater trust in markets than in the institutions put in place to regulate them. In contrast, the Grand Chamber sticks to a vision of competition as being about open markets, continues to trust the propriety of delegating economic regulation to the Commission, and contrary perhaps to the formalism of old, is open to economic analysis, but in line with its position on the role of competition enforcement allows the Commission to use as much economic analysis as possible to achieve the right result: an overall assessment is required.[105]

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[101] Recital 5, referred to twice in the judgment: Case C-376/20 P, *supra* n. 4, paras 66 and 109.
[102] Case T-399/16, *supra* n. 1, para. 372. And *see* para. 393 with regard to Vodafone.
[103] F. H. Easterbrook, *Workable Antitrust Policy,* 63 Texas L. Rev. 1696, 1701 (1986), doi: 10.2307/1288943.
[104] Along similar lines, Deutscher, *supra* n. 3, challenging the use of economics made by the General Court.
[105] Case C-376/20 P, *supra* n. 4, para. 261.