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Courts as Engines of the 'More Economic Approach'? Revolutions Realised and Aborted

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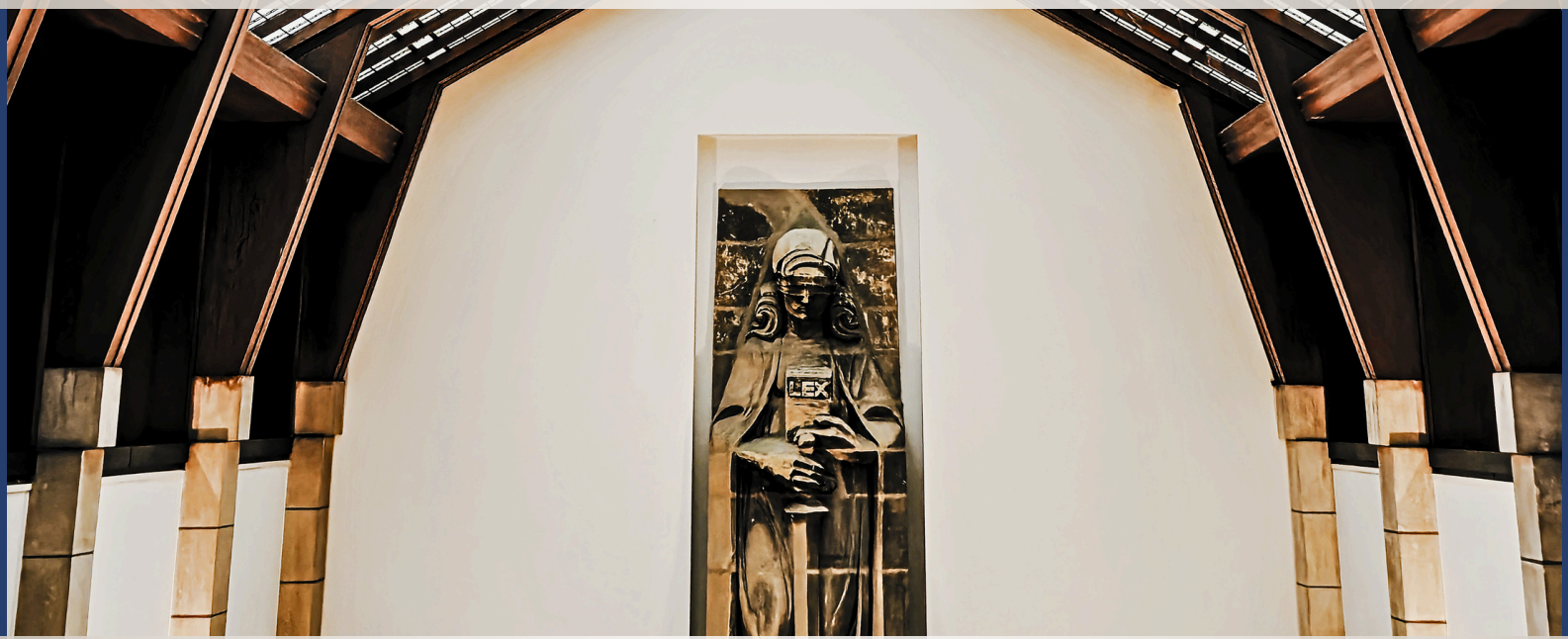

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Abstract

Competition law has long been grounded in economic theory. In the EU context, however, it was only with the introduction of the 'more economic approach' (MEA) that competition law began to align more closely with neoclassical economic principles. Despite this development, the integration of economic insights remains a continuous progress. This thesis investigates the pivotal role of the CJEU in promoting the MEA. At first glance, the relationship between the judiciary and economics appears constrained by the marginal review doctrine that characterises 'complex economic assessments'. However, this analysis reveals that EU Courts have occasionally deviated from this standard of review in order to actively foster more economic thinking.

EU Courts have propelled the MEA during its early stages, particularly in three critical annulments in 2002: *Airtours, Schneider Electric*, and *Tetra Laval*. This paper investigates whether the General Court has continued to promote this approach in recent years by analysing its intensive judicial review in *CK Telecoms*. The findings indicate that the General Court sought to promote more economic thinking once again, albeit in a notably different manner. In essence, the Court's rationale was informed by economic theory, dictating that not all horizontal mergers in oligopolistic markets are anti-competitive. Although the Court requested more economic evidence from the Commission as it had done in 2002, it also developed a legal test based on economic principles and, to some extent, substituted the Commission's economic assessment. This paper argues that the promotion of the MEA by EU Courts is desirable considering their historic role in shaping competition law. However, the Court's more stringent standard of review should only serve to reasonably heighten evidentiary standards, and to create legal tests based on economics in alignment with the legal framework; the Court should not impose its own economic convictions by substituting the Commission's assessment.

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1. Introduction

Since its inception, modern competition law has been, to some extent or another, rooted in economics.[1] The general purpose of competition law is to maintain market competition by deterring private restraints on competitive conduct.[2] The examination of whether a conduct is pro- or anti-competitive, by definition, necessitates the incorporation and utilisation of economic concepts, such as market power.[3] This holds true for competition law generally, as well as in the European Union (hereinafter EU) particularly. As pointed out by Van de Walle, "law is not economics, although law that ignores economics cannot be good law."[4]

Be that as it may, a distinction is made between 'old' and 'new' competition law in the EU context.[5] 'Old' competition law, comprised of all competition law doctrine which evolved before the 1990s, was described as (more or less) ordoliberal,[6] and characterised as formalistic, interventionist and economically

[1] Modern competition laws appeared at the end of the nineteenth century, first in North America following the emergence of 'trusts' post-second industrial revolution (most notably the Canadian Act for the Prevention and Suppression of Combinations found in Restraint of Trade (1889) and the Sherman Antitrust Act (1890)). Only 50 years later were competition rules to be adopted in Europe. David J Gerber, *Law and Competition in Twentieth- Century Europe: Protecting Prometheus* (Oxford University Press 2010) 7-10; Wolf Sauter, *Coherence in EU Competition Law* (Oxford University Press 2016) 34; Imelda Maher, 'Re-imagining the Story of European Competition Law' (2000) 20(1) Oxford Journal of Legal Studies 155, 155. See also for example Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004).

[2] David J Gerber, *Competition Law and Antitrust* (Oxford University Press 2020) 14-18.

[3] Kevin Harriot, 'Key Economic Concepts for the Competition Lawyer in Litigation' (Continuing Legal Education Weekend Conference, Montego Bay, November 2013) 6; David J Gerber, 'Two Forms of Modernisation in European Competition Law' (2007) 31(5) Fordham International Law Journal 1235, 1247. See also Robert Cooter and Thomas Ulen, *Law & Economics* (6th edition, Berkeley Law Books 2016) 1, who make clear that economics has been used in antitrust law for a long time, to answer questions such as "What is the defendant's market share?"

[4] Bernard van de Walle de Ghelcke, 'Economic Reasoning before the European Union Courts in Competition Law' (2018) 44 Bruges European Economic Policy Briefings 1, 4.

[5] Kiran Klaus Patel and Heike Schweitzer, 'EU Competition Law in Historical Context: Continuity and Change' in Kiran Klaus Patel and Heike Schweitzer (eds) *The Historical Foundations of EU Competition Law* (Oxford University Press 2013) 207; See also James S Venit, 'Article 82: The Last Frontier—Fighting Fire with Fire?' (2024) 28 Fordham International Law Journal 1157, 1161-1166.

[6] Anna Gerbrandy, 'Changing Competition Law in a Changing European Union: The Constitutional Challenges of Competition Law' (2019) 14(1) The Competition Law Review 33, 36; Sigfrido M Ramírez Pérez and Sebastian van de Scheur, 'The Evolution of the Law on Articles 85 and 86 EEC: Ordoliberalism and its Keynesian Challenge' in Kiran Klaus Patel and Heike Schweitzer (eds) *The Historical Foundations of EU Competition Law* (Oxford University Press 2013) 19.

uninformed.[7] This competition law was allegedly driven by objectives like fairness and equity, 'contaminated' by an internal market goal, and based on a pro-regulatory philosophy.[8] 'New' competition law, on the other hand, evolved from the 1990s onwards and is supposedly based on 'economics galore'.[9] The differentiating factor, well-known to EU competition lawyers, is that 'new' competition law benefitted from the enlightenment of the so-called 'more economic approach' (hereinafter MEA).[10]

Yet, the MEA is not a monolithic theory; rather, a conglomerate of suggestions on how to make intensified use of economic insights in competition law.[11] Three different aspects of this approach will be distinguished in this thesis. In its most radical form, it is a proposition to redefine the goals of EU competition law, centred around the goal of consumer welfare (Category 1).[12] A second aspect of the MEA is to make greater use of economic theories and methods in competitive assessments, and to provide evidence for the appropriateness of a given market definition and the anti-competitive effects of a given conduct (Category 2).[13] Finally, in its third form, it suggests reviewing the established legal tests for anti-competitive conduct in light of economic theory (Category 3).[14]

It is known, or at least extensively hypothesised, that there were many contributing factors to the adoption of the MEA. Among these factors, one stands out as the focal point of this thesis: the Court of Justice of the EU (hereinafter CJEU or EU Courts).[15] Indeed, despite the purportedly limited influence of economists

[7] Barry E Hawk, 'System Failure: Vertical Restraints and EC Competition Law' (1995) 32 Common Market Law Review 973, 975-982 and 983-986; James S Venit, 'Slouching Towards Bethlehem: The Role of Reason and Notification in EEC Antitrust Law' (1987) 10 Boston College International and Comparative Law Review 17, 33- 35 and 42-45; James S Venit, 'Future Competition Law' in Claus-Dieter Ehlermann and Laraine L Laudati (eds) *European Competition Law Annual 1997: The Objectives of Competition Policy* (Hart Publishing 1998) 567-569.

[8] Patel and Schweitzer (n 5) 207.

[9] Anne C Witt, 'The European Court of Justice and the More Economic Approach to EU Competition Law—Is the Tide Turning?' (2019) 64(2) The Antitrust Bulletin 172, 172.

[10] This policy turn is described by some scholars as the EU-equivalent of the 'Chicago School revolution' to US antitrust law. Patel and Schweitzer (n 5) 208.

[11] This is unlike the Chicago School revolution to American antitrust law, which is considered more straightforward in its aims.

[12] Gerber (n 2) 22-23.

[13] Patel and Schweitzer (n 5) 220.

[14] Patel and Schweitzer (n 5) 220.

[15] Consolidated version of the Treaty on European Union [2012] OJ C326/13, art 19.

and economics in court proceedings,[16] the defeats of the Commission in *Airtours*, *Schneider Electric* and *Tetra Laval*, dating back to 2002 when the Courts abruptly heightened their judicial scrutiny of so-called 'complex economic assessments', catapulted the MEA.[17] Less theorised in scholarship, however, is whether there have been any recent attempts by EU Courts to promote the MEA by increasing their judicial review of mergers.

1.1 Research Aims

This thesis endeavours to contribute to three main debates found in contemporary EU law scholarship. On the first level, it aims to contribute to literature pertaining to judicial review standards in 'complex economic assessments.' Indeed, judicial control of the Commission's complex economic appraisals in competition enforcement has long troubled both academics and practitioners, and the 'default' marginal standard of review has been debated and re-debated.[18]

On a second level, this research contributes to the discussion on the prevalence and relevance of the MEA in the present day. Although this paper succumbs to upcoming claims that the MEA is partially being abandoned—for example in the regulation of digital markets[19]—it does not subscribe to the belief that this holds true for all sectors. Indeed, and despite this emerging trend, Van den Bergh opines that the importance of an economic approach to assess anti-competitive effects and potentially outweighing efficiency benefits of conduct is now widely acknowledged.[20]

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[16] Ioannis Lianos, '"Judging" Economists: Economic Expertise in Competition Law Litigation' (2009) Centre for Law, Economics and Society, 4. Bar, according to Lianos, several cases where economic arguments have been examined by Courts, such as Case T-464/04 *Impala v Commission* [2006] ECR II-2289; Case T-209/01 *Honeywell International Inc v Commission* [2005] ECR II-5575; Case T-201/04 *Microsoft v Commission* [2007] ECR II-03601; Case T-168/01 *GlaxoSmithKline Unlimited v Commission* [2006] ECR II-2969.

[17] Anne C Witt, *The More Economic Approach to EU Antitrust Law* (Hart Studies in Competition Law Volume 14, Hart Publishing 2016) 28; Nicholas Levy, 'Foreword' in Daniel Gore and Others, *The Economic Assessment of Mergers under European Competition Law* (Cambridge University Press 2013) xv.

[18] Andriani Kalintiri, 'What's in a Name? The Marginal Standard of Review of "Complex Economic Evaluations" in EU Competition Enforcement (2016) 53(5) Common Market Law Review 1282, 1308.

[19] Pablo Ibáñez Colomo, 'Whatever Happened to the 'More Economics-Based Approach?' (2020) 11(9) Journal of European Competition Law & Practice 473, 474. See also Pablo Ibáñez Colomo, *The New EU Competition Law* (Bloomsbury Publishing 2023).

[20] Roger Van den Bergh, *Comparative Competition Law and Economics* (Edward Elgar Publishing 2017) 1.

On a third level, this thesis aims to contribute to literature on the role of the Courts within the Union's system of judicial protection. Much ink has been spilled on what the main purpose of judicial review is, in particular in the Court-driven context of the EU, where the judiciary often plays a more heightened role than can (or should) be expected, while other times displays considerable deference to the Commission.[21] Several related topics are explored within this thesis, including the role of EU Courts in furthering policy choices in the EU, as well as the relationship between Courts and expertise.[22] The junction of these matters cuts to the core of striking an equilibrium between respect for the principle of institutional balance on the one hand, and meaningful judicial review on the other.[23]

In order to contribute to these various strands of EU law scholarship, the overarching question this thesis aims to answer is*: To what extent and in what ways does the General Court employ a strict standard of judicial review for economic assessments in order to advance the 'more economic approach' in EU merger control?*

1.2 Methodology

To provide a comprehensive answer to the research question, the doctrinal method is employed. The MEA is an inherently multidisciplinary phenomenon, due to the integration of core concepts from the discipline of economics into the discipline of law. Arguably, competition law itself, being to a certain extent rooted in economics since its dawn, is multidisciplinary, viewed by many as a "hybrid policy science, a cross between law and economics that produces a mode of reasoning somewhat different from that of either discipline alone."[24] However, as pointed out by Levy, "the use of economics and economists was in its infancy in the EU [during the

[21] For an overview, see for example Henri de Waele, 'The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment' (2010) 6(1) Hanse Law Review 1, 2-9.

[22] This is a topic also observed in other areas of EU law. See for example Luca Knuth and Ellen Vos, 'When EU Courts Meet Science: Judicial Review of Science-Based Measures Post-Pfizer' in Mark Dawson, Bruno de Witte, and Elise Muir (eds) *Revisiting Judicial Politics in the European Union* (Edward Elgar Publishing 2024); Joanne Scott and Susan P Sturm, 'Courts as Catalysts: Re-Thinking the Judicial Role in New Governance' (2007) 13 Columbia Journal of European Law 565.

[23] Pablo Ibáñez Colomo, 'Law, Policy, Expertise: Hallmarks of Effective Judicial Review in EU Competition Law' (2022) 24 Cambridge Yearbook of European Legal Studies 143, 148.

[24] Stefan Weishaar, 'A Primer on Competition Law Economics and Law, Policy and EU Integration' (2010) 1, 2.

adoption of the Merger Regulation]."[25] Due to the unprecedented internalisation of economics into the law during the MEA, this thesis relies on a research design that primarily remains internal to the law.[26]

Although the MEA has permeated all branches of competition law,[27] it is generally accepted that merger control has been at the vanguard of this development.[28] Furthermore, the role of EU Courts is generally most pronounced in merger control.[29] Arguably, the Court has taken a proactive role also in cases pertaining to other branches.[30] However, such proactivity seems to be most consistent in merger control where it is acknowledged that EU Courts exercise a more stringent review,[31] endowing this branch particular scientific relevance. This is complemented by societal significance, as merger control is characterised by the need for fast and predictable decisions; mergers are famously time-sensitive, and undertakings will often go long ways to obtain clearance even with conditions and

[25] The quote continues: few Commission officials had a background in economics; outside counsel were for the most part unfamiliar with economic theory and concepts; and economics was applied only rarely in antitrust cases. Levy (n 17).

[26] Jan M Smits, 'What is Legal Doctrine?' On the Aims and Methods of Legal-Dogmatic Research' in Ron van Gestel, Hans-W Micklitz and Edward L Rubin (eds) *Rethinking Legal Scholarship: A Transatlantic Dialogue* (Cambridge University Press 2017) 210.

[27] Pieter van Cleynenbreugel, 'Article 101 TFEU and the EU Courts: Adapting Legal Form to the Realities of Modernisation?' (2014) 51 Common Market Law Review 1381, 1382; Marta Zalewska-Glogowska, *The More Economic Approach Under Article 102 TFEU: A Legal Analysis and Comparison with US Antitrust Law* (Nomos 2017); Phedon Nicolaides, 'A More Economic Approach to the Control of State Aid' in Bruno Nascimbene and Alessia Di Pascale (eds) *The Modernisation of State for Economic and Social Development* (Studies in European Economic Law and Regulation, Springer Cham 2018) 63.

[28] Nicholas Levy, 'Mario Monti's Legacy in EC Merger Control' (2005) 1(1) Competition Policy International 99, 123.

[29] Pier Luigi Parcu, Giorgio Monti and Marco Botta, 'Introduction: From the Legalistic to the Effect-Based Approach in EU Competition Policy' in Pier L Parcu, Giorgio Monti and Marco Botta (eds) *Economic Analysis in EU Competition Law: Recent Trends at National and EU Level* (Edward Elgar Publishing 2021) 4.

[30] Concerning abuse of dominance: Case T-286/09 *Intel Corporation v Commission* [2022] ECLI:EU:T:2022:19. See for example Jose Luis da Cruz Vilaca, 'The Intensity of Judicial Review in Complex Economic Matters— Recent Competition Law Judgments of the Court of Justice of the EU' (2018) 6(2) Journal of Antitrust Enforcement 173; Rupprecht Podszun, 'The Role of Economics in Competition Law: The "effects-based approach" after the Intel-judgment of the CJEU' (2018) 7(2) Journal of European Consumer and Market Law 57. Concerning restrictive agreements: Case C-67/13 P *Groupement Cartes Bancaires v Commission* [2014] ECLI:EU:C:2014:2204. See for example Ginevra Bruzzone, 'The Effect-Based Approach after Intel: A Law and Economics Perspective' in Pier L Parcu, Giorgio Monti and Marco Botta (eds) *Economic Analysis in EU Competition Policy* (Edward Elgar Publishing 2021) 50-52.

[31] Damien Geradin and Nicolas Petit, 'Judicial Review in European Union Competition Law: A Quantitative and Qualitative Assessment' (2011) Tilburg Law and Economics Centre Discussion Paper No 2011-008, 21.

obligations.[32] In light of this, the way in which the judiciary engages with Commission decisions is highly relevant for merging undertakings.

Within the system of the merger regime, this thesis investigates how the MEA has been integrated into legislation and accompanying soft law, namely the Merger Regulation and Horizontal Merger Guidelines, as well as how it manifests in the Commission's enforcement decisions. More importantly, the case law of the Court is examined, focusing on three 2002 judgments: *Airtours*, *Schneider Electric*, and *Tetra Laval*, as well as the most recent relevant case law in this field: *CK Telecoms*. Although the General Court's judgment serves as the main object of inquiry, the Court of Justice's judgment on appeal is also investigated.

The theoretical framework employed views *CK Telecoms* as an endeavour by the General Court to stimulate the MEA.[33] In order to attain this conceptualisation, certain sections of the judgment are interpreted by analogy to the case law of 2002. Where analogy fails to provide insights because the General Court's judgment is divergent to prior case law, the dissimilarities are analysed. The similarities and differences identified are framed within three categories of the MEA. In light of the findings, it is argued that the General Court is advancing the MEA in some ways reminiscent of the early 2000s, while in other respects innovatively. The Court of Justice's argumentation on appeal is also investigated, revealing a different interpretation and application of legal-economic criteria. The reasons why there was resistance to the advocacy of the MEA in 2023, leading to the 'aborted revolution', are theorised.

Finally, in allegiance to the normativity inherent in legal doctrine,[34] this thesis adopts a prescriptive angle in investigating the judiciary's role in promoting the MEA. Unlike existing literature which typically uses dichotomous frameworks—either advocating for stringent judicial review to ensure effective judicial protection, or relaxed review to preserve administrative discretion—this thesis

[32] Pablo Ibáñez Colomo, 'EU Merger Control Between Law and Discretion: When is an Impediment to Effective Competition Significant?' (2021) 44(4) World Competition 347, 347; Susanne Zuehlke, Francesca Gentile, and Petar Petrov, 'Merger Cases in the EU Courts' (2020) 11(1-2) Journal of European Competition Law & Practice 3, 3.

[33] Jan Vranken, 'Methodology of Legal Doctrinal Research: A Comment on Westerman' in Mark van Hoecke (ed) *Methodologies of Legal Research: Which Kind of Method for what Kind of Discipline?* (Hart Publishing 2011) 119.

[34] Pauline C Westerman, 'Open or Autonomous: The Debate on Legal Methodology as a Reflection of the Debate on Law' in Mark van Hoecke (ed) *Methodologies of Legal Research: Which Kind of Method for what Kind of Discipline?* (Hart Publishing 2011) 88.

adopts a normative framework that does justice to the historic role of EU Courts in shaping competition law. At the same time, it devises three parameters that act as a manifestation of the principle of institutional balance and serve as constraints to EU Courts' ability to promote the MEA.

1.3 Structure

Firstly, Section 1 analyses how the standard of review for 'complex economic assessments' has been shaped and defined by EU Courts, answering the sub-question: *How has the standard of review for 'complex economic assessments' evolved in early case law?* Thereafter, Section 2 assesses the extent to which EU Courts, especially through heightening their judicial scrutiny of economic assessments, contributed to the inception of the MEA, answering the sub-question: *To what extent and how have EU Courts heightened their judicial scrutiny of economic assessments in the past to propel the 'more economic approach'?* Building upon that analysis, Section 3 investigates the review standard and reasoning of the General Court in *CK Telecoms*, and conceptualises the judgment as a promotion of the MEA. This section answers the sub- question: *How does the General Court's reasoning in CK Telecoms reflect a stricter standard of review in a way to promote the 'more economic approach'?* Finally, Section 4 discusses the desirability for Courts to be the promoters of this approach, answering the sub-question: *To what extent is it desirable for EU Courts to advance the 'more economic approach', particularly in the manner demonstrated in CK Telecoms?*

1.4 Assumptions and Limitations

Several assumptions underpin the research undertaken in this thesis. Firstly, it is submitted that judicial review standards are not atemporally crystallised, but rather evolve over time. When the CJEU deviates from its established standard of review, it is assumed that there is a decipherable reason for this, rather than succumbing to the all-too-familiar trope that questions what the judge had for breakfast as opposed to investigating rational reasons.[35]

Moreover, it is assumed that the EU judiciary neither conforms entirely to the civil law nor the common law tradition.[36] Whilst in many respects the judicial

[35] See Willard L King, 'Breakfast Theory of Jurisprudence' (1937) 14(6) Denver Law Review 143.

[36] Marc Jacob, *Precedents and Case-based Reasoning in the European Court of Justice: Unfinished Business*

(Cambridge University Press 2014) 3.

style of the CJEU follows the civil law tradition of most of its Member States,[37] a common law feature of relevance is the ability of the judiciary, in one way or another,[38] to influence policy.[39] In other words, the significance of a judgment extends beyond the immediate legal context, and can also influence policy choices by other EU institutions (most notably, the Commission) and the broader legal framework.[40]

Alongside these assumptions that shape the theoretical framework adopted, there are inherent limitations linked to the scope of the research. Firstly, the central focus of this research is placed on *CK Telecoms*. While an array of other case law is also investigated, this research is unable to capture all cases that may contribute to (dis)proving the claims made. In order to confirm whether this pattern of judicial proactivity is present in other case law, including in other branches of competition law, empirical research is needed. Secondly, some ambiguities persist in defining terms in this research, including 'complex economic assessments' and even in ascertaining exactly when judicial review is more stringent or more lenient.[41] While

[37] Fernanda G Nicola, 'National Legal Traditions at Work in the Jurisprudence of the Court of Justice of the European Union' (2016) 64(4) The American Journal of Comparative Law 865, 871.

[38] Not necessarily via the doctrine of *stare decisis* and judicial precedent (Jacob (n 36) 3), but in a way unique to the European integration project. See for example Dorte Sindbjerg Martinsen, 'Judicial Influence on Policy Outputs? The Political Constraints of Legal Integration in the European Union' (2015) 48(12) Comparative Political Studies 1622.

[39] The ability of courts to generate policy change has been extensively debated in literature in studies of national, comparative, and international politics. See for example Clifford J Carruba, Matthew Gabel, and Charles Hankla, 'Understanding the Role of the European Court of Justice in European Integration' (2012) 106(1) The American Political Science Review 214; Lisa Conant, *Justice Contained: Law and Politics in the European Union* (Cornell University Press 2002); Alec Stone Sweet, 'Governing with Judges: Constitutional Politics in Europe' in Jack comparative, and international politics. See for example Clifford J Carruba, Matthew Gabel, and Charles Hankla, 'Understanding the Role of the European Court of Justice in European Integration' (2012) 106(1) The American Political Science Review 214; Lisa Conant, *Justice Contained: Law and Politics in the European Union* (Cornell University Press 2002); Alec Stone Sweet, 'Governing with Judges: Constitutional Politics in Europe' in Jack Hayward and Edward C Page (eds) *Governing the New Europe* (Polity Press 1995).

[40] Martinsen (n 38) shows this using a formula: Judicial influence on EU policy outputs occurs when the established regulatory status quo ($SQreg^1$) is challenged by a new court-generated status quo (SQCourt), which is then codified into or altered by EU legislation ($SQreg^2$).

[41] It is generally recognised that quantifiable indices, such as how many Commission decisions are annulled by the CJEU, is an inaccurate measure of judicial review. As a result, the saying that judicial review is intense if the government does not win more than 50% of cases seems to be a futile parameter (Jean-François Bellis and Claire Simpson, Book Launch: Evidence, Proof and Judicial Review in EU Competition Law (29 May 2024, Brussels).

this thesis touches on defining the boundaries of these concepts, it uses these terms in a practical and context-specific way rather than attaining universal definitions.

Finally, this thesis analyses a judgment by the General Court that was later overturned by the Court of Justice. Despite its *prima facie* redundancy, it is argued that this heightens the theoretical significance of the analysis. Indeed, the ability to analyse both the General Court's daring reasoning as well as the Court of Justice's confrontational response provides fruitful insights into how the two Courts employed distinct attitudes and understood their standards of review and mandates differently. Both of their inputs are useful in deciphering how best to understand the core function of judicial review in competition law, including Courts' engagement with economic reasoning and their perceived role in furthering the MEA. Furthermore, the case has not been conclusively adjudicated, as the Court of Justice has referred it back to the General Court, whose judgment is currently pending and can be expected in the upcoming years. In light of this, the insights presented in this thesis may also prove practically valuable as the saga unfolds.

2. Judicial Review of 'Complex Economic Assessments': Traditional Systematisation

Generally, the intensity with which EU Courts examine the legality of a Commission decision is dictated by the applicable standard of review.[42] Over time, an established systematisation of what can be reviewed by EU Courts and what is largely shielded from such review has emerged both in the case law of the CJEU as well as in EU law scholarship. EU Courts exercise full review over whether the law has been correctly applied to a given case, and/or whether the facts that the Commission relies on are correct.[43] If, however, the Court must scrutinise whether the Commission's *assessment* of the facts is correct, the Court's control is (exceptionally) limited to verifying whether there has been a manifest error of assessment.[44] Therefore, a wide margin of discretion is given to the Commission as the decision-maker in 'complex economic assessments.'[45]

The application of this marginal standard of review is argued to reflect the institutional partition of competences between the Commission, entrusted with the enforcement of Articles 101 and 102 TFEU, the control of concentrations, and more generally the development of EU competition policy on the one hand,[46] and EU Courts in charge of reviewing the legality of Commission decisions on the other hand.[47] In the field of merger control specifically, the institutional balance dictates that the Commission not only enjoys wide investigative powers, akin to those of a public prosecutor, but it is also the sole arbiter, in the first instance, of whether a merger is anti-competitive, and has the power to enforce its decisions by imposing

[42] David Bailey, 'Scope of Judicial Review under Article 81 EC' (2004) 41(5) Common Market Law Review 1327, 1330; Luca Prete and Alessandro Nucara, 'Standard of Proof and Scope of Judicial Review in EC Merger Cases: Everything Clear after Tetra Laval?' (2005) 26 European Competition Law Review 692, 693.

[43] Mariolina Eliantonio, 'Deference to the Administration in Judicial Review—the European Union' in Guobin Zhu (ed) *Deference to the Administration in Judicial Review: Comparative Perspectives* (2019 Springer International Publishing) 168; Kyriakos Fountoukakos and Camille Puech-Baron, 'Towards a Higher Standard of Proof and a More Interventionist Judicial Review in Antitrust Cases Involving Complex (Economic) Assessments Following CK Telecoms?' (2020) 11(8) Journal of European Competition Law & Practice 460, 462-463.

[44] Fountoukakos and Puech-Baron (n 43).

[45] Marc Jaeger, 'The Standard of Review in Competition Cases Involving Complex Economic Assessments: Towards the Marginalisation of the Marginal Review?' (2011) 2(4) Journal of European Competition Law and Practice 295, 295.

[46] Loïc Azoulay, 'The Court of Justice and the Administrative Governance' (2001) 7 European Law Journal 425, 429-430.

[47] Kalintiri (n 18) 1285.

fines, or ultimately by prohibiting the merger from taking place.[48] On the one hand, the multitude of duties that the Commission is called to fulfil necessitates the existence of an effective system of judicial review.[49] Indeed, as the Commission acts both as an investigator as well as decision- maker, mechanisms allowing for full review of all issues of law and fact are indispensable from a fundamental rights perspective.[50] Although some scholars have dubbed judicial review's role in upholding the rule of law a "trite assertion",[51] its role in rectifying decisional errors should not be understated.[52] However, on the other hand, it is precisely this multiplicity of roles that make it imperative that the Commission enjoy a certain degree of discretion in the discharge of its duties.[53]

The birth of the marginal standard of review found place already under the European Coal and Steel Community, where judicial scrutiny was subject to an important qualification: the Court could not examine "the evaluation of the situation resulting from economic facts, or the circumstances in the light of which the High Authority took its decision or made its recommendation."[54] Although this restriction was removed upon the entry into force of the Treaty of Rome (and has remained absent in subsequent Treaties), the "seed had already been sown."[55] Indeed, the notion of marginal review of complex economic assessments inspired by this provision had already made its debut in the case law of the CJEU. In the seminal judgment *Consten and Grundig*, the CJEU expressly accepted that the "exercise of the Commission's powers necessarily implied complex evaluation on

[48] Bo Vestendorf, 'Standard of Proof in Merger Cases: Reflections in the Light of Recent Case Law of the Community Courts' (2005) European Competition Journal 3, 9; Laurent Warlouzet, 'The Centralisation of EU Competition Policy: Historical Institutionalist Dynamics from Cartel Monitoring to Merger Control' (2016) 54(3) Journal of Common Market Studies 725, 725.

[49] Bo Vesterdorf and Others, 'The Importance of Judicial Review for the Future of EU Merger Control' in Ioannis Kokkoris and Nicholas Levy (eds) *Research Handbook on Global Merger Control* (Edward Elgar Publishing 2023) 241.

[50] Fernando Castillo de la Torre and Eric Gippini Fournier, *Evidence, Proof and Judicial Review in EU Competition Law* (Edward Elgar 2017) paras 6.052-6.062.

[51] Geradin and Petit (n 31). Furthermore, it must be recalled that the rule of law is a fundamental value of the Union according to Consolidated version of the Treaty on European Union [2012] OJ C326/13, art 2.

[52] Geradin and Petit (n 31).

[53] Alexander Fritzsche, 'Discretion, Scope of Judicial Review and Institutional Balance in European Law' (2010) 47 Common Market Law Review 361, 368.

[54] Treaty Establishing the European Coal and Steel Community [1951] (repealed), art 33.

[55] Kalintiri (n 18) 1388.

economic matters", and in such complex situations, judicial review "must take account of their nature by confining itself to the examination of the relevance of the facts and of the legal consequences which the Commission reduces therefrom."[56]

This marginal standard of review was applied to the field of merger control in *Kali & Salz*, where the Court of Justice applied the 'deference approach'[57] by drawing attention to the fact that "the Merger Regulation…confers on the Commission a certain discretion, especially with respect to assessments of an economic nature. Consequently, the review of the 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."[58] Therefore, this traditional understanding of judicial review of economic assessments calls for a 'hands-off approach' or 'light-touch' by EU Courts, including in merger control.

Ambiguities undoubtedly remain as to what precisely constitutes such an assessment (as opposed to, for instance, 'normal' or 'uncomplex' economic assessments), or what exactly indicates the 'manifestness' of an error by the Commission, but a generous amount of scholarship has been dedicated to this seemingly never-ending endeavour,[59] and this paper does not venture to demystify these concepts and miring in abstract pursuits. Suffice it to say that complex economic appraisals have been found to exist pertaining to the definition of the relevant market,[60] a conclusion that an undertaking holds a dominant position,[61] a

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[56] Case C-56/64 *Consten and Grundig v Commission* [1966] ECR 299, p347.

[57] Bo Vesterdorf, 'Economics in Court: reflections on the role of judges in assessing economic theories and evidence in the modernised competition regime' in Martin Johansson, Nils Wahl and Ulf Bernitz (eds) *Liber amicorum in honour of Sven Norberg – A European for all seasons* (Bruylant 2006) 511.

[58] Joined cases C-68/94 and C-30/95 *French Republic and Société commerciale des potasses et de l'azote and Entreprise minière et chimique v Commission* [1998] ECR I-1375, para 244.

[59] See for example Ian S Forrester, 'A Bush in Need of Pruning: The Luxuriant Growth of Light Judicial Review' in Clause-Dieter Ehlermann and Mel Marquis (eds) *European Competition Law Annual 2009: The Evaluation of Evidence and its Judicial Review in Competition Cases* (Hart Publishing 2009) 425; Jaeger (n 45) 310-313; Kalintiri (n 18) 1291-1294.

[60] Case T-301/04 *Clearstream v Commission* [2009] ECR II-03155, para 47; Case T-201/04 *Microsoft v Commission* [2007] ECR II-03601, para 482; Case T-151/05 *NVV and Others v Commission* [2009] ECR II-01219, para 53.

[61] Case T-210/01 *General Electric v Commission* [2005] ECR II-05575, paras 60-64 and 121.

finding that a conduct amounts to an abuse of dominance,[62] the balancing task under Article 101(3) TFEU,[63] and, most importantly for this thesis, ascertaining that a concentration significantly impeded effective competition.[64]

[62] For example regarding predatory pricing as a form of abuse Case C-202/07 P *France Télécom v Commission*

[2009] ECR I-02369, para 7; Case T-340/03 *France Télécom v Commission* [2007] ECR II-00107, para 129.

[63] Case T-168/01 *GlaxoSmithKline Unlimited v Commission* [2006] ECR II-02969, para 244.

[64] Joined cases C-68/94 and C-30/95 *French Republic and Société commerciale des potasses et de l'azote and Entreprise minière et chimique v Commission* [1998] ECR I-1375, paras 223-224; Case T-342/07 *Ryanair v Commission* [2010] ECR II-03457, paras 29-30; Case T-119/02 *Royal Philips Electronics v Commission* [2003] ECR II-01433, para 77.

3. Annus Horribilis: Heightened Judicial Review and the Push for the 'More Economic Approach'

At first glance, EU Courts' marginal standard of review in 'complex economic assessments' gives the impression that as competition law becomes more economically oriented, the Courts will exhibit greater deference. Indeed, the higher the role played by economics in competition law (e.g. featuring in tests, theories of harm, evidence), the more one would expect for assessments to be classified as 'complex economic' ones. Furthermore, comparing the Commission's nature as a specialised agency[65] with EU judges' generalist background,[66] it makes sense to allow a degree of leeway to the Commission in its appreciation—or so the argument goes. The present thesis wishes to adopt a different, somewhat underestimated angle, according to which irrespective of the 'comparative advantage' the Commission may enjoy due to its specialisation, economics is not its sole prerogative. As Kalintiri also opines, economics can function as a double-edged sword.[67] Therefore, this thesis aspires to shift the conversation from one concerning judicial restraint and passivism, to one on judicial proactivity and activism.[68] Indeed, EU Courts have played a key role in rejecting and/or applying economics,[69] as well as in promoting the MEA through intensifying their judicial review of economic assessments. This was seen in the Commission's *annus horribilis*, where EU Courts repealed three consecutive merger decisions, in an unprecedented action that came to be a defining moment in the evolution of (more) economics-based competition law.

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[65] Cristina Teleki, *Due Process and Fair Trial in EU Competition Law: The Impact of Article 6 of the European Convention on Human Rights* (Nijhoff Studies in European Union Law Volume 18, Brill/Nijhoff 2021) 200.

[66] Michael R Baye and Joshua D Wright, 'Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity and Judicial Training on Appeals' (2011) 54 Journal of Law and Economics 1, 2; Joshua D Wright and Angela Diveley, 'Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission (2013) Journal of Antitrust Enforcement 1, 4.

[67] Kalintiri (n 18) 1301.

[68] In this context, proactivity refers to the EU Courts' assertive and anticipatory engagement in competition law cases. It involves a forward-thinking approach, setting legal precedents, and ensuring rigorous scrutiny of Commission decisions. Activism refers to the willingness of courts to go beyond the text of the law or precedent to achieve what they perceive as desirable outcomes. This often involves interpreting laws in a broader or more creative manner, potentially influencing or setting policy directions.

[69] For example, in *General Electric* (n 61), the Commission's reliance on economics, in particular its conclusion based on the "Cournot effect" of bundling to prohibit the GE/Honeywell concentration, backfired as the General Court rejected that this economic theory leads to such a direct and automatic consequence, taking into account the produced expert economic evidence.

3.1 Five Months, Three Repeals

3.1.1 *Airtours*

The first of these cases was *Airtours*, where the Commission had prohibited a merger between two UK tour operators, reasoning that it would create a collective dominant position[70] in the UK market for short-haul foreign package holidays, and would thus lead to a significant impediment of competition.[71] Collective dominance falls under the coordinated effects of mergers (as opposed to non-coordinated or unilateral effects).[72] The General Court clarified that such a position only exists under three conditions: (i) the market had to be sufficiently transparent for each member to know how the other members were behaving in order to monitor whether they were adopting the common policy; (ii) the situation of tacit coordination had to be sustainable over time, which was only the case if there was a sufficient deterrent not to depart from the common course of conduct;[73] and (iii) the Commission had to establish that the foreseeable reaction of current and future competitors, as well as of consumers, would not jeopardise the results expected from the common policy.[74]

The General Court believed that the Commission failed to prove any of these conditions for a collective dominant position to the requisite legal standard.[75] For example, it found that the Commission was wrong to infer, based on factors such as the market participants' cautious capacity planning or the fact that the same institutional investors were found to some extent in the three major market players, that there was already a tendency towards collective dominance prior to the merger.[76] It further criticised the Commission for disregarding the fact that the main

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[70] A collective dominant position is a position held by the parties to the concentration together with one or more undertakings not party thereto. It refers to a situation where effective competition would be significantly impeded by members of the collective dominant position, in particular because factors giving rise to a connection between them as a result of which they would be able to adopt a common policy on the market and act to a considerable extent independently of their competitors, customers, and consumers. Case T-102/96 *Gencor v Commission* [1999] ECR II-753, paras 125 and 163.

[71] *Airtours/First Choice* (Case IV/M.1524) Commission Decision 2000/276/EC [2000] OJ L93/1, paras 127 and 158.

[72] Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5 (Horizontal Merger Guidelines) para 39.

[73] *Gencor* (n 70) para 267.

[74] Case T-342/99 *Airtours v Commission* [2002] ECR II-02585, para 62.

[75] *Airtours* (n 74) para 294.

[76] *Airtours* (n 74) paras 91-92.

tour operators' market shares had been volatile in the past, which was counter-indicative of coordination.[77] Moreover, the Court determined that the Commission had not substantiated crucial factors underlying its assumption that the market was conducive to oligopolistic coordination; that the Commission had often misinterpreted the available data;[78] and that it had *ignored economic theory* by failing to consider demand volatility as a factor likely to destabilise any attempt at collusion by the remaining market players post-merger.[79] It also concluded that the Commission had underestimated the probable reactions of smaller competitors, potential competitors, and consumers as factors capable of destabilising the alleged dominant oligopoly,[80] and specifically failed to consider barriers to entry.[81] Finally, the Court criticised the Commission for *ignoring economic logic* by failing to consider that every business aims to maximise profit when predicting the likely impact of the merger on the conduct of the remaining participants.[82] It found that the decision, "far from basing its prospective analysis on *cogent evidence*, is vitiated by a series of errors of assessment as to factors fundamental to any assessment"[83]—a damning criticism of the Commission evidentiary standards and economic know-how.[84]

3.1.2 *Schneider Electric*

In the second case, *Schneider Electric*, the Commission prohibited a transaction in the electrical distribution sectors on the ground that it would create new dominant positions in nine markets and would strengthen pre-existing dominant positions in another five.[85] The Court found that the Commission had, again, committed serious errors in its assessment of the merger's likely impact. It held *inter alia* that the Commission overestimated the merged entity's power by assuming the existence of transnational effects capable of increasing the concentration's impact on the

[77] *Airtours* (n 74) paras 112 and 120.

[78] *Airtours* (n 74) paras 133, 172-180.

[79] *Airtours* (n 74) para 147.

[80] *Airtours* (n 74) paras 208-261.

[81] *Airtours* (n 74) para 269.

[82] *Airtours* (n 74) paras 290-293.

[83] *Airtours* (n 74) para 294.

[84] Witt (n 17) 29.

[85] *Schneider/Legrand* (Case COMP/M.2283) Commission Decision 2004/275/EC [2004] OJ L101/1, paras 782- 783; Case T-310/01 *Schneider Electric SA v Commission* [2002] ECR II-04071, paras 40-58.

relevant national markets, without providing concrete evidence to support this.[86] Furthermore, it stated that after defining the separate product markets as national, the Commission failed to carry out a country-by-country analysis and instead relied on generalised EU-wide considerations,[87] or characteristics of other national markets.[88] Beyond this, it found that the Commission failed to prove its contention that the merged entity would become an unavoidable trading partner for wholesalers without countervailing buyer power.[89] It opined that the data contained in the decision was at odds with the Commission's findings and criticised the Commission for attributing specific future market conduct on the part of the entity *without providing any evidence* in support.[90] Finally, the Commission erred by not considering the proportion of sales that competitors made to vertically integrated groups when calculating their market shares.[91] In unusually severe language, the Court concluded that it considered the errors, omissions and inconsistencies in the Commission's analysis to be of undoubted gravity, and that they were such as to "*deprive of probative value the economic assessment* of the impact of the concentration."[92] Again, the Court annulled the decision in its entirety.

3.1.3 *Tetra Laval*

The final blow, delivered all but three days after the previous judgment, was the landmark *Tetra Laval* judgment.[93] The case concerned a proposed merger in the liquid food packaging industry, which the Commission prohibited on the grounds that it created a dominant position in the market for carton packaging systems.[94] The Commission held that pre-merger, Tetra already had a dominant position in the market for aseptic cartons and that it had a leading position in the non-aseptic

[86] *Schneider Electric* (n 85) paras 152-191.

[87] *Schneider Electric* (n 85) paras 103-197.

[88] *Schneider Electric* (n 85) paras 237 and 238.

[89] *Schneider Electric* (n 85) paras 194-208.

[90] *Schneider Electric* (n 85) paras 203-230.

[91] *Schneider Electric* (n 85) paras 292-296.

[92] *Schneider Electric* (n 85) paras 404 and 411.

[93] See for example Matteo Bay and Javier Luis Calzado, 'Tetra Laval II: The Coming of Age of the Judicial review of Merger Decisions' (2005) 28(4) World Competition 433.

[94] *Tetra Laval/Sidel* (Case No COMP/M.2416) Commission Decision 2004/124/EC [2001] OJ L43/13, para 452.

cartons markets.[95] Furthermore, Sidel (with whom Tetra was merging) had a leading (not yet dominant) position in the market for PET packaging equipment.[96] According to the Commission, the merger would turn the latter into a dominant position.[97] It would also further strengthen Tetra's dominant position in the carton packaging market since it would create the only vertically integrated entity that was involved in the production of three separate packaging systems.[98] The Commission stated that the merged entity's dual position as supplier and competitor of converters would create a 'channel conflict' and was likely to incite it to raise competing converters' costs.[99] It also predicted that the merged entity would use its presence in several packaging markets to leverage its dominant position in the carton sector, and turn its already leading position in PET packaging equipment into a dominant position.[100] The Court, by contrast, held that if the commitments were taken into account, the potential negative horizontal and vertical effects were minimal if not non-existent.[101] It also found that the Commission had committed 'manifest errors of assessment' in predicting that the merged entity could and would use its dominant position in the carton packaging market successfully as a lever to achieve dominance in the neighbouring PET packaging equipment market by means of bundling or other exclusionary practices.[102] This was because, firstly, the Commission failed to take into account that such practices would be illegal pursuant to Article 102 TFEU, which had to be considered a disincentive for the parties to engage in such behaviour.[103] Secondly, Tetra submitted behavioural commitments that left little room for such conduct to arise.[104] The Court held that the Commission *failed to adduce sufficiently convincing evidence* to prove that leveraging practices would allow the merged

[95] *Tetra Laval/Sidel* (n 94) paras 215-231.

[96] *Tetra Laval/Sidel* (n 94) paras 232-258.

[97] *Tetra Laval/Sidel* (n 94) paras 263-290.

[98] *Tetra Laval/Sidel* (n 94) paras 293-300.

[99] *Tetra Laval/Sidel* (n 94) paras 291-324.

[100] *Tetra Laval/Sidel* (n 94) paras 325-408.

[101] Case T-5/02 *Tetra Laval BV v Commission* [2002] ECR II-04381 (*Tetra Laval General Court*), paras 132 and 136-139.

[102] *Tetra Laval General Court* (n 101) para 162 and 308.

[103] *Tetra Laval General Court* (n 101) para 159.

[104] *Tetra Laval General Court* (n 101) para 161.

entity to achieve a dominant position in any of the PET-related markets.[105] It also dismissed the Commission's finding that the merger would reinforce Tetra's dominant position on the market for aseptic carton packaging by eliminating the competitive constraint represented by Sidel as a potential competitor coming from the neighbouring PET markets on the grounds that the Commission had *not adduced any evidence* for the key assumption on which this prediction was based, namely that there would be considerable growth in PET use for sensitive products.[106] The Court thus concluded that the contested decision *did not establish any of the alleged anti-competitive effects to the requisite legal standard* and annulled it in its entirety.

The Commission's appeal to the Court of Justice was similarly unsuccessful. The Commission accused the General Court of "purporting to apply a standard of review based on manifest error of assessment while in reality, applying a different standard"[107] and stated that "the Court of First Instance, whilst referring to 'manifest error of assessment' in the judgment, has in fact significantly raised the level of standard of proof required from the Commission to prohibit a conglomerate merger and has thereby gone beyond the review of legality."[108] This complaining was, however, to no avail: the Court of Justice stated that the Commission's margin of discretion does not mean that EU Courts had to refrain from reviewing its interpretation of information of an economic nature. On the contrary in fact, not only did the General Court have the duty to establish that the evidence relied on was factually accurate, reliable and consistent, it also had to ascertain whether the evidence contained all the information necessary for assessing a complex situation and whether it was capable of substantiating the conclusions drawn from it.[109]

In this series of judgments, the Court abandoned its practice of judicial self-restraint pertaining to assessments of economic nature.[110] Rather than limiting itself to verifying whether the relevant procedural rules had been complied with, whether the decision's statement of reasons was adequate, and whether the facts were

[105] *Tetra Laval General Court* (n 101) paras 226-307.

[106] *Tetra Laval General Court* (n 101) paras 312-333.

[107] Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-00987 (*Tetra Laval Court of Justice*), para 26.

[108] *Tetra Laval Court of Justice* (n 107) para 29.

[109] *Tetra Laval Court of Justice* (n 107) para 39.

[110] Witt (n 17) 27.

accurately stated,[111] the Court heightened its judicial control of economic assessments and engaged with them in substance.[112]

3.2 Genesis of the 'More Economic Approach'

After this unprecedented criticism of the Commission's competitive assessments by EU Courts, the moment was opportune for reflection. This reflection had already commenced around the 1990s, when the Commission's competition policy came under increasing criticism from academics and practitioners for its lack of economic analysis. To name but one famous example, Barry Hawk published a particularly critical analysis of the treatment of vertical restraints under EU antitrust law, which he deemed overly legalistic and lacking in economic analysis.[113] Another important factor was the appointment of an economist to the position of Commissioner for Competition in 1999, Mario Monti, whose professional background and personal convictions played a major role in driving forward the reform and shaping the Commission's more economic revolution.[114] There were other reasons for this transition, and literature has been particularly active in hypothesising explanations. Many purport, rather unsurprisingly, that competition law relied too heavily on assumptions—blunt rules of thumb on the basis of which conduct was inferred without recourse to factual economic analysis.[115] This often made competition law over-capture conduct because it was *prima facie* anti-competitive (so-called Type I error),[116] and overburdened enforcement authorities.[117] Furthermore, according to Colomo, the transition was a rational response by the Commission to a legitimacy crisis in the system—it was understood that enforcement of competition law would not be accepted as legitimate if not informed by economic analysis.[118] Despite all these different

[111] See also Case C-42/84 *Remia v Commission* [1985] ECR 02545, para 34.

[112] Kalintiri (n 18) 1295-1298.

[113] Hawk (n 7) 973. See also Barry E Hawk, 'The American (Anti-trust) Revolution: Lessons for the EEC?' (1988) 9 European Competition Law Review 53.

[114] Nicholas Levy, 'Mario Monti's Legacy in EC Merger Control' (2005) 1(1) Competition Policy International 99, 132.

[115] Witt (n 9) 175.

[116] Giorgio Monti, *EC Competition Law* (Cambridge University Press 2007) 17.

[117] Luc Peeperkorn, 'The Effects-Based Approach: Still just as Necessary for an Effective and Coherent EU Competition Policy' in Adina Claici, Assimakis Komninos and Denis Waelbroeck (eds) *The Transformation of EU Competition Law: Next Generation Issues* (Kluwer Law International 2023) 8.

[118] Colomo (n 19) 474.

factors that influenced the Commission to a larger or lesser extent, it is certain that EU Courts played an important role as catalysts for the economisation of competition law.[119] As phrased by Witt, the Commission's *annus horribilis* led to some 'soul-searching' on the quality of its competitive assessments.[120]

3.2.1 Tripartite Categorisation

Propelled by the realisations brought by (among others) EU Courts, the Commission embarked on a mission to bring EU competition law more in line with contemporary economic theory. Over the following decade, it elevated competition policy from its former "legalistic approach" to one "based on sound economic principles".[121] Under 'old' competition law, the establishment of an infringement was conducted on the basis of the form or intrinsic nature of a particular practice (form-based approach).[122] The transition cultivated a newfound emphasis on the assessment of anti- and pro-competitive effects (effects-based approach).[123] Thus, business conduct (with few exceptions) was no longer prohibited without prior in-depth economic assessment of a conduct's actual effects on competition.[124] The many changes brought about by the MEA can be classified into three categories: i) redefining the goals of competition law; ii) making greater use of economic theories and methods in competitive assessments, and providing evidence for the appropriateness of a given market definition and the anti- competitive effects of a given conduct; and iii) reviewing established tests for anti-competitive conduct in

[119] This is not the same that EU Courts have *always* been proponents of economics-based competition law. As Parcu, Monti, and Botta argue, both the Commission and CJEU had shaped the enforcement of EU competition policy with limited reference to economic analysis in landmark cases like *United Brands, Consten and Grundig, and Hoffman La-Roche*.

[120] Witt (n 17) 27.

[121] Mario Monti, 'EU Competition Policy After May 2004' (Fordham Annual Conference on International Antitrust Law and Policy, New York, 24 October 2003) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_03_489> accessed 20 February 2024.

[122] Dieter Schmidtchen, Max Albert and Stefan Voigt, *The More Economic Approach to European Competition Law* (Conferences on New Political Economy, Mohr Siebeck 2007) 1; Damien Geradin, Anne Layne-Farrar and Nicolas Petit, *EU Competition Law and Economics* (Oxford University Press 2012) 13.

[123] Schmidtchen and Voigt (n 122); Geradin, Layne-Farrar and Petit (n 122). This is notwithstanding Lindeboom's legal-philosophical argument that effects- and economics-based approaches to competition law have reproduced legal formalism. Justin Lindeboom, 'Formalism in Competition Law' (2022) 18 Journal of Competition Law & Economics 832, 856-869.

[124] Schmidtchen and Voigt (n 122); Geradin, Layne-Farrar and Petit (n 122).

light of economic theory.

Firstly, the Commission adopted the consumer welfare aim.[125] Enforcement instruments employed prior to the 1990s revealed that the Commission was guided by a plethora of economic as well as non-economic aims, and that competition law was viewed as instrumental for achieving many of the Treaties' objectives.[126] By emphasising, above all, the enhancement of consumer welfare, the primary legal objective of competition rules was clarified. As former Commissioner for Competition Neelie Kroes declared, the aim of competition law is "to protect competition in the market as a means of enhancing *consumer welfare* and ensuring an *efficient allocation of resources*. An effects-based approach, grounded in solid economics, ensures that citizens enjoy the benefits of a competitive, dynamic market economy."[127]

Secondly, the Commission started using economic tools and theories to establish facts, define relevant markets, and prove anti-competitive effects. In particular, it revised its understanding of competitive harm and countervailing effects, and committed itself to carrying out more in-depth assessments of a conduct's effects. One of the main changes in key concepts was that of competitive harm, which saw a shift from a purely exclusionary perspective (that protected competitors) to one that also took into account harm to consumer welfare, to

[125] Anna Gerbrandy, 'Rethinking Competition Law within the European Economic Constitution' (2019) 57(1) Journal of Common Market Studies 127, 128. This is still, however, much discussed in literature. See for example Ioannis Lianos, 'Some Reflections on the Question of the Goals of EU Competition Law' in Ioannis Lianos and Damien Geradin (eds) *Handbook on European Competition Law: Substantive Aspects* (Edward Elgar Publishing 2013); Konstantinos Stylianou and Marios Iacovides, 'The Goals of EU Competition Law: A Comprehensive Empirical Investigation' (2022) 42(4) Legal Studies 620; Anne C Witt, 'Public Policy Goals Under EU Competition Law—Now is the Time to Set the House in Order' (2015) 8(3) European Competition Journal 443; Van den Bergh (n 21) 86-121; Anca D Chirita, 'A Legal-Historical Review of the EU Competition Rules' (2014) 63(2) The International and Comparative Law Quarterly 281.

[126] Including the creation of the internal market, the protection of individual economic freedom, freedom of opportunity, fairness, employment, diverse macroeconomic aims, the interests of society at large, consumer interests, efficiency, and innovation. It is to be noted that the body of scholarship labelled "hipster antitrust" has revived the need for competition law to pursue multifaceted aims, and thus retain polycentricity. These claims are certainly legitimate, although do not (yet) find concrete place in the Commission's guidelines and decisional practice. See for example Ioannis Lianos, 'Polycentric Competition Law' (2018) 71(1) Current Legal Problems 161; Marco Botta and Silvia Solidoro, 'Hipster Antitrust, the European Way?' (Fourth Annual Conference for the Florence Competition Programme, Florence, January 2020); Simon Holmes, 'Sustainability and Competition Policy in Europe: Recent Developments' (2023) 14(7) Journal of European Competition Law & Practice 448.

[127] Neelie Kroes, Competition Commissioner, 'Delivering Better Markets and Better Choices' Speech held in London, 15 September 2005.

reflect the narrower legal objective.[128] The Commission also renewed its understanding of what types of beneficial effects engendered by anti-competitive conduct ought to be taken into account as countervailing factors. Given its narrower aim, only economic efficiency effects, in particular those liable to be passed on to consumers and combat the reduction in consumer welfare, should be capable of saving anti-competitive conduct.[129] Finally, the type of evidence used during its competitive assessments also shifted: the Commission started using econometric tools to support its conclusions, which had only exceptionally occurred prior to the reform. By now, quantitative analysis has become commonplace, and the quality and quantity of empirical evidence used has generally increased.[130]

Thirdly, legal tests to ascertain whether a conduct is anti-competitive were reviewed or invented altogether to reflect economic understandings. These are reflected in legislation, case law, and Commission Guidelines. Although many examples of such test-creation will be discussed in Section 4.1, an example is the test created in *Microsoft*, whereby a three-step framework was constructed for tying under Article 102 TFEU: firstly, the undertaking must be dominant in the tying product market; secondly, there must be separate markets for the tying and tied products (so that the undertaking can leverage its market power from one market to the other); and thirdly, there must be foreclosure of competitors in the tied market (meaning that rivals or potential new entrants are eliminated, and such foreclosure should lead to consumer harm). Via the creation of these legal tests, it was ensured that the conduct targeted is anti-competitive not as a rule of thumb, but as a matter of reality.

The contribution of EU Courts to these three categories varies. Although the

[128] This is seen in the criterion of 'anti-competitive foreclosure' applied in exclusionary abuse of dominance cases. Even though exclusionary abuses are about a dominant undertaking impairing effective competition by foreclosing its *competitors*, such foreclosure must adversely affect *consumer welfare* according to the Commission's Guidance on enforcement priorities in applying Article 102. This can be contrasted to the appraisal of abuse seen in e.g. *Hoffman- La Roche*, which seems to apply a black-or-white test to exclusionary conduct. Pinar Akman, 'A Critical Inquiry into 'Abuse' in EU Competition Law' (2024) 44(2) Oxford Journal of Legal Studies 405, 408; Jay Modrall, 'EU Movement on Exclusionary Abuses, but in Which Direction?' (*Kluwer Competition Law Blog*, 2 May 2023)

<https://competitionlawblog.kluwercompetitionlaw.com/2023/05/02/eu-movement-on-exclusionary-abuses-but- in-which-direction/> accessed 27 August 2024.

[129] For example Horizontal Merger Guidelines (n 72) paras 76-88.

[130] Lars-Hendrik Röller, 'Economic Analysis and Competition Policy Enforcement in Europe' in Peter A G van Bergeijk and Erik Kloosterhuis (eds) *Modelling European Mergers: Theory, Competition Policy and Case Studies* (Edward Elgar Publishing 2005) 11.

annus horribilis cases and the fervent context in which they were delivered catapulted the MEA as a whole, an analysis of the reasoning contained therein reveals that EU Courts mostly propelled Category 2 of the MEA: above all, the Commission was prompted to strengthen its competitive assessments with sufficient economic theories and evidence. Beyond this, the Courts are generally active in creating legal tests, sometimes in a way that advances the MEA in the sense of Category 3, as will be seen below. Indeed, this third form seems to be the most evident way in which Courts can contribute to the MEA, given that it concerns (seemingly) *legal* criteria. By contrast, EU Courts have shown ambivalence towards Category 1,[131] although the General Court has recognised the consumer welfare goal.[132]

3.2.2 'More Economic' Merger Control

In merger control, the two latter categories of the MEA are particularly discernible. Indeed, increased reliance on theoretical concepts from industrial economics and quantitative methods of analysis ensued in a twofold manner: first, in case investigations, whereby investigative techniques were employed that could be tested against what Schumpeter coined 'the cold metal of economic theory'

[131] Witt (n 9) 182-183. It is also normatively contested in scholarship. See for example Timothy J Brennan, 'Should Antitrust Go Beyond "Antitrust"?' (2018) 63(1) Antitrust Bulletin 49; Maurice E Stucke, 'Reconsidering Antitrust's Goals' (2012) 53 Boston College Law Review 551; Herbert Hovenkamp, 'Implementing Antitrust's Welfare Goals' (2013) 81 Fordham Law Review 2471; Robert H Lande, 'A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing the Theft from Consumers, and Consumer Choice (2013) 81 Fordham Law Review 2349; John B Kirkwood, 'The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct (2013) 81 Fordham Law Review 2425; Jonathan B Baker, 'Economics and Politics: Perspectives on the Goals and Future of Antitrust' (2013) 81 Fordham Law Review 2175; Barak Orbach, 'The Antitrust Consumer Welfare Paradox' (2010) 7 Journal of Competition Law & Economics 133; Ben van Rompuy, *Economic Efficiency: The Sole Concern of Modern Antitrust Policy? Non-Efficiency Considerations under Article 101 TFEU* (Kluwer Law International 2012); Christopher Townley, *Article 81 EC and Public Policy* (Hart Publishing 2009); Daniel Zimmer, *The Goals of Competition Law* (Edward Elgar Publishing 2012); Claus- Dieter Ehlermann and Laraine Laudati, *Objectives of Competition Law* (Hart Publishing 1997).

[132] Case T-168/01 *GlaxoSmithKline Unlimited v Commission* [2006] ECR II-2969, para 118: the goal of competition law is "to prevent undertakings, by restricting competition between themselves or with third parties, from reducing the welfare of the final consumer of the products in question." The ECJ, on the other hand, has pointed out that the objective is still to safeguard undistorted competition in the internal market, and reversed the General Court's ruling in *GlaxoSmithKline* and said that competition rules safeguard "not only the consumers, but also the structure of the market" (Case C-501/06 P *GlaxoSmithKline Services v Commission* [2009] ECR I-09291, para 118.) However, in *Intel*, the ECJ seems to emphasise that the goal of Article 102 is to safeguard consumers, rather than less efficient competitors.

(Category 2);[133] and second, in formulating legislation and defining the relevant criteria (Category 3).[134]

Concerning Category 2, the heightened influence of economics can be observed in the Commission's enforcement as well as in soft law,[135] the latter of which serves as guidelines for interpreting competition law provisions and provides detailed and extensive analyses of the interpretative methodology in enforcing those provisions.[136] Indeed, the Horizontal Merger Guidelines introduced various new concepts from contemporary industrial economics, such as the Herfindahl-Hirschman Index to examine market structure, and the differentiation between coordinated and non-coordinated effects as possible anti-competitive consequences of horizontal mergers.[137] Non-coordinated or unilateral effects arise in mergers where the elimination of the competitive constraint between the merging parties enables the merged entity to increase prices above their pe-merger levels.[138] As the Guidelines explain, a merger may give rise to unilateral effects if it eliminates an important competitive constraint that the parties previously exerted upon each other.[139] By contrast, coordinated effects arise when a merger creates conditions that make tacit coordination (or tacit collusion) more likely or more effective.[140] According to Christiansen, while these coordinated effects were largely a reiteration of the traditional concept of collective dominance, the inclusion of unilateral effects was explicitly meant to extend the scope of the Merger Regulation and cover anti-competitive mergers in oligopolistic markets.[141] Furthermore, efficiencies were for the first time acknowledged as a "countervailing factor", which could off-set anti-competitive indications.[142] Concerning Category 3, the Commission proposed that the Council formally recast

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[133] Joseph A Schumpeter, *Capitalism, Socialism and Democracy* (George Allen and Unwin 1943) 21.

[134] Marta Zalewska-Glogowska, 'A More Economic Approach to the Application of EU Merger Control' (2015) 5 Adam Mickiewicz University Law Review 171, 171.

[135] Anne C Witt, *The More Economic Approach to EU Antitrust Law* (Bloomsbury 2016) 1.

[136] Lianos (n 16) 5.

[137] Horizontal Merger Guidelines (n 72) para 16.

[138] Gore and Others (n 17) 148.

[139] Horizontal Merger Guidelines (n 72) paras 22(a) and 24-25.

[140] Gore and Others (n 17) 318; Van den Bergh (n 20) 48.

[141] Arndt Christiansen, 'The "more economic approach" in EU merger control' (2006) 7(1) Institut für Wirtschaftsforschung an der Universität München 34, 35.

[142] Horizontal Merger Guidelines (n 72) paras 76-88.

the test of the original Merger Regulation.[143] The most striking change was the new prohibition criterion contained in Article 2(3).[144] This new test, referred to as the Significant Impediment of Effective Competition (SIEC) test, replaced the previous criterion of market dominance, and was given concrete form in the Horizontal Merger Guidelines.[145] The reason for the new test was that the previous dominance-based test was unable to capture all potential scenarios in which concentrations could lead to anti-competitive effects, and therefore opened a 'gap' in the EU regime.[146] In particular, the notion did not cover the strengthening of market power, absent single dominance, in a non-collusive oligopoly. Therefore, under the new test, the assessment of the impact of transactions is no longer pre-conditioned on the finding of dominance; rather, the creation or strengthening of a dominant position is but one scenario that may give rise to incompatibility. Whether or not the alleged 'gap' in merger control under the dominance test was truly as detrimental as one perceived at the time has been questioned,[147] and since the introduction of the Merger Regulation, gap features have emerged in only few cases, including *T-Mobile Austria/Tele.ring*,[148] *EDF/Segebel*,[149] and now *CK Telecoms*.

[143] Council Regulation (EEC) 4064/89 of 21 December 1989 on the control of concentrations between undertakings [1989] OJ L395/1 (repealed).

[144] Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L24/1 (Merger Regulation), art 2(3).

[145] Horizontal Merger Guidelines (n 72) para 1.

[146] Colomo (n 32) 347.

[147] See Lars-Hendrik Röller and Miguel de la Mano, 'The Impact of the New Substantive Test in European Merger Control' (2006) 2(1) European Competition Journal 9.

[148] *T-Mobile Austria/Tele-ring* (Case COMP/M.3616) Commission Decision 2007/193/EC [2007] OJ L88/44. The merger brought together the second and fourth largest network operators on the Austrian mobile telecommunications sector, and the Commission concluded that anti-competitive effects would occur despite the fact that the merged entity would account for only one-third of the market.

[149] *EDF/Segebel* (Case COMP/M.5549) Commission Decision 12/11/2009 [2009]. The merger involved EDF's acquisition of a majority stake in SPE, the second largest electricity operator in Belgium, and the Commission required the parties to make significant divestments despite a combined share in the Belgian electricity wholesale market of only 10-20%.

4. The Return of the Horribilis in CK Telecoms?

By now, it is widely acknowledged that the MEA has permeated competition law and economic insights have become "indispensable" for everyday practice.[150] However, the General Court's judgment in *CK Telecoms* can, I argue, reveal a more tumultuous reality than this serene version. *CK Telecoms* was colloquially labelled 'daring',[151] a 'watershed',[152] 'revolutionary',[153] and a 'bombshell'.[154] It has been subject to much academic debate over the last years, with many condoning[155] and many condemning[156] the General Court. While taking these commentaries into

[150] Roger van den Bergh, 'The More Economic Approach in European Competition Law: Is More Too Much or Not Enough?' in Kovac Mitja and Vandenberghe Ann-Sophie (eds) *Economic Evidence in EU Competition Law* (Intersentia 2016) 13. Geradin, Layne-Farrar and Petit (n 117) 13; *Oracle/PeopleSoft* (Case No COMP/M.3216) Commission Decision 2005/621/EC [2004] OJ L218/6; *Carnival/P&O Princess* (Case No COMP/M.3071) Commission Decision 2003/667/EC [2003] OJ L248/1; *Sony/BMG* (Case No COMP/M.3333) Commission Decision 2005/188/EC [2005] OJ L62/30; *Blackstone/Acetex* (Case No COMP/M.3625) Commission Decision 2005/839/CE [2005] OJ L312/60. This is not the say, however, that its normative value is undisputed. See for example Wolfgang Fikentscher, *Culture, Law and Economics* (Carolina Academic Press 2004); Wolfgang Fikentscher, *Wirtshaftliche Gerechtigkeit und Kulturelle Gerechtigkeit* (CF Mueller 1997); Wolfgang Fikentscher, 'Intellectual Property and Competition–Human Economic Universals or Cultural Specificities' (2007) 38 International Review of Intellectual Property and Competition Law 137. For a review, see David J Gerber, 'Anthropology, History and the "More Economic Approach" in European Competition Law—A Review Essay' (2010) 41 International Review of Intellectual Property and Competition Law 441.

[151] Justin Lindeboom, 'The Virtue of Discretion and the Vice of Expertise': Judicial Review in Merger Control after *CK Telecoms* (C-376/20)' (*EU Law Live*, 27 July 2023) <https://eulawlive.com/the-virtue-of-discretion-and- the-vice-of-expertise-judicial-review-in-merger-control-after-ck-telecoms-c-376-20-by-justin-lindeboom/> accessed 18 November 2023.

[152] Amaryllis Müller, Thomas Wessely, and James Aitken, 'CK Telecoms judgment—a watershed for European merger control' (Freshfields, 29 May 2020) <https://transactions.freshfields.com/post/102g8hg/ck-telecoms- judgment-a-watershed-for-european-merger-control> accessed 16 June 2024.

[153] Pablo Ibáñez Colomo, 'Case-376/20 P, CK Telecoms: Tetra Laval survives, but the legal test for non- coordinated effects will have to wait' (Chillin' Competition, 13 July 2023)

<https://chillingcompetition.com/2023/07/13/case%E2%80%91376-20-p-ck-telecoms-tetra-laval-survives-but- the-legal-test-for-coordinated-effects-will-have-to-wait/> accessed 16 June 2024.

[154] Thilo Klein, 'The General Court's CK Telecoms Ruling: Towards a Re-Assessment of Unilateral-Effects in Merger Review' (Compass Lexecon, 1 July 2020) <https://www.compasslexecon.com/insights/events/the- general-courts-ck-telecoms-ruling-towards-a-re-assessment-of-unilateral-effects-in-merger-review> accessed 16

June 2024.

[155] Colomo (n 32) 347; Dirk Auer and Nicolas Petit, 'CK Telecoms v Commission: The Maturation of the Economic Approach in Competition Case Law' (2020) 11(5) Journal of Competition Law and Practice 225.

[156] Giorgio Monti, 'EU Merger Control After CK Telecoms UK Investments v Commission' (2020) 43(3) World Competition 447; Elias Deutscher, 'Prometheus Bound?—The Uncertain

account, this thesis takes a distinct perspective that, rather than donating to 'case-law journalism',[157] or being ambushed in 'Verzwergung der Rechtswissenschaft zur Rechtsprechungskunde,'[158] endeavours to theorise *CK Telecoms* as a renewed attempt by the Court to advance the MEA somewhat akin to its activism in the *annus horribilis*. By doing so, the General Court's judgment in *CK Telecoms* can be placed in its appropriate context, facilitating the Herculean task of systematising competition judgments.

4.1 Commission's Economic Assessment

Brief context of the transaction must be given to understand the Commission's reasoning for prohibiting the merger. The proposed concentration involved the acquisition of O2 by Three through the intermediary of its indirect subsidiary CK Telecoms. This concentration would have resulted in the merged entity becoming the largest player on the UK retail telecommunications market with 30-40% market share, and with the number of players decreasing from four to three.[159] The retail telecommunications market was characterised by network sharing agreements,[160] which allowed operators to share their network costs while competing for retail customers (first relevant market).[161] Furthermore, all four operators were active on the market for wholesale access to mobile networks, where they sold part of their network capacity to virtual network operators (second relevant market).[162]

The Commission advanced three theories of harm in its assessment, which were all based on the existence of non-coordinated effects on an oligopolistic

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Future of the Unilateral Effects Analysis in EU Merger Control After CK Telecoms' (2022) 18(2) Journal of Competition Law and Economics 323; Justin Lindeboom and Yasmine Bouzoraa, 'CK Telecoms and the Assessment of Horizontal Mergers in Oligopolistic Markets: Does the More Economic Approach Entail Stricter Judicial Review? (T-399/16 CK Telecoms)' (2021) 5 European Competition and Regulation Law Review 423.

[157] Pierre Schlag, 'Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)' (2009) 97 The Georgetown Law Journal 804, 821.

[158] Rob van Gestel and Hans-W Micklitz, 'Revitalizing Doctrinal Legal Research in Europe: What about Methodology?' (2011) 5 European University Institute 1, 7.

[159] *Hutchison 3G UK/ Telefonica UK* (Case No COMP/M.7612) Commission Decision [2016], para 307. The three mobile network operators being EE Ltd, Vodafone, and the merged entity.

[160] Between EE and Three, and between O2 and Vodafone.

[161] Case T-399/16 *CK Telecoms UK Investments v Commission* [2020] ECLI:EU:T:2020:217, para 4.

[162] Such as Tesco Mobile and Virgin Mobile*. CK Telecoms* [2020] (n 161) para 3.

market.[163] The first theory of harm related to the existence of non-coordinated effects on the retail market arising from the elimination of 'important competitive constraints', since the reduction in competition would have probably led to an increase in prices and a restriction of choice for consumers.[164] The second theory of harm related to the existence of non-coordinated effects on the retail market relating to network sharing, since the transaction would have likely had a negative effect on the quality of services for consumers, hindering the development of mobile network infrastructure.[165] The third theory of harm related to the existence of non-coordinated effects arising from the elimination of 'important competitive constraints' on the wholesale market due to the reduction in the number of mobile operators from four to three; the elimination of Three as an 'important competitive force'; the removal of 'important competitive constraints' which the parties had previously exerted upon each other; and a reduction of competitive pressure on the remaining players.[166] In light of these, and since the efficiencies were found not to be verifiable, specific nor benefitting consumers, nor the remedies proposed in the commitments to be comprehensive and effective, the Commission declared the operation incompatible with the internal market.[167]

4.2 General Court's Reasoning

The Commission's decision was appealed by the merging parties, bringing the case before the General Court. Concerning the first theory of harm, the Commission had reasoned that the concentration would remove an 'important competitive force' (Three) from the market, a term in the Horizontal Merger Guidelines.[168] The Commission had stated that "an undertaking having more of an influence on competition than its market share would suggest" suffices for that undertaking to be considered an 'important competitive force' and that the simple "decline in the competitive pressure which would result, in particular, from the loss of an important competitive force is sufficient, in itself, to prove a significant impediment

[163] *Hutchison 3G UK/ Telefonica UK* (Case No COMP/M.7612) Commission Decision [2016] OJ C357/15 Summary, paras 19-30; 31-40; 43-50.

[164] *CK Telecoms* [2020] (n 161) para 20.

[165] *CK Telecoms* [2020] (n 161) para 21.

[166] *CK Telecoms* [2020] (n 161) para 22.

[167] *CK Telecoms* [2020] (n 161) para 23.

[168] Horizontal Merger Guidelines (n 72) paras 37. See also cited decisions *Boeing/McDonnell Douglas* (Case IV/M.877) Commission Decision 97/816/EC [1997] OJ L336/16, para 58; *Haneil/Ytong* (Case COMP/M.2568) Commission Decision 2003/292/EC [2003] OJ L111/1, para 126.

to effective competition".[169] However, according to the General Court, the Commission had erroneously confused the concepts of 'important competitive force' in the Horizontal Merger Guidelines, 'important competitive constraints' in the preamble of the Merger Regulation, and 'significant impediment to effective competition' in Article 2(3) Merger Regulation.[170] Consequently, the Commission elevated the concept of 'important competitive force' to an autonomous legal criterion additional and distinct to the criteria laid down in the Merger Regulation.[171] This interpretation allowed the Commission to block any concentration in oligopolistic markets, thereby infringing the principle of legal certainty.[172] In light of this, the General Court concluded that the Commission failed to show that Three was an 'important competitive constraint' in the sense of Article 2(3) and recital 25 Merger Regulation.[173]

Secondly, the General Court scrutinised the Commission's analysis regarding the 'closeness of competition' between Three and O2.[174] It concluded that the Commission failed to demonstrate that Three and O2 were not only 'relatively close competitors' but also 'particularly close' ones.[175] Given that in an oligopolistic market, all competitors are 'relatively close', the Commission's reasoning would mean that "any concentration resulting in a reduction from four to three operators would as a matter of principle be prohibited."[176]

Thirdly, the General Court rejected the Commission's quantitative analysis of upward pricing pressure on the retail telecommunications market. Following its prediction of price increases, the Commission claimed that the parties should have demonstrated efficiencies which were capable of outweighing anti-competitive effects.[177] However, the General Court opined that the Commission confused two types of efficiencies: ones that were likely to counteract the restrictive effects of the concentration on the one hand, and the so-called 'standard efficiencies' that

[169] *CK Telecoms* [2020] (n 161) para 171.

[170] *CK Telecoms* [2020] (n 161) para 173.

[171] *CK Telecoms* [2020] (n 161) para 172.

[172] *CK Telecoms* [2020] (n 161) para 175.

[173] *CK Telecoms* [2020] (n 161) paras 226 and 249.

[174] *CK Telecoms* [2020] (n 161) para 227.

[175] *CK Telecoms* [2020] (n 161) paras 234-249.

[176] *CK Telecoms* [2020] (n 161) para 249.

[177] *CK Telecoms* [2020] (n 161) para 278.

are a component of the ability of the concentration to restrict competition in the first place on the other hand.[178] According to the Court, the latter type is inherently within the burden of proof of the Commission as opposed to the merging parties, when it proves non-coordinated effects in the form of price increases.[179] Lastly, the Commission also failed to show, with sufficient degree of probability, that the predicted price increase was 'significant' within the meaning of Article 2 Merger Regulation.

With regard to the second theory of harm concerning the disruption of network-sharing agreements, the General Court noted firstly that this is a "novel" and "innovative" theory of harm.[180] The Court then stated that "the more prospective analysis is and the chains of cause and effect dimly discernible, uncertain and difficult to establish, the more demanding the EU judicature must be in terms of the specific examination of the evidence produced by the Commission."[181] It also held that the Commission's prediction of harm to the other parties to the network-sharing agreements due to reduced or delayed network investments relied on a weak chain of cause and effect,[182] and was not sufficiently realistic and plausible.[183]

With regard to the third theory of harm concerning non-coordinated effects on the wholesale market, the Commission had concluded that "Three's presence had competitive impact in wholesale negotiations even in cases where it was not successful" and "that it was considered to be an important competitor", whose removal from the market would weaken the bargaining position of virtual mobile network operators seeking wholesale access.[184] However, given that Three's market share in the wholesale market was merely 0-5%, the General Court held that the Commission failed to show how, despite its small market share, Three was an 'important competitive force'. The fact that Three "is considered to be a credible threat on the market and participated in a significant number of calls for tenders" was insufficient to prove that Three stands out from other market participants and

[178] *CK Telecoms* [2020] (n 161) paras 278-279.

[179] *CK Telecoms* [2020] (n 161) paras 276-277.

[180] *CK Telecoms* [2020] (n 161) paras 328-330.

[181] *CK Telecoms* [2020] (n 161) para 332.

[182] *CK Telecoms* [2020] (n 161) para 276.

[183] *CK Telecoms* [2020] (n 161) para 388.

[184] *CK Telecoms* [2020] (n 161) para 421.

is thus to be considered an 'important competitive force'.[185] Finally, the Commission also failed to demonstrate that Three and O2 formed 'important competitive constraints' in the sense of recital 25 Merger Regulation.[186]

In light of this, the General Court rejected all three theories of harm advanced by the Commission, thereby overturning its decision prohibiting the concentration. According to the General Court, the many mistakes committed by the Commission were severely detrimental to its outcome, and the transaction should be allowed under the Merger Regulation.[187]

4.3 Advancing the 'More Economic Approach': Redux

Against the background of the reasoning by both the Commission and the General Court, this thesis argues that the General Court's judgment can be theorised as a promotion of the MEA. This is not to say that the Commission's decision is totally devoid of economics. In some respects, the heritage of the MEA permeates the Commission's assessment: the decision applied the SIEC test introduced by the Merger Regulation to a horizontal concentration on an oligopolistic market, advanced theories of harm relating to unilateral effects, and employed economic tools to substantiate its reasoning.[188] However, upon close inspection, it seems that the General Court pushes for more economic thinking, in some respects in a manner similar to the three cases in the *annus horribilis*, while in other respects in a distinct way.

4.3.1 Similarities in MEA Promotion

From the outset, the most evident similarity is that the General Court heightened its judicial review standard. As pointed out by Lindeboom, the Court did not refer to the doctrine of marginal review of complex economic assessments. Instead, the Court relied on the 'other formula', namely that EU Courts have the task of establishing, among others, whether the evidence relied upon by the Commission is "factually accurate, reliable and consistent" and whether the evidence "is capable of supporting the conclusions drawn from it."[189] In so doing, it ignored or

[185] *CK Telecoms* [2020] (n 161) para 452.

[186] *CK Telecoms* [2020] (n 161) paras 450-451 and 90.

[187] Merger Regulation (n 144) art 2(2).

[188] Tobias Caspary and Valeri Bozhikov, 'CK Telecoms UK Investments v Commission—The Judgment That Defines a Significant Impediment to Effective Competition in Oligopolistic Merger Cases' (2020) 23(7) Journal of European Competition Law & Practice 363, 363.

[189] Case C-376/20 P *Commission v CK Telecoms UK Investments* [2023] ECLI:EU:C:2023:561, para 125; Case C-413/06 P *Bertelsmann and Sony* [2008] ECR I-

disregarded the fact that according to the traditional doctrine of 'complex economic assessments', EU Courts are merely meant to ensure that the Commission has not committed a 'manifest error of assessment', as explained in Section 1.

Secondly, the General Court in *CK Telecoms* made an innovative contribution to the standard of proof required for the Commission to ascertain anti-competitive conduct. This is reminiscent of, although not identical to, the demands by the Court in the *annus horribilis* cases to provide sufficient evidence supporting the Commission's conclusions.[190] The General Court held that the Commission may only block a merger if it can demonstrate with 'strong probability' that the merger would significantly impede effective competition.[191] The Court adamantly emphasised that the standard of proof was stricter than the 'balance of probabilities' test normally applied, whereby a merger can be blocked if a significant impediment to effective competition is 'more likely than not.'[192] This increased standard of proof, akin to the calls for more evidence by the General Court in 2002, can also be understood as a testament to encourage the Commission to increase its accuracy and reliance on empirical evidence to prove that a merger is genuinely anti-competitive. This can be seen in the rejection of all three theories of harm, as the General Court held *inter alia* that the Commission failed to show that Three was an 'important competitive constraints', that Three and O2 were 'particularly close' competitors, and that its evidence was insufficiently realistic and plausible. By doing so, it seems that the General Court in *CK Telecoms*, like *Airtours, Schneider Electric*, and *Tetra Laval*, promotes Category 2 of the MEA.

4.3.2 Similarities in MEA Promotion

Certain differences from the 2002 judgments can also be discerned. Above all, it seems that the entire judgment, if distilled into one philosophy, is grounded on the economic understanding that not *all* horizontal concentrations in oligopolies lead to anti-competitive effects. It is around this belief that arguably most, if not all, arguments are centred. For instance, the Court rejects the first theory of harm, by

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04951, para 145.

[190] To be clear, the standard of proof is the standard incumbent upon the Commission, as the administrative body deciding cases at first instance in prohibiting a merger under the Merger Regulation (or in other branches of competition law, in concluding that a conduct infringes Articles 101 and 102 TFEU). Tony Reeves and Ninette Dodoo, 'Standards of Proof and Standards of Judicial Review in European Commission Merger Law' (2005) 29(5) Fordham International Law Journal 1034, 1037.

[191] *CK Telecoms* [2020] (n 161) para 118.

[192] *CK Telecoms* [2020] (n 161) para 118.

firstly arguing that the Commission mistakenly confused the two differing concepts of 'important competitive force' and 'important competitive constraints', so as to impede the Commission from declaring all concentrations in oligopolies incompatible with the internal market. Similarly, the Court employs another reasoning in the rejection of the first theory of harm, namely that it is insufficient to demonstrate that the market players are 'relatively close competitors', and rather the correct criterion would be for them to be 'particularly close competitors'. Put differently, the Court employs a stricter standard of judicial review and higher standard of proof in order to disagree with the Commission's arguments by (economic) principle. Such a strong motive, based on economic doctrine, cannot be discerned from the cases in the *annus horribilis*.

The rationale employed by the General Court is, by and large, recognised in economic theory.[193] Indeed, it is not necessarily the case that all mergers in oligopolistic markets result in a distortion of competition. Rather, this heavily depends on several factors, including efficiency gains, which can be attained through cost savings; or economies of scale or improved operational synergies, if these are passed on to consumers in the form of lower prices or improved quality.[194] This understanding is particularly inspired by the Chicago School, which focuses more on the linkage between structure and performance of merging parties: large firms are more efficient than smaller ones and will therefore grow more rapidly at a given price level, thus strengthening the tendency towards a higher degree of concentration without causing problems of abuse of market power.[195] As pointed out by Van den Bergh, Camesasca and Giannaccari, since

[193] See for example Gregory J Werden, 'An Economic Perspective on the Analysis of Merger Efficiencies' (1996) 11 Antitrust 12, 13.

[194] Richard Whish and David Bailey, *Competition Law* (8th Edition, Oxford University Press 2015) 11. See for example Bart Lambrecht, 'The timing and terms of mergers motivated by economies of scale' (2004) 72(1) Journal of Financial Economies 41; Keith Brouthers, Paul van Hastenburg, and Joran van den Ven, 'If Most Mergers Fail Why are They so Popular?' (1998) 31 Long Range Planning 347.

[195] Van den Bergh (n 20) 48. This is not notwithstanding some upcoming economic literature that disputes the understanding that mergers create efficiencies and value, often calling for stricter merger control. See for example Bruce A Blonigen and Justin R Pierce, 'Evidence for the Effects of Mergers on Market Power and Efficiency' (2016) National Bureau of Economic Research Working Paper; Melissa A Schilling, 'Potential Sources of Value from Mergers and Their Indicators' (2018) 63(2) The Antitrust Bulletin 183; Joel Stiebale and Florian Szücs, 'Mergers and Market Power: Evidence from Rivals' Responses in European Markets' (2022) 53(4) The RAND Journal of Economics 678; John Kwoka, *Controlling Mergers and Market Power: A Program for Reviving Antitrust in America* (Competition Policy International 2020); Competition and Markets Authority, Australian Competition and Consumer Commission and Bundeskartellamt, 'Joint Statement on Merger Control

mergers are more intrusive than cartels (because they eliminate competition permanently between participating firms), one might expect that the former are condemned by a simple *per se* rule.[196] However, a closer study of the motives that lead firms to concentrate suggests a more cautious approach; in fact, they may have detrimental as well as beneficial results for social welfare deriving on the one hand from augmentation of market power (transfer of consumer surplus to producers) and the related deadweight loss to society (allocative inefficiency), and on the other hand from potential net welfare gains materialised due to efficiencies such as rationalisation, better access to capital and more favourable buying conditions, economics of scale and scope (productive efficiencies), technological progress (dynamic efficiencies) and reduction of X-inefficiencies (managerial slack).[197] This latter idea is what the Court also seems to advocate for, in particular when it invented (indeed there is no applicable euphemism) a differentiation between the burden of proof for standard efficiencies and efficiencies that counteract the restrictive effects of the concentration.

It was based on this economic understanding that the General Court also attempted to construct a workable legal test for establishing when a horizontal merger in an oligopolistic market is incompatible with the internal market. Indeed, according to the Commission's interpretation of Article 2(3) Merger Regulation, the criteria to evaluate the concentration would be decided on a case-by-case basis. In this vein, the Commission argued that a finding of incompatibility does not necessitate evidence showing that one of the parties is an 'important competitive force' within the meaning of its own Guidelines.[198] This unstructured test made it difficult to anticipate the outcome of an investigation, and allowed the Commission to enjoy *de facto* power to declare the incompatibility of virtually any horizontal transaction in an oligopolistic market.[199] To mitigate this, the General Court introduced a test inspired by the preamble of the Merger Regulation, according to

Enforcement' (2021). However, these claims are not yet part of mainstream economics.

[196] Roger Van den Bergh, Peter Camesasca, and Andrea Giannaccari, 'Merger Control' in Roger Van den Bergh (ed) *Comparative Competition Law and Economics* (Edward Elgar Publishing 2017) 454. The possibility of a presumptive approach in merger control similar to Article 101(1) TFEU is also briefly discussed in Pablo Ibáñez Colomo, *The Shaping of EU Competition Law* (Cambridge University Press 2018) 219.

[197] Van den Bergh, Camesasca, and Giannaccari (n 196) 454.

[198] Hutchison 3G UK/ Telefonica UK (Case No COMP/M.7612) Commission Decision [2016] para 325.

[199] *CK Telecoms* [2020] (n 161) para 175.

which the Commission would need to show that the transaction would lead to i) the elimination of the important competitive constraints that the merging parties had exerted upon each other, and ii) a reduction of competition pressure on the remaining competitors.[200] Therefore, it could be argued that the Court here aimed to promote Category 3 of the MEA, which stands in contrast to its approach during the *annus horribilis*.

4.4 Or Casu Mirabilis Rather? The Aborted Revolution

Yet, the fate of the General Court's judgment in *CK Telecoms*, unlike those of the *annus horribilis*, lacked in impact—one can argue that this decision shifted from a *casu horribilis* to a *casu mirabilis* for the Commission. The Court of Justice's judgment was labelled by some as a "good day for competition policy", "music to the ears of those who believe in merger control,"[201] and setting "the record straight",[202] most importantly because it restored the Commission's wide discretionary powers.

The Commission's first ground of appeal challenged the standard of proof required by the General Court, a rather controversial element of the latter's judgment.[203] The Court of Justice rejected the "strong probability" test that the General Court had invented and clarified that the Commission may block a merger if a SIEC is "more likely than not".[204] As commentators have also argued, the General Court's standard would have been overly stringent.[205]

The Commission's more specific grounds of appeal focused on three questions of law: whether Article 2(3) requires the cumulative test that the General Court created in light of recital 25 Merger Regulation,[206] and what the meaning and relevance of the two concepts of 'important competitive force' and 'close

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[200] *CK Telecoms* [2020] (n 161) para 98.

[201] Massimo Motta, LinkedIn Post, May 2023 <https://www.linkedin.com/posts/massimomotta4b62b541_thegeneral-court-must-rule-once-more-on-activity-7085194684657999873hE1H?utm_source=share&utm_medium=member_desktop> accessed 16 June 2024.

[202] Lindeboom (n 151).

[203] *CK Telecoms* [2023] (n 189) para 51.

[204] *CK Telecoms* [2023] (n 189) paras 70-88.

[205] Monti (n 156) 1, 4-7.

[206] *CK Telecoms* [2023] (n 189) paras 98-99; Merger Regulation (n 131) recital 25.

competitors' in the Horizontal Merger Guidelines is.[207] In regard to the first question, the Court held that the General Court had erred in stipulating a cumulative test for the assessment of mergers which do not create a dominant position, and that this amounted to a misinterpretation of the recitals.[208] Regarding the notion of an 'important competitive force', which appears solely in the Horizontal Merger Guidelines,[209] the General Court had held that the Commission was only allowed to classify an undertaking as such if that firm stood out from its competitors in terms of its impact on competition.[210] Otherwise, any undertaking in an oligopolistic market would meet the narrower definition of the concept found in the Guidelines, according to which an 'important competitive force' is a firm which has more of an influence on the competitive process than its market share suggests.[211] However, the Court of Justice dismissed the General Court's reasoning, and held that adding criteria for the concept was an error in law.[212] Thirdly, the Court of Justice held that the General Court unlawfully required the Commission to show that O2 and Three were 'particularly close competitors', rather than accepting the fact that they were merely 'close competitors' because neither the Merger Regulation nor the Horizontal Merger Guidelines included this new concept, nor had the Commission claimed that the closeness between O2 and Three was sufficient to meet the SIEC test (it was merely one of the relevant factors).[213]

Finally, the Court of Justice rejected the General Court's allocation of the burden of proof in regard to 'standard efficiencies' pertaining to the rationalisation and integration of production and distribution.[214] According to the General Court, these standard efficiencies were inherent to any merger, and therefore the Commission had to take them into account to ascertain the restrictive effects of the merger.[215] The Court of Justice rejected this as it reversed the burden of proof in

[207] *CK Telecoms* [2023] (n 189) paras 98-99; Horizontal Merger Guidelines (n 74) paras 37-38, 28-30.

[208] *CK Telecoms* [2023] (n 189) paras 112-114.

[209] Horizontal Merger Guidelines (n 72) paras 37-38.

[210] For example by competing in a particularly aggressive way and forcing other players to follow that conduct. *CK Telecoms* [2020] (n 171) paras 170 and 174.

[211] *CK Telecoms* [2020] (n 171) paras 174-175.

[212] *CK Telecoms* [2023] (n 189) para 162.

[213] *CK Telecoms* [2023] (n 189) paras 189-192 and 196.

[214] *CK Telecoms* [2023] (n 189) para 243.

[215] *CK Telecoms* [2020] (n 161) paras 277 and 279.

regard to efficiencies, and the separate category of efficiencies was manufactured by the General Court and not prescribed in the Merger Regulation nor in the Guidelines.[216]

Based on the Court of Justice's judgment, which to a certain extent reflects scholarship's response to the General Court's judgment, it becomes evident that the activism of the General Court was largely unappreciated, and its promotion of the MEA was also uncalled for. The Court of Justice adopts a very different approach to the General Court, one characterised by close inspection of the relevant legal framework and respect for discretion, rather than emancipated economic convictions.

[216] *CK Telecoms* [2023] (n 189) paras 239-244.

5. Driving the 'More Economic Approach': From Whether to How *(Not)*

From a normative perspective, the General Court's judgment raises questions about what role EU Courts should play in the promotion of the MEA. On the one hand, some argued that the General Court's proactivity was within its mandate under Article 19 TEU, whilst on the other hand, others contended that the Court went a step (or leap) too far.[217] This debate can also be placed in the wider context of discussions on the role of judicial review in EU law generally, given that by far the greatest number of legal principles governing the administrative activity of the EU originate in the creative law-making and decision-making process of the CJEU.[218]

That being said, judicial review is no easy task.[219] This difficulty stems from the necessity to endow an administrative authority with sufficient discretion, while simultaneously ensuring meaningful oversight.[220] This balance is a key area of debate in the literature on *CK Telecoms*, with scholars disputing various theories of law and discretion. The way in which one views the intervention of the Court inherently hinges on the normative framework utilised. Various frameworks can be envisaged (and have been implicitly used in literature), including the right to effective judicial protection,[221] and the margin of manoeuvre needed for the Commission in competition policy.[222] The framework that this thesis wishes to adopt recognises that EU Courts are one of the main 'shapers' of competition law.[223] Through this lens, EU Courts' role in moulding competition law to be more

[217] For instance, Lindeboom (n 151).

[218] Thomas Perroud, 'Constitutional Structure and Basic Characteristics of the Legal Systems Examined Concerning Judicial Review' in Chris Backes and Mariolina Eliantonio (eds) *Judicial Review of Administrative Action* (Hart Publishing 2019) 18.

[219] Colomo (n 23) 144.

[220] Justin Lindeboom, 'Rules, Discretion, and Reasoning According to Law: A Dynamic-Positivist Perspective on

Google Shopping' (2022) 13(2) Journal of Competition Law & Practice 63, 74.

[221] See for example Colomo (n 23); Eleanor Sharpston, 'Effective Judicial Protection through Adequate Judicial Scrutiny—Some Reflections' (2013) 4(6) Journal of European Competition Law & Practice 453.

[222] See for example Lindeboom (n 151).

[223] Nicolas Petit, 'The Future of the Court of Justice in EU Competition Law—New Role and Responsibilities' in Allan Rosas, Egils Levits, and Yves Bot (eds) *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case Law—La Cour de Justice et la Construction de l'Europe: Analyses et Perspectives de Soixante Ans de Jurisprudence* (TMC Asser Press 2013) 400.

in line with the MEA becomes a question not of *whether* the Courts can do this, but rather *how* they should do so. Indeed, the General Court had already successfully promoted the MEA before in the *annus horribilis* cases—why was its reception so different this time around?

Simultaneously, the framework recognises that such shaping must operate within the constitutional architecture of the EU, in particular the institutional balance. According to this principle, which is often regarded as the EU-translation of the separation of powers or 'checks and balances',[224] each institution must act in accordance with the powers conferred on it by the Treaties.[225] Though sometimes termed an elusive concept,[226] it can nevertheless provide a helpful structure for this discussion due to the independence and discretion it endows institutions. A tripartite scheme is devised in this Section, whereby three parameters emerge as a manifestation of the institutional balance in *CK Telecoms*: latitude in policymaking, autonomy in assessment-conducting, and limitations on expertise. These parameters help to understand how (and how not) EU Courts should advance the MEA, and serve as a baseline for assessing the extent to which the way the General Court promoted the MEA in *CK Telecoms* was desirable.

5.1 Role of EU Courts in Competition Law

From the outset, it must be recalled what the role of EU Courts has been (and still is) in the competition regime. Firstly, judicial review has been pivotal to the direction and evolution of EU competition law.[227] Indeed, many substantive choices that define the aims and boundaries of this field were made in the context of an action for annulment.[228] Notable cases include *Continental Can* where the Court of Justice clarified that Article 102 TFEU encompasses both exploitative and

[224] See for example Jean-Paul Jacqué, 'The Principle of Institutional Balance' (2004) 41(2) Common Market Law Review 383; Gerard Conway, 'Recovering a Separation of Powers in the European Union' (2011) 17(3) European Law Journal 304; Hilaire Barnett, *Constitutional and Administrative Law* (Routledge 2011) 210; Sacha Prechal, 'Institutional Balance: A Fragile Principle with Uncertain Contents' in Niels M Blokker, Ton Heukels and Marcel MTA Brus (eds) *The European Union After Amsterdam* (Kluwer Law International 1998) 280; Gráinne de Búrca, 'The Institutional Development of the EU: A Constitutional Analysis' in Paul Craig and Gráinne de Búrca (eds) *The Evolution of EU Law* (Oxford University Press 1999) 58.

[225] Consolidated version of the Treaty on European Union [2012] OJ C326/13, art 13(2).

[226] Merijn Chamon, 'The Institutional balance, an Ill-Fated Principle of EU Law?' (2015) 21(2) European Public Law 371, 371.

[227] Colomo (n 23) 143.

[228] Colomo (n 23) 143.

exclusionary conduct, and held that a link between the dominant position and the practice is not a precondition for finding an abuse;[229] *Airtours* where the General Court aligned the notion of collective dominance with the economic concept of tacit collusion (see above);[230] and *Consten and Grundig*, where the General Court made clear that Article 101 TFEU is concerned both with horizontal and vertical relationships.[231]

Secondly, beyond shaping the substance of competition law provisions, the Courts have been paramount in shaping the operationalisation of such provisions through the creation of legal tests. According to Colomo, the creation of such tests also acts as a 'hallmark' of effective judicial protection.[232] Indeed, competition law provisions are famously broad and vague: they prohibit practices without defining the concepts within them.[233] For example, Article 102 TFEU does not define 'abuse', and the Merger Regulation does not offer an explanation as to what amounts to a SIEC. Although primary, secondary and soft law can provide non-exhaustive examples of anti-competitive behaviour, the content and scope of competition law provisions can only be properly defined through the case-by-case administration of the law.[234] Legal tests are the tool that shape vaguely defined law, and bridge the gap between competition law as prescribed and competition law as applied.

EU Courts have played an important role in the construction of these tests. Indeed, whereas judges have consistently favoured clear and well-defined criteria, the Commission seems to display a tendency to craft relatively unstructured legal tests that can be adjusted to the circumstances of each case.[235] This places legal certainty at risk, rendering it almost impossible to anticipate the outcome of an investigation. This shows that although discretion of administrative action may be a virtue, too much of it may be detrimental for foreseeability. *CK Telecoms* is certainly not the only case where disparity of

[229] Case C-6/72 *Continental Can v Commission* [1973] ECR 00215, paras 26-27.

[230] *Airtours* (n 74) para 62.

[231] *Consten and Grundig* (n 56) p339.

[232] Colomo (n 23) 145.

[233] Colomo (n 23) 152; Antonio Capobianco, 'Safe Harbours and Legal Presumptions in Competition Law' (2017) Organisation for Economic Development and Cooperation, Directorate for Financial and Enterprise Affairs Competition Committee, Background Note by the Secretariat, 5.

[234] Colomo (n 23) 152.

[235] Colomo (n 23) 153.

views between an EU Court and the Commission have arisen. For example, in *AKZO*, the Commission had proposed a legal test that was grounded on a broad range of considerations, which might or might not be relevant in the context of a specific case.[236] Under this interpretation, a finding of abuse would not be contingent on the authority showing that the practice would lead to below-cost prices.[237] The Court, on the other hand, crafted a clearer legal test which identified two instances in which an aggressive pricing strategy would indeed give rise to an infringement within the meaning of Article 102 TFEU.[238] Under this new legal test, evidence of below-cost prices would be a necessary precondition for the application of the provision.[239] Another recent example of legal test-creation under Article 102 TFEU is the *Intel* saga,[240] where the Court identified a number of indicators that the Commission must consider once a firm provides evidence showing that a system of loyalty rebates is incapable of restricting competition.[241]

This role of rule-making as phrased by Petit,[242] or test creation as phrased by Colomo, is normally attributable to the Court of Justice (other examples include

[236] *ECS/AKZO* (Case IV/30.698) Commission Decision 85/609/EEC [1985] OJ L374/1, para 73.

[237] *ECS/AKZO* (n 236).

[238] Case C-62/86 *AKZO Chemie BV v Commission* [1991] ECR I-03359, paras 71–72.

[239] *AKZO Chemie* (n 238).

[240] See for example Podszun (n 30).

[241] *Intel* (n 30) para 139: "The Commission is not only required to analyse, first, the extent of the undertaking's dominant position on the relevant market and, secondly, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market".

[242] Petit (n 223).

Magill,[243] *Javico,*[244] *Kali & Salz II*,[245] *Tetra Laval*,[246] *Impala*,[247] *Glaxo*,[248] *Syfait*,[249] *T-Mobile,*[250] *TeliaSonera,*[251] *and Tomra*).[252] However, it could be theorised, as done above, that it was the General Court in *CK Telecoms* that attempted to construct such a legal test. Insofar as the promotion of the MEA is carried out through the construction of tests, this thesis submits that such activism is entirely desirable, even if it seemingly disturbs the Commission's discretionary powers. This becomes important in the light of legal certainty, because unstructured tests may render competition assessments unforeseeable for undertakings.[253] Where the General Court went wrong, however, was that it created a legal test through a misinterpretation of the law. This shows that the Court can certainly base its test creation on economics, but it must be mindful that it does so in alignment with the existing legal framework. As argued by the Court of Justice, the cumulative conditions would amount to a restrictive interpretation of Article 2(3) of the Merger Regulation, and would thus be incompatible with its objective.[254]

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[243] Joined Cases C-241/91 P and C-242/91 P *RTE and ITP v Commission* [1995] ECR I-00743, setting the standard on refusal to deal in the presence of IP rights.

[244] Case C-309/96 *Javico v Yves Saint Laurent Parfums* [1995] ECR I-01983, setting the standard for the appraisal of the effect on trade condition, when third countries are concerned.

[245] Joined cases C-68/94 and C-30/95 *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v Commission* [1998] ECR I-1375, setting the standard on collective dominance and the failing firm defense in merger cases.

[246] Case C-12/03 P *Commission v Tetra Laval* [2005] ECR I-00987, setting the standard of judicial review to be applied by the General Court.

[247] Case C-413/06 P *Bertelsmann and Sony* [2008] ECR I-04951, refining the standard for the appraisal of existing collective dominant positions.

[248] Case C-501/06 P *GlaxoSmithKline Services v Commission* [2009] ECR I-09291, recalling the standard for appraisal on restrictions on parallel trade under Articles 101(1) and 101(3) TFEU.

[249] Case C-53/03 *Syfait and Others* [2005] ECR I-04609, setting a standard for the appraisal on restrictions on parallel trade under Article 102 TFEU.

[250] Case C-8/08 *T-Mobile Netherlands and Others* [2009] ECR I-04529, refining the notion of a concerted practice.

[251] Case C-52/09 *TeliaSonera Sverige* [2011] ECR I-00527, setting the standard for the appraisal of margin squeezes under Article 102 TFEU.

[252] Case C-549/10 P *Tomra and Others v Commission* [2012] ECLI:EU:C:2012:221, recalling and refining the standard for the appraisal of rebates, and other exclusivity inducing schemes under Article 102 TFEU.

[253] Colomo (n 23) 155.

[254] *CK Telecoms* [2023] (n 189) para 113.

5.2 Latitude in Policymaking

Despite the ways in which EU Courts can contribute to the development of competition law, including the creation of legal tests, there are numerous parameters defining the boundaries of judicial activity. EU Courts are constrained by the discretion administrative authorities enjoy in deciding and formulating *policy*.[255] This becomes particularly relevant when discussing the MEA. Indeed, policymaking relates primarily to the definition of an agency's enforcement priorities; competition authorities (including the Commission) choose to devote their limited resources to certain industries or practices.[256] The rise of the MEA falls within the notion of policy choice, given that it placed the Commission's focus on conduct that is—from an economic rather than formalistic perspective—harmful to competition.

At the same time, however, policy discretion may not be a useful parameter with which to evaluate the General Court's review of *CK Telecoms*. Colomo highlights that policy is constrained by, and formulated through, *law*,[257] making it difficult to ensure full judicial review of legal interpretation on the one hand and marginal judicial review for policy choices on the other.[258] However, this thesis argues that it is precisely because of the translation of policy into law that EU Courts should be allowed to check whether the policy choices are complied with within the law. Indeed, the MEA as a policy choice has been operationalised through the law, including the Merger Regulation and accompanying soft law. Accordingly, insofar as the Court upholds that law, which is already a manifestation of the policy choices made by the Commission, such judicial review does not interfere with administrative discretion. Such discretion would only be unduly constrained if the policy choices promoted by the Court were *entirely foreign* to the legal framework

[255] Colomo (n 23) 144.

[256] Colomo (n 23) 148.

[257] Colomo (n 23) 144.

[258] Colomo gives the example that the application of Article 102 TFEU demands (*inter alia*) showing that the relevant undertaking enjoys a dominant position within a substantial part of the internal market. Accordingly, a Commission decision that fails to establish dominance to the requisite legal standard or interprets the notion of dominance erroneously, must be quashed if challenged by the Court. In such a case, the annulment of such a decision even if confined to issues of law, would in fact interfere with the Commission's policy choices insofar as it affects its enforcement priorities. The challenge for EU Courts is thus to ensure that judicial review does not unduly interfere with the policy choices made by the Commission, and at the same time, to ensure that their scrutiny lives up to their remit of controlling the legality of all aspects of administrative action.

adopted by the EU legislator and enforced by the administrative authority. This was evidently not the case in 2020 since by that time, it was widely acknowledged that the MEA was central to merger control.

5.3 Autonomy in Assessment-Conducting

Another constraint that (more successfully) constitutes a boundary to judicial review in competition law is independence in assessment-conducting by the administrative authority. As this thesis began by examining, 'complex economic assessments' occupy a privileged realm vis-à-vis judicial scrutiny, whereby Courts must restrict themselves to spotting manifest errors of assessment. Until now, it has been made clear that the General Court decided to ignore this doctrine and reviewed the Commission's economic assessment at length and depth. However, a question that has not been addressed yet is whether the General Court, in some respects, even substituted the Commission's assessment.

Indeed, it can be argued that the Court not only scrutinised the way in which the Commission conducted its assessment beyond its manifestness, but also, knowingly or otherwise, distorted the assessment to such an extent that it *de facto* conducted the assessment itself. Although, or maybe precisely because, the line between in-depth legality review and substitution of an assessment is thin, it can be contended that the Court effectively substituted the Commission's assessment.[259] To support this claim, Bouzoraa argues that it does not strictly follow from the SIEC test that a 4-to-3 merger *only* impedes effective competition significantly if it removes a competitor which 'stands out from its competitors in terms of impact on competition'.[260] In light of this, it can be argued that the review conducted by the General Court independently re-evaluated the economic facts of the case and reached its own conclusions.[261] As is widely recognised both by the Courts themselves as well as scholarship, it is not the prerogative of the Court to conduct such evaluations.[262] Therefore, the General Court in *CK Telecoms* promoted the MEA not only by calling for a higher evidentiary standard (Category

[259] Lindeboom and Bouzoraa (n 156) 427.

[260] Lindeboom and Bouzoraa (n 156) 427.

[261] Lindeboom and Bouzoraa (n 156) 429.

[262] José Carlos Laguna de Paz, 'Understanding the Limits of Judicial Review in European Competition Law' (2014) 2(1) Journal of Antitrust Enforcement 203, 204. Ioannis Kokkoris and Howard Shelanski, *EU Merger Control: A Legal and Economic Analysis* (Oxford University Press 2014) 559; Case C-376/20 P *Commission v CK Telecoms UK Investments* [2023] ECLI:EU:C:2023:561, Opinion of Advocate General Kokott, para 51.

2) and attempting to create a structured legal test (Category 3), but also, in some respects, by replacing the economic assessment of the Commission.

Therefore, an important reason for resistance by the Court of Justice was that the General Court's judgment effectively amounted to a substitution of the Commission's economic assessment.[263] In contrast, in *Tetra Laval* for instance, no autonomous economic conceptions and substitutions can be discerned from the General Court's judgment, rather a 'mere' push for the Commission to adhere to economics and provide sufficient evidence in its *own* assessments. The Court of Justice stood by that judgment on appeal, but was unable to support the General Court's economically emancipated reasoning in *CK Telecoms*, which morphed into a substitution of the Commission's economic assessment.[264]

5.4 Limitations on Expertise

Expertise in EU Courts can act as a final delimitation to judicial proactivity by EU Courts. As highlighted previously, EU Courts are often described as generalist, without specialised knowledge on the subject-matter in which they adjudicate.[265] However, this was not the case in *CK Telecoms*: the extended chamber of the General Court included several competition law experts with more expertise and familiarity of competition law and economics than the judges sitting in the Court of Justice.[266] According to Lindeboom, the General Court acted as a specialist court "in all but name,"[267] offering an illustration of the virtues and vices of judicial review by experts.

Although dubbing expertise as either a vice or a virtue may be overly simplistic, it is posited that a high degree of specialisation can at times complicate rather than enhance the adjudicative process. Indeed, it was likely their expertise that made it challenging for the General Court judges to distinguish between the economic soundness of the Commission's assessment, and lawfulness in line with the Merger Regulation. The inability of such distinction risks judicial overreach and thus places in doubt the desirability of specialist courts (in name or in form) to

[263] Lindeboom (n 151).

[264] Lindeboom (n 151).

[265] Michal Krajewski, 'On crosswords and jigsaw puzzles: the epistemic limits of the EU Courts and a board of appeal in handling empirical uncertainty' (2023) 2 European Law Open 784, 785.

[266] Out of the five judges hearing the case, three have a competition law background (Marc van der Woude, Eugène Buttigieg, and Paul Nihoul).

[267] Lindeboom (n 151).

adjudicate on matters of EU competition law, thus acting as a normative constraint to such promotion of the MEA.

Ultimately, the desirability of Courts to promote the MEA hinges on treading the fine line between the creation of structured and predictable legal tests (that align with the legal framework) and requiring the Commission to provide ample economic evidence (without excessively heightening the standard of proof nor reversing the burden of proof) on the one hand, and the total substitution of the Commission's economic assessment based on the Court's own economic reality on the other. This becomes all the more complicated when the Courtroom features competition law (and economics) experts, who may find it particularly difficult to tread the line between economic soundness and lawfulness.

6. Conclusion

This thesis sought to examine the extent to which, and methods by which, the General Court applies a strict standard of judicial review for economic assessments to advance the MEA in merger control. The findings of this research indicate that the Court has on multiple occasions used a more stringent standard of review than traditionally anticipated for economic assessments to trigger economic thinking. However, it has done so in different ways. To illustrate the different methods of promoting the MEA, this thesis devised a tripartite categorisation, which encompasses setting consumer welfare as the goal of competition law (Category 1); making use of economic tools and theories to establish facts, define relevant markets, and prove anti-competitive effects (Category 2); and creating legal tests based on economic theory (Category 3).

In the *annus horribilis* cases, which represented both the Commission's sternest challenge and its greatest opportunity at the turn of the century, the Court reviewed the Commission's economic assessment to an unprecedented degree and deplored the lack of economic logic and proof. Above all, a more stringent judicial review standard was used to propel the Commission to make greater use of economic theories, methods, and evidence, rather than rely on presumptions. Therefore, the General Court fostered Category 2 of the MEA, and, given that *Airtours, Schneider Electric,* and *Tetra Laval* are regarded as having catapulted the MEA, did so very successfully.

In *CK Telecoms*, the General Court yet again played a role in championing the MEA by heightening its judicial review standard, this time to overturn a Commission decision that prohibited a 4-to-3 horizontal merger in an oligopolistic market. The way in which the General Court promoted the MEA was in some ways similar to 2002: a call for more evidence in order to base prohibitions on genuinely anti-competitive behaviour (Category 2). However, in other fundamental respects, the judgment is unique: the underlying rationale of the Court was based on the economic understanding that not all horizontal mergers in oligopolistic markets are *ipso facto* anti-competitive. This rationale was then administered through an attempted clarification of the concepts of 'important competitive force', 'important competitive constraint', and 'closeness of competition', and an unforeseen distinction in burden of proof between efficiencies likely to counteract the restrictive effect of a concentration and 'standard efficiencies'. By rejecting the Commission's *ad hoc* unstructured examination, one may opine that the General

Court attempted to put in place a structured legal test, fostering Category 3 of the MEA.

However, it can also be theorised that the Court went slightly beyond this by imposing its own economic convictions through effectively substituting the Commission's assessment. The normative analysis of this thesis, which devised administrative discretion in assessment- conducting as one of three parameters of the institutional balance, restricts EU Courts' ability to promote the MEA this way. In light of this, it is rather unsurprising that the Court of Justice overturned the General Court's judgment.

In order to promote the MEA successfully, this thesis posits that EU Courts bear a responsibility to tread the line between reviewing economic soundness on the one hand, and lawfulness on the other. The extent to which this is still possible, and if so how, necessitates further scholarly research, as well as judicial reflection, not only as the General Court revisits *CK Telecoms*, but also well beyond. Solutions could include revising the Commission's margin of discretion and allowing EU Courts to play a more intrusive role in economics, or clarifying where legality review ends, and economic review begins in order to better safeguard the privileged realm that 'complex economic assessments' occupy vis-à-vis judicial scrutiny. Paradoxically, the tightrope between law and economics may have been instigated by the MEA itself—the infusion of economics into the law has left judicial review fraught with uncertainties. The tripartite categorisation of the MEA and the three parameters of the institutional balance devised in this thesis offer a foundation for further doctrinal, normative and empirical research into disentangling these indeterminacies.

Ultimately, the maxim that this thesis began with—"law that ignores economics cannot be good law"—rings profoundly true. Every institution, including the CJEU, can contribute to advancing the integration of economics into the law. The General Court has actively embraced this role, both historically and currently, albeit with varying degrees of success. By critically assessing its past endeavours and learning from its experiences, the General Court stands poised to more effectively champion the MEA in the future. The best way forward is to call for more economic evidence without excessively increasing the standard of proof nor reversing the burden of proof, and to create structured legal tests grounded on economic thinking and aligned with the legal framework. In this way, the General Court can make a significant contribution to ensuring that the law embraces, rather

than ignores, economics.

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