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**The General Court Reverses Commission's Decision in *H3G UK/Telefónica UK*:
Proposing a 'Fruits in a Bowl' to assess the competitive effects of mergers
Kalpana Tyagi***

Abstract: The General Court recently annulled the Commission's 2016 H3G UK/Telefónica UK prohibition decision. Commission's failure to meet the Court's newly-found higher threshold demonstrating that the merger would lead to 'significant impediment to effective competition' (SIEC), and that H3G UK was an 'important competitive force' were central to the decision. Considering that on the one hand, the Court's decision is welcome as it reflects that even telecom mergers - that are heavily grounded in economics and econometric simulations - are subject to legal review; then on the other, it also reflects a 'gap' - an evident need to appreciate that economics and econometric simulations, need clear and demonstrable definitions for application by Commission and the courts, as the case may be. This article, using an inter-disciplinary methodology with insights from competition law and economics & business strategy, tries to address this gap, and in the process respectfully highlights how the absence of such a 'vocabulary' and 'structure' led to a decision by the General Court that is good in spirit, but deplorably mistaken in reasoning. Potential remedies that could have alleviated competition concerns, while preserving merger specific efficiencies are also discussed.

Keywords: H3G UK/Telefónica UK; significant impediment to effective competition; important competitive force; Efficiencies; Merger Remedies; 4-to-3 Mobile telecom mergers

1. Introduction

The General Court (GC) recently annulled the Commission's prohibition decision in the 2016 H3G UK/Telefónica UK merger. Following a hearing by a five-judge chamber sitting in an extended composition¹, the GC in Case T-399/16 found that the Commission failed on the following two counts: first, to demonstrate that the merger would lead to 'significant impediment to effective competition' (SIEC), and second, that H3G UK was an 'important competitive force' for mobile telecommunications in the UK. The Court's decision is widely-hailed as a sequel to the EU Merger Control's Airtours' watershed moment, and a clear indication that EU competition law 'at large', and that EU merger control in particular, are

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¹ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 38.

rooted in a sound legal analysis, with the rule of law at its core, and EU competition law being neither unfettered nor arbitrary in enforcement.²

It may be noteworthy to recall that the so-called ‘gap’ cases, including the Commission’s defeat in the Airtours decision, led many to label 2003 as the *annus horribilis* for the Commission.³ This in turn led to the reform of the then EU Merger Control regime.⁴ The outcome in Case T-399/16 in that respect is a full circle on the issue of SIEC as it is the first interpretation by the General Court in a ‘so-called “gap-case”, i.e., concentrations in oligopolistic markets which do not result in the creation or strengthening of an individual or collective dominant position’.⁵ Shortly following the GC’s decision, Geradin emphasized that the annulment of the Commission’s decision is ‘no shame’, rather, it signals a well-functioning system, wherein the decisions of the Commission are subject to review of the European Courts, and if the appraisal of the decision so requires, are struck down.⁶ Considering that on the one hand, the Court’s decision is welcome as it reflects that even telecom mergers - that are heavily grounded in economics and econometric simulations - are subject to legal review; then on the other, it also reflects a ‘gap’- an evident need to appreciate that economics and econometric simulations, call for a clear and demonstrable definition for application by Commission and the courts, as the case may be. Conducting simulations in economics is not the same as taking volumetric analysis, more popularly known as titrations⁷ in chemistry. The limitations ‘inherent in a modelling exercise’ call for caution while placing ‘reliance on economic modelling’.⁸ Even though the model may precisely predict the outcome, but this ‘precision’ must not be equated with ‘accuracy’.⁹ Different economic models may yield varying results, and often times to get a grasp of the more probable outcome, it is often times important to look at the entirety of

² Pablo Ibáñez Colomo, ‘Case T-399/16, CK Telecoms v Commission: a new Airtours moment and the future of effects analysis’ Chilling Competition (28 May 2020) <<https://chillingcompetition.com/2020/05/28/case-t-399-16-ck-telecoms-v-commission-a-new-airtours-moment-and-the-future-of-effects-analysis/>>

³ Paul Craig, *EU Administrative Law* (New York: Oxford University Press 2006) 452.

⁴ Paul Craig, *EU Administrative Law* (New York: Oxford University Press 2006) 452.

⁵ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 85; Johan Ysewyn and Wesley Lepla, The General Court Annuls the Commission’s Decision to Block the Acquisition of Telefónica UK by Hutchison 3G UK – a Landmark Judgment for EU Merger Control? *Covington Competition: The Covington View* (Online 15 June 2020) <<https://www.covcompetition.com/2020/06/the-general-court-annuls-the-commissions-decision-to-block-the-acquisition-of-telefonica-uk-by-hutchison-3g-uk-a-landmark-judgment-for-eu-merger-control/>>

⁶ Damien Geradin, ‘Case T-399/16 CK Telecoms UK Investments v Commission: Why there is no shame for the Commission to be defeated in the EU Court’ EU Law Live Op-Ed Competition & State Aid (3 June 2020) <<https://eulawlive.com/op-ed-case-t-399-16-ck-telecoms-uk-investments-v-commission-why-there-is-no-shame-for-the-commission-to-be-defeated-in-the-eu-courts-by-damien-geradin/>>

⁷ The word ‘titration’ comes from the French word ‘titrer’ which means measuring the percentage of a substance in a given product or sample.

⁸ Jonathan Faull & Ali Nikpay (eds) *The EU Law of Competition* (Oxford University Press 3rd ed. 2014) p. 672.

⁹ Jonathan Faull & Ali Nikpay (eds) *The EU Law of Competition* (Oxford University Press 3rd ed. 2014) p. 672.

circumstances to determine *ex-ante* whether a merger may indeed be anti-competitive. This is one conundrum that competition lawyers and economists encounter in their application of economic and econometric insights to competition policy¹⁰. As Ibáñez Colomo identifies, when it comes to merger control, there is an evident gap, and hence, a need to provide ‘vocabulary’ and ‘structure’ to merger control.¹¹ This article, using an inter-disciplinary methodology, with insights from competition law and economics & business strategy, tries to address this gap, and in the process respectfully highlights how the absence of such a ‘vocabulary’ and ‘structure’ led to a decision by the GC that is good in spirit, but deplorably mistaken in reasoning. In particular, the disquiet expressed is three-fold. First, concerns the raising of the ‘threshold for evidentiary proof’ to a standard higher than the balance of probabilities for a finding of SIEC in non-coordinated conduct-based theory of harm. Second, concerns the discussion in the decision on ‘loss of competitive constraint’. Third, the discussion as regards ‘efficiencies’. As per the decision, all mergers lead to an inevitable price increase and for a finding of unilateral effects in so-called ‘gap’ cases, the merging parties must be able to act independently of consumers and competition in setting prices. With this sliding of scales, it emerges that the GC did away with the differences that exist in monopolized markets and those that are oligopolistic in structure.¹²

The article is organized as follows. Section 2 offers an overview of the General Court’s decision in Case T-399/16. Considering that the resulting ‘significant impediment to effective competition’ (SIEC), and whether H3G UK was an ‘important competitive force’ were central to the General Court’s decision, the section, while highlighting the concerns with the GC’s decision, also endeavours to offer a ‘vocabulary’ and meaning to these expressions and seeks to evaluate whether Commission’s interpretation was a good fit within the meaning of this vocabulary. Section 3 attempts to offer a potential remedial framework. It discusses the remedies offered by the parties during Commission’s investigation of the merger, and compares them with remedies in other recent 4-to-3 telecom mergers in the EU. Section 4 concludes.

2. General Court on H3G UK/Telefónica UK merger

¹⁰ See for instance Lars Wiethaus and Rainer Nitsche, ‘Upward Pricing Pressure Analysis: Critical Issues in Recent Applications’ *Journal of European Competition Law and Practice* (20 November 2014) 3 <http://awa2015.concurrences.com/IMG/pdf/wiethaus_nitsche.pdf>. In the context of demand estimation-based merger simulation, a frequently used quantitative technique in the analysis of mobile telecom mergers, the authors caution that the ‘reliability’ is dependent on ‘careful implementation’ of the model.

¹¹ Pablo Ibáñez Colomo, ‘Case T-399/16, CK Telecoms v Commission: a new Airtours moment and the future of effects analysis’ *Chilling Competition* (28 May 2020) <<https://chillingcompetition.com/2020/05/28/case-t-399-16-ck-telecoms-v-commission-a-new-airtours-moment-and-the-future-of-effects-analysis/>>

¹² See for example, Carl Shapiro, ‘Mergers with Differentiated Products’ [Spring 1996] *Antitrust* 23, 28.

2.1 The Commission's prohibition decision

In March 2015, Hutchison 3G UK (H3G UK) submitted Form CO to the Commission notifying its intention to acquire Telefónica UK for 10.25 billion pounds.¹³ Out of these 10.25 billion pounds, 9.25 billion were to be paid in cash, with another one billion being paid subject to the business meeting certain periodic cash flow targets.¹⁴ For Telefónica, the deal made sense as it wanted to divest from the UK market, and instead concentrate and strengthen its foothold in the continental European markets and other Spanish speaking regions, such as Mexico and Brazil.¹⁵

At the time of the proposed transaction, the UK market for mobile telecommunication services comprised of 4 mobile network operators (MNOs): Everything Everywhere (EE) Ltd. (subsequently acquired by BT Group, and since 2016 operating as 'BT/EE'), Telefónica UK (O2), Vodafone and H3G UK. In addition to these 4 MNOs, the UK market enjoys a very healthy retail competition from several mobile virtual network operators (MVNOs) such as Virgin Mobile, Lycamobile, Lycra and TalkTalk. The four MNOs cooperate at the upstream level by entering into various network-sharing agreements, while continuing to compete at the retail level.

As the phase I investigation indicated that the merger could lead to substantial impediment to effective competition (SIEC) in each one of these three markets, the Commission initiated a phase II investigation. To address the Commission's concerns identified in the Statement of Objections, the parties submitted a first set of commitments. Following an oral hearing, the parties submitted a second set of commitments, that were then subject to market test. To address the concerns emerging therefrom, the parties submitted a third set of commitments. Finding the commitments insufficient to alleviate its concerns, in May 2016, the Commission issued its prohibition decision.¹⁶

2.2 General Court

The Commission's assessment indicated that the merger would lead to non-coordinated oligopolistic effects in the retail market for mobile telecommunication services and the

¹³ Section 1.2 of Form CO, M. 7612 Hutchison 3G UK/Telefónica UK, *European Commission* <https://ec.europa.eu/competition/mergers/cases/additional_data/m7612_957_4.pdf>; Julien Toyer and Denny Thomas 'Hutchison to buy Telefónica UK unit for 10.25 billion pounds' *Reuters* (23 January 2015 Online) <<https://uk.reuters.com/article/uk-telefonica-m-a-hutchisonwhampoa/hutchison-to-buy-telefonica-uk-unit-for-10-25-billion-pounds-idUKKBN0KV2U020150123>>

¹⁴ *Ibid.*

¹⁵ Toyer and Thomas (2015)

¹⁶ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), paras 1-16.

wholesale market for access and also adversely impact the prevailing network sharing agreement in the UK.¹⁷

Applicant CK Telecoms UK's (the parent company of H3G UK) principal arguments in law were as follows. The first part of the plea dealt with the 'standard of proof incumbent on the Commission' for proving 'significant impediment to effective competition, in accordance with Article 2(3) of Regulation No 139/2004'.¹⁸ The applicant accordingly requested the General Court to 'clarify the applicable criteria for establishing the existence of [SIEC] where there is no dominant position or coordination between the parties on an oligopolistic market'.¹⁹

As per the Commission's first theory of harm, the merger was expected to lead to anti-competitive effect on the retail market for mobile telecommunications.²⁰ H3G UK and Telefónica UK exercised an 'important competitive constraint' in the UK market for retail mobile, as their market shares were growing constantly; the two 'competed closely against one another and against other MNOs'; the firm enjoyed a sound financial position and had excess capacity, absent consolidation, it was expected to continue exerting this competitive pressure; and following the merger, all the MNOs were expected to inevitably increase the price of their retail offerings (Section 2.2.1 to 2.2.5 *infra*).²¹ Second, the merger was also anticipated to disrupt the existing network sharing agreement between the 4 MNOs (Section 2.2.6 *infra*).²² This in turn was estimated to adversely impact the ability of non-MNOs to compete in the retail market (Section 2.2.7 *infra*).²³

¹⁷ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), paras 17-22.

¹⁸ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 70

¹⁹ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 78.

²⁰ *Hutchison 3G UK/Telefónica UK* (Case M.7612), Commission Decision [2016] OJ C 357/08, at para 1226

²¹ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), paras 128-133.

²² *Ibid*, at para 135.

²³ *Ibid*, at para 136.

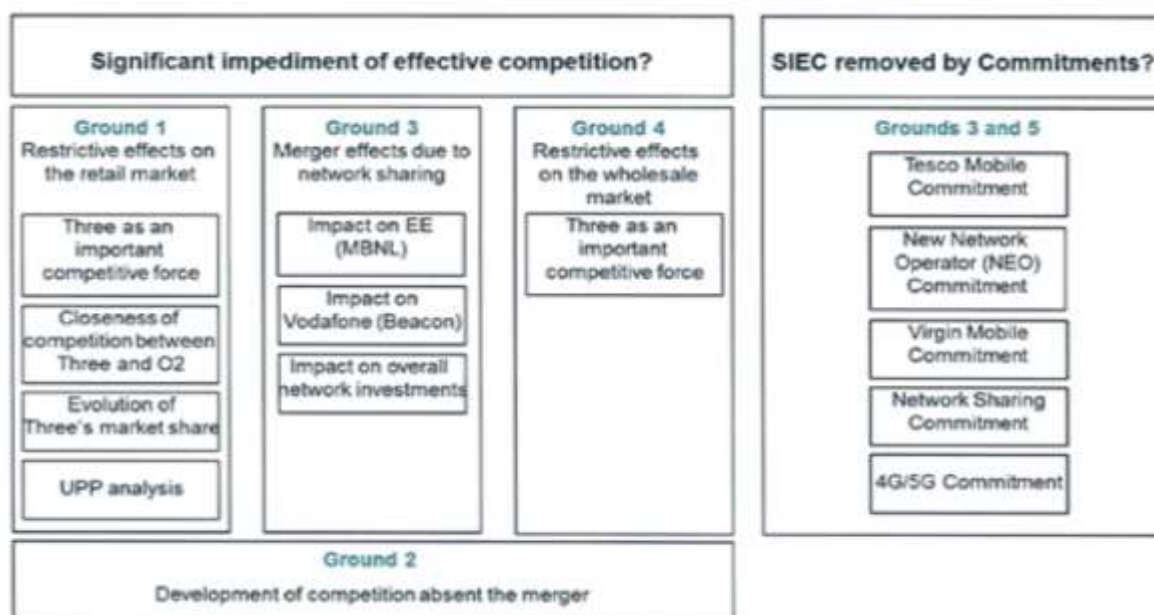


Fig. 1 Grounds of appeal in H3G UK/ Telefónica UK (Source: General Court)²⁴

2.2.1 The Spokes in the wheel - 'important competitive force'?

The applicant contested the Commission's finding that the merger would adversely impact retail competition in the mobile telecommunications market on the following grounds - first, the assessment that H3G UK was an 'important competitive force', second, 'closeness of competition', and third, the 'assessment of market shares'.²⁵

As regards the post-merger change in market shares, the Court agreed with the Commission that the fact that the post-merger market comprising of three MNOs that collectively controlled for over 90% of the retail mobile in the UK, with merged entity in the lead [30-40%] followed by BT/EE [30-40%] and Vodafone [20-30%], was at best 'a first indication of the [pre-merger] important competitive constraint' exercised by H3G UK and Telefónica UK.²⁶

The classification of H3G UK as an 'important competitive force' was contested by the applicant on account of the following three factors. First, the Commission distorted the 'concept of important competitive force', second, incorrect assessment of the degree of competitive constraint exercised by H3G UK in the market for retail telecommunication and third, 'distortion of the concept of important competitive constraint'.²⁷

²⁴ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020) 14.

²⁵ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 137.

²⁶ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), paras 148-154.

²⁷ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 156.

Even though in the opinion of the Commission, there is no one standard definition of an ‘important competitive force’, but there stands out some distinct features that are *sine qua non* to qualify as one – that is the firm ‘must have more of an influence on competition than its market share [indicate and the firm must] compete in a particularly aggressive way and force other players to follow that conduct’.²⁸

Unimpressed by the arguments of the Commission, the Court was of the opinion that the Commission jumbled up three concepts that is the concept of SIEC, the legal criterion u/A 2(3) Regulation 139/2004; the concept of ‘elimination’ of an important competitive constraint as referred to [in] recital 25 of the said Regulation and the ‘concept of elimination of an “important competitive force”’ as referred to in the decision and the 2004 EU HMG.²⁹ With this cluttering of three concepts, the Commission, in the opinion of the GC, significantly broadened the scope of Article 2(3), ‘since [acceptance of such a proposition would mean that] any elimination of an important competitive force would amount to the elimination of an important competitive constraint which, in turn, would justify a finding of SIEC’.³⁰ More particularly, the Commission ‘erred’ both in law and in assessment by stating that there exists no special requirement for an “important competitive force” to stand out from its competitors in terms of its impact on competition’.³¹ This in the opinion of the Court was wrong as such a treatment would permit ‘any elimination of an important competitive force to amount to the elimination of an important competitive constraint which, in turn, would justify a finding of SIEC’.³²

It is respectfully submitted that there are four inherent contradictions in the GC’s foregoing argument.

First, this approach of the Commission actually offers a sense of legal certainty meaning that a significant market shares of the merged entity, followed by classification of one or both of them as an ‘important competitive constraint’ in a oligopolistic market leads to a possibility that absent sufficient remedies to alleviate the SIEC, the merger may be prohibited.

Second, according to the current practice in the EU, the parties must be ‘close competitors’ (and not ‘closest competitors’). The GC’s arguments above are somewhat reminiscent of the

²⁸ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), paras 169-170.

²⁹ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 173.

³⁰ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 173.

³¹ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 174. To reach this conclusion the Court referred to *Hutchison 3G UK/Telefónica UK* (Case M.7612), para 326 from *Hutchison 3G UK/Telefónica UK* (Case M.7612), Commission Decision [2016] OJ C 357/08 [the contested decision].

³² Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 173-176.

2004 decision of the US district court in the Oracle/PeopleSoft merger, a 3-to-2 merger, first prohibited by the US Department of Justice (DoJ), but later reversed by the US District Court of Columbia for the DoJ's failure to unambiguously delineate a relevant market.³³ It almost seems that old habits die hard, but this time they are on display on the other side of the Atlantic. Commenting on the Oracle/PeopleSoft decision of the Court, Rubinfeld emphasized (and rightly so) that in unilateral effects the question is one of degree of market power.³⁴ Greater the degree and intensity of market power, closer is that market structure to that of a monopoly. In oligopoly there exists certain degree of independence to act freely on certain segments (in *niche segments*) of the market. This is called 'localized competition'.³⁵ Such localized spaces may be big or small. In order to strengthen their position of strength, firms try to differentiate – using the 4Ps (in marketing, discussed below) in such niche segments. This however, should not be equated with the classic definition of monopoly. This is the behaviour of firms in an oligopolistic setting, which is quite distinct from the behaviour of a monopolist. Whereas an oligopolist has the possibility to act independently in some niche segments of the market, the monopolist can act independent of its consumers, customers and competition in the entire relevant market.

Third, if at all, there is an argument against such an approach of the Commission, it is grounded in economic thinking (and *not* for any lack of legal certainty), and which paradoxically enough calls for more (and not less) discretion grounded in the post-Chicago economic thinking.

Fourth, and most notably, that as is evident from the discussion that follows – in order to appreciate how the 'elimination of an important competitive constraint' can lead to SIEC through non-coordinated effects, a joint reading of the recital 25 and Article 2(3) of the Regulation 139/2004 and HMG 2008 are required. A joint reading of the three forms a connected and coherent whole, and effectively elucidates how mergers that lead to the removal of an important competitive constraint may lead to unilateral effects in certain cases. The GC's disassociation of the three concepts, leaves us with a fundamental question as regards merger

³³ Kalpana Tyagi, Promoting Competition in Innovation through Merger Control in the ICT Sector: A Comparative and Interdisciplinary Study, *Springer* (2019) <<https://www.springer.com/gp/book/9783662587836>> 58-60. See also the references therein.

³⁴ Daniel L Rubinfeld, 'Current Issues in Antitrust Analysis, in Competition Policy and the Economic Approach: Foundations and Limitations' in Josef Drexler, Wolfgang Kerber and Rupprecht Podzun, Competition Policy and the Economic Approach: Foundations and Limitations (Edward Elgar 2012) 81.

³⁵ David T. Levy and James D. Reitzes 'Anticompetitive Effects of Mergers in Markets with Localized Competition' 8 *J.L. Econ. & Org.* 427 (1992) <<https://heinonline.org/HOL/LandingPage?handle=hein.journals/jleo8&div=35&id=&page=>>> ; Gregory J. Werden and Luke M. Froeb 'Unilateral Competitive Effects of Horizontal Mergers' *Handbook of Antitrust Economics* (2006) <https://papers-ssrn-com.ezproxy.ub.unimaas.nl/sol3/papers.cfm?abstract_id=927913>

control. Which one of the following two approaches is more suitable to determine whether a merger may indeed lead to anti-competitive effects? Can the various evidence be seen as additive in nature (as established by the Commission) or in the alternative, whether different available pieces of evidence be seen separately (as identified by the General Court). In the sections that follow, I illustrate how in an ex-ante analysis, the Commission's approach - that sees evidence as fruits in a basket, and then looks at this basket as a whole - may indeed lead to a more accurate depiction of how markets may develop following the concentration. For simplicity, I call this 'fruits in a bowl approach'.

Article 2(3) of the Regulation 139/2004 reads that a concentration that significantly impedes effective competition due to 'creation or strengthening of a dominant position, shall be declared incompatible with the common market'.

Recital 25 of the Regulation 139/2004³⁶ clarifies that oligopolistic markets generally exhibit a healthy degree of competition. However, in some cases, 'elimination of important competitive constraint' and the resulting diminished pressure on the other competitors, even absent any coordinated effects may lead to SIEC. The recital, accordingly, goes on to clarify that in light of this economic insight, the concept of SIEC in Article 2(2) and 2(3) must also include cases of 'anti-competitive effects' of a merger resulting from non-coordinated behaviour, even when the merging parties do not enjoy a position of dominance in the relevant market.

As per the 2004 EU HMG, some firms may be more influential in terms of their impact on the market dynamics then their market shares may suggest. In case the market is already highly concentrated, as is usually the case in tightly-knit oligopolies, a merger involving such firms may have 'significant, anti-competitive' impact in the relevant market. Examples of such firms

³⁶ Recital 25, Regulation 139/2004 reads thus: 'In view of the consequences that concentrations in oligopolistic market structures may have, it is all the more necessary to maintain effective competition in such markets. Many oligopolistic markets exhibit a healthy degree of competition. However, under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition. The Community courts have, however, not to date expressly interpreted Regulation (EEC) No 404/89 as requiring concentrations giving rise to such non-coordinated effects to be declared incompatible with the common market. Therefore, in the interests of legal certainty, it should be made clear that this Regulation permits effective control of all such concentrations by providing that any concentration which would significantly impede effective competition, in the common market, or in a substantial part of it, should be declared incompatible with the common market. The notion of 'significant impediment to effective competition' in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned.

include ‘recent entrants’ and firms with ‘promising pipeline products’. Paras 36 and 37 of the 2004 EU HMG refers to such firms as ‘important competitive force’.³⁷

As is evident from a joint reading of the recital and relevant paras of the 139/2004 EUMR and the 2004 EU HMG, the relevant paras merely indicate a possibility of finding anti-competitive effects in oligopolistic mergers where one of the parties substantially impacts the market dynamics, then its market shares indicate. To clarify, this alone is not sufficient. As the 2004 EU HMG goes on to add ‘*a number of factors*’ *add up* to make up for this possibility - that the merger may indeed lead to ‘significant non-coordinated effects’. Further the Guidelines caution that neither all the factors as referred to in the Guidelines need to be present, nor should they be ‘considered an exhaustive list’.³⁸

With this guidance, as the following sections illustrate, the proposed ‘fruits in a bowl’ approach can help effectively determine the anti-competitive effects of a merger.

According to Gore et al.

‘... whatever the nature of a firm’s behaviour, it is always necessary to determine whether that firm exerts an important competitive constraint on the other merging party (or would be expected to do so in the absence of the merger). If it is **not possible to demonstrate this on the basis of a coherent set of evidence**, a unilateral effects finding cannot be sustained.’³⁹

To determine whether H3G UK was indeed an ‘important competitive force’ or at least exercised some degree of competitive constraint, the Commission assessed the following (Fig. 1) – first, H3G UK’s gross add shares; second, its rate of growth; third, its pricing strategy; fourth, its competitiveness and finally, its network quality, brand loyalty.⁴⁰

³⁷ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings OJ 2004/ C 31/03, paras 37-38.

³⁸ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings OJ 2004/ C 31/03, paras 24-26.

³⁹ Daniel Gore, Stephen Lewis, Andrea Lofaro and Frances Dethmers, *The Economic Assessment of Mergers under European Competition Law* (Cambridge University Press 1 ed. 2013) 163.

⁴⁰ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 177.



Fig.2 H3G: An Important Competitive Constraint?

(Author's illustration based on Commission's contested decision and General Court's assessment)

2.2.1.1 H3G UK's 'gross add share'

The Commission's first argument was that H3G UK's 'gross add share' were way higher than its market share indicated. The Court's principle concern here was the patent lack of any consistent 'growth rate' when compared with earlier telecom mergers assessed by the Commission.⁴¹ In earlier 4-to-3 telecom mergers, such as T-Mobile Austria/Tele.ring and H3G Austria/Orange Austria, the gross add shares varied between 21 to 50%, whereas in the current concentration it hovered between 10-20%.⁴² The Court found that the Commission's assessment on H3G's gross add shares was 'vitiating by an error of assessment'.⁴³

Trying to quantify the concept of 'gross add shares' by putting a high threshold is sailing the wrong course in economic thinking. If there are any lessons from the post-SCP (Structure Conduct Performance) paradigm dynamic thinking, it is that it is whole that is greater than the sum-of-the-parts. Gross add shares, even when they may be as small as 5-10%, could be a first

⁴¹ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), paras 179-190.

⁴² Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), paras 186-187.

⁴³ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 189-190.

good indication of competitive constraint, provided that the whole, that is the assessment in its entirety, (*see* Fig. 1 *supra*) offers the synergies to act in a certain (competitive or anti-competitive) manner. Modelling their framework on the dynamic Austrian school of economic thinking, Ferrier et al study ‘how the market process influences changes in market share and the profitability of dethronement’.⁴⁴ The study is based on the Schumpeterian Austrian school approach, according to which ‘to truly understand competition, one must examine the process and consequences of competitive activity among leading firms’.⁴⁵ The authors study 41 industries over a period of 7 years, and find that firms can strategically choose from a range of actions and the larger is the diversity, the range and intensity of actions pursued, more aggressive is the intensity of competition in the industry. Simply put, if there is any learning from the Austrian school and the so-called *hyper competition theory*, it is to understand the dynamics of competition, rather than putting metrics, such as ‘gross add shares’ in the straightjacket of numbers. To add to the foregoing argument, it may be useful to suggest that below a *de minimis threshold*, such as 5-10%, ‘gross add shares’ may not be a meaningful indicator. But then, even such a proposition is subject to challenge. Consider for instance a highly saturated market with a highly loyal customer base in a tightly knit oligopoly. A ‘gross add share’ of as little as 5% may also be a meaningful first indicator of the ‘constraint’ exercised. Hence, as suggested, the right approach to capture the dynamics of competition is to look at the competition in its entirety, a reasoning that also gains momentum in light of the more dynamic approach.

2.2.1.2 ‘The development of [H3G UK’s] customer base’

On the growth in market shares, the General Court held that even though the *ratio decendi* in *General Electric v Commission* was relevant that ‘the growth in market shares is a convincing factor in terms of competitive pressure exerted by an operator’⁴⁶, however, in that case the applicant was ‘the leading supplier of aircraft engines, had the highest growth rate on the market, and was thus in a dominant position’⁴⁷. The GC held that this distinguished it from the

⁴⁴ Walter J. Ferrier, Ken G. Smith and Curtis M. Grimm, ‘The Role of Competitive Action in Market Share Erosion and Industry Dethronement: A Study of Industry Leaders and Challengers’ *Academy of Management Vol.2 No.4* (1999) 372-388

⁴⁵ Walter J. Ferrier, Ken G. Smith and Curtis M. Grimm, ‘The Role of Competitive Action in Market Share Erosion and Industry Dethronement: A Study of Industry Leaders and Challengers’ *Academy of Management Vol.2 No.4* (1999) 372-388, 373

⁴⁶ Case T-210/01 *General Electric v Commission* as referred to in Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 193.

⁴⁷ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 194.

present case as H3G UK was neither dominant, nor had it strengthened its dominant position on the relevant market.⁴⁸ It further added:

The mere growth in gross add shares over several consecutive years of the smallest mobile network operator in an oligopolistic market, namely Three, which has in the past been classified as a ‘maverick’ by the Commission (Case COMP/M.5650 – T-Mobile/Orange) and in the Statement of Objections in the present case, does not in itself constitute sufficient evidence of that operator’s power on the market or of the elimination of the important competitive constraints that the parties to the concentration exert upon each other.⁴⁹

Foregoing paragraph indicates the addition of a non-economic perspective to a highly complex economic concept that is conditions under which a new entrant disrupts an oligopolistic market by acting as a maverick. It is well-established that in telecom markets, on account of availability of excess capacity, the last MNO entrant usually acts as a maverick.⁵⁰ This is largely on account of the availability of excess network capacity and the possibility to quickly reach economies of scale by sharing this excess capacity. As can for example, be seen from a neighbouring French market, when Bouygues Telecom entered as an MNO in the French market, the then Chief Executive Officer (CEO) said in a moment of jest that he did not purchase a castle to let the gypsies free-ride. But it was not long before its entrance the market, that Bouygues emerged as a maverick in both – the wholesale as well as the retail market for mobile telecommunications in France.⁵¹

In addition, as the following sub-section highlights, H3G UK has also been recognized as a maverick on various occasions in earlier merger reviews by the European Commission – a fact, very useful to appreciate the parent company’s strategy of leading by acting as a *maverick*.

2.2.1.3 ‘Three’s pricing policy’

As regards H3G UK’s pricing policy, whereas the Commission’s principle argument was that H3G UK was amongst the most competitive in terms of the 4 MNOs in the UK retail mobile telecoms market; the applicant argued that its pricing was in the ‘middle’ - with its offering being ‘slightly cheaper’ than those of the other MNOs in the direct channel but ‘substantially

⁴⁸ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 195.

⁴⁹ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 195.

⁵⁰ Both Bouygues Telecom in France and Base in Belgium were the latest of the four MNOs in the respective markets, and are well-known to play the role of a maverick in both the retail and whole mobile telecoms market. See Kalpana Tyagi, *Four-to-Three Telecom Mergers: Substantial Issues in EU Merger Control in the Mobile Telecommunications Sector IIC* (2018) 49:185-220 available at <<https://doi.org/10.1007/s40319-018-0677-3>> 194 ff.

⁵¹ *Ibid.*

more expensive' than those of the 'other mobile network operators in the indirect channel and the mobile virtual network operators'.⁵² The Commission added that even though MVNOs have substantially contributed to business model innovation through competitive tariffs and customer service, they failed to 'meaningfully constrain the competitive behaviour' of the MNOs.⁵³ Unimpressed by the Commission's arguments, the GC found that the foregoing arguments or the fact that H3G UK's competitive pricing policy for 4G was insufficient to 'demonstrate that it was an "important competitive force"'.⁵⁴

It is respectfully submitted that this argument goes patently against the dynamics of competition in the mobile retail telecommunications sector for the following two reasons. First, it is well established that following a decline in average revenues per unit (ARPU) from voice and the failure of the mobile service providers to benefit from the emergence of so called big data and large data sets on account of regulatory restrictions imposed on them (the data wave incidentally was benefitted by the mobile handset manufactures and the platform providers, that were free from such regulatory restrictions, which in turn has produced a rich pedigree of competition cases), MNOs key strategy remains to maintain their foothold by offering newer generations of services at a premium. This also brings me to the second related point that MVNOs and other mobile service providers do not compete in the same relevant market as the MNOs.⁵⁵ Instead the dominant strategy of the MVNOs is to compete in niche segments. In other words, MVNOs target small clusters in the larger relevant market for mobile services. These niche clusters are either too small or too unprofitable for the MNOs to serve profitably, and this is essentially where the MNOs step-in to cooperate with the MVNOs. Following a failure of MVNOs to profitably reach out to these segments, MNOs in fact prefer to develop their own brands. Offering different generations of data services are the key differentiator for the MNOs, and in that regard, there exists a very special relationship between the MNOs and MVNOs. This current relationship between the MNOs and MVNOs did not develop overnight. It took close to two decades and substantial regulatory changes such as deregulation of the telecoms sector and the introduction of the 2002 Telecoms Package to evolve into its current form. Prior to Directive 2002/19/EC – the first regulatory measure that required access to the other telecom operators, such as the MVNOs - the MNOs were highly reluctant to deal with

⁵² Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), paras 199-208.

⁵³ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), paras 210-211.

⁵⁴ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), paras 212-216.

⁵⁵ For a remarkable account of an early evolution of the MVNOs, particularly the Danish Tele2Denmark and UK's Virgin Mobile – two early success stories of MVNOs in Europe, see Olga Sasinovskaya, 'Mobile Virtual Network Operators in Europe. Strategic and Legal Analysis' *Lund University Master Thesis* available at <https://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1349075&fileId=2433717>>

the MVNOs.⁵⁶ It was a range of notable regulatory changes that substantially contributed to the current position of the MVNOs in the EU.⁵⁷ Despite these developments, even today, MVNOs are permitted to step in where profits are thin, and MNOs have excess unused capacity. As a matter of fact, where MVNOs have failed to leverage on these niches, MNOs continue create their own sub-brands. MVNOs in turn have called this as a predatory behaviour of the MNOs considering that in the opinion of the MVNOs, the MNOs have their ‘own cake and [want] to eat it too’!⁵⁸ Examples include ‘SMARTY’ a sub-brand of H3G UK, ‘Voxi’ by Vodafone and ‘Giffgaff’ by Telefónica UK. All these sub-brands were launched by the respective MNOs to capture the niche segments in the UK retail telecommunications market.⁵⁹ It may be useful to add that in the mainstream media campaigns, even today none of these MNOs associate their main brands with their low-cost sub-brands. This further establishes that MVNOs, or MNO sub-brands that operate with a similar business model as the MVNOs, are at best, the ‘cash cows’⁶⁰ for the MNOs.

2.2.1.4 ‘The role historically played by Three on the market’

The Court also dismissed H3G UK’s ‘historic role on the market’ as relevant to determine its future conduct. In the opinion of the Court, the fact that H3G UK had acted disruptive by breaking the industry trends such as launching ‘One Plan’, ‘free international roaming’ and offering ‘4G at no extra cost’, which in turn led the other MNOs to sell 4G at a premium, were all historic and not at all representative of the pricing policy of H3G UK at the time of the notification of the proposed concentration.⁶¹

⁵⁶ Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) OJ L 108 (24 April 2002) pp. 7-20 <<https://eur-lex-europa-eu.ezproxy.ub.unimaas.nl/legal-content/en/ALL/?uri=CELEX:32002L0019>> . See also Consolidate Text: Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) <<http://data.europa.eu/eli/dir/2002/19/2009-12-19>>

⁵⁷ See Olga Sasinovskaya, ‘Mobile Virtual Network Operators in Europe. Strategic and Legal Analysis’ *Lund University Master Thesis* available at <<https://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1349075&fileId=2433717>>

⁵⁸ Tom Leines, ‘The Future of MVNOs in Europe’: Summary of the proceedings at the 16th annual MVNOs Conference Europe, *TeleGeography blog* (Online 31 October 2019) <<https://blog.telegeography.com/the-future-of-mvnos-in-europe>>

⁵⁹ Tom Leines, ‘The Future of MVNOs in Europe’: Summary of the proceedings at the 16th annual MVNOs Conference Europe, *TeleGeography blog* (Online 31 October 2019) <<https://blog.telegeography.com/the-future-of-mvnos-in-europe>>

⁶⁰ According to the BCG (Boston Consulting Group) Matrix, based on the degree of ‘industry attractiveness’ and ‘competitive position’, a company should classify develop its ‘business portfolio’. ‘Cash cows’ within this matrix are those brands that should be ‘milked’ to maximize cash flows. These cash flows should then be invested in other more profitable and promising brands of the firm. See Bruce Henderson, ‘The Product Portfolio’ (1 January 1970, *Online*) *Boston Consulting Group* <<https://www.bcg.com/publications/1970/strategy-the-product-portfolio>>

⁶¹ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), paras 217-226.

A neglect of the past behaviour of a ‘maverick’ firm can lead to misleading results. If earlier merger control cases are any indicator, H3G has not only been identified as a ‘maverick’ in the UK market on various occasions (consider for instance the 5-to-3 *T-Mobile/Orange/JV*)⁶², H3G’s sister concerns (all H3G firms are managed by CK Telecom UK Investment, the applicant in the present case), too have consistently been identified as ‘an important competitive force’ across other mobile telecommunications markets in the EU.⁶³

In marketing, price is one of the four fundamental Ps of a product (other three being ‘product’, ‘place’ and ‘promotion’) *see* Figure 2 *infra*.⁶⁴ These 4Ps are well recognized by leading mobile telecom players ranging from British Telecom⁶⁵ to Verizon⁶⁶ to Deutsche Telekom⁶⁷. The decision of these 4Ps is central to the positioning of a product or service in the market. These are strategic decisions taken at the level of the top management, which in turn impact business model innovation that are decisions at the level of tactics.⁶⁸ Considering the strategic nature of these decisions, and their bearing on consumer perception, it is unconceivable that a firm can or will even deliberately venture into changing its ‘price’ (unless and until there is a conscious strategic decision for downright re-positioning of the product or service). Further, even though

⁶² *T-Mobile/Orange* (Case COMP/M.5650) [2010] OJ C108/4, paras 59-63. *See also* the discussion in Kalpana Tyagi, Promoting Competition in Innovation through Merger Control in the ICT Sector: A Comparative and Interdisciplinary Study, *Springer* (2019) <<https://www.springer.com/gp/book/9783662587836>> 49, 107, 209-212

⁶³ H3G Italy for instance, was identified as influential despite its modest market shares in the Italian market for mobile telecommunications. *H3G Italy/Wind/JV* (Case M.7758), Commission Decision [2015] OJ C 391/05 at paras 1920 and 1969-1970. In a study dealing with mobile telecom mergers, I identify that in four out of six notable 4-to-3 telecom mergers in the EU, H3G was identified as a ‘maverick’. *See* Kalpana Tyagi, Four-to-Three Telecom Mergers: Substantial Issues in EU Merger Control in the Mobile Telecommunications Sector *IIC* (2018) 49:185-220 available at <<https://doi.org/10.1007/s40319-018-0677-3>> p.209. Likewise, H3G operating as ‘Three’ in Ireland was identified as a maverick in the 4-to-3 telecoms merger in the Irish mobile telecoms market. *See* Kalpana Tyagi, Promoting Competition in Innovation through Merger Control in the ICT Sector: A Comparative and Interdisciplinary Study, *Springer* (2019) <<https://www.springer.com/gp/book/9783662587836>> 217 ff.

⁶⁴ The 4Ps of Marketing – product, price, place and promotion – were first defined by Prof E. Jerome McCarthy in his classic textbook on Marketing. E. Jerome McCarthy, *Basic Marketing: A Managerial Approach* (Library of Congress Catalogue Card No, 60-10852 1960) <<https://babel.hathitrust.org/cgi/pt?id=inu.30000041584743&view=1up&seq=8>>. The relevance and centrality of the concept to the foundations of marketing can be gauged from the fact that to this day it remains one of the key concepts taught to marketing students across the globe. *See* Philip Kotler and Kevin Lane Keller *Marketing Management* (Pearson 15th ed. 2016).

⁶⁵ MBA Skool Team ‘British Telecommunication (BT) Marketing Mix (4Ps) Strategy’ *MBA Skool: Marketing Mix of Companies: Services* (19 April 2020 Online) <<https://www.mbaskool.com/marketing-mix/services/16895-british-telecommunication-bt.html>>

⁶⁶ Nathaniel Smithson ‘Verizon’s Marketing Mix (4Ps) Analysis’ *Panmore Institute* (19 August 2017 Online) <<http://panmore.com/verizon-marketing-mix-4ps-analysis>>

⁶⁷ MBA Skool Team ‘Deutsch Telekom Marketing Mix (4Ps) Strategy’ *MBA Skool: Marketing Mix of Companies: Services* (19 April 2020 Online) <<https://www.mbaskool.com/marketing-mix/services/16894-deutsche-telekom.html>>

⁶⁸ Kalpana Tyagi, ‘Merger Control in the Telecom Industry: A Landscape Transformed’ *Journal of Business Strategy* (2019) <<https://www.emerald.com/insight/content/doi/10.1108/JBS-10-2018-0173/full/html>>

‘repositioning’ through ‘prices and position’ is a theoretical possibility, ‘it is [neither] always profitable’ nor well-established ‘in the economic literature’.⁶⁹ While taking the applicant’s arguments into account, taking note of the following two fundamental market realities of the market – first, H3G’s disruptive role across the EU markets in general, and the UK market in particular and second, its positioning strategy - could have had a very decisive impact on whether (or not) H3G UK’s ‘historic role’ did offer some meaningful insights into its potential future conduct. Taking account of this insight is also relevant, considering that merger control being inherently forward-looking and prospective in nature, competition authorities and courts must consider the past dynamics as a torchbearer for future conduct.

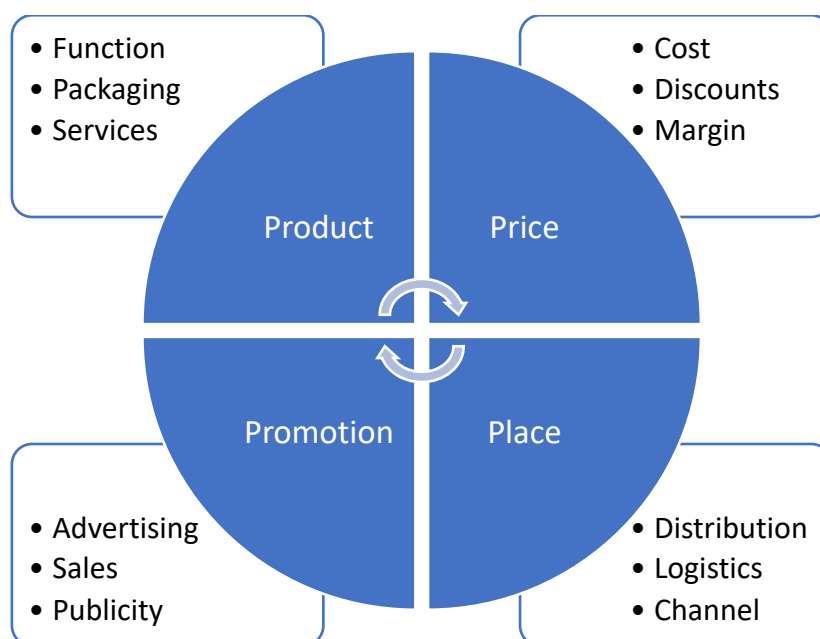


Fig. 3 The Four Ps of Marketing⁷⁰ (This figure is based on author’s understanding of the Marketing Mix as discussed in Business2Community)

2.2.2 H3G UK and Telefónica UK: ‘close’, ‘closer’ or ‘closest’ competitors?

The Commission’s theory of ‘non-coordinated effects’ in the retail market also relied on the finding that H3G UK and Telefónica UK were ‘close competitors’. To substantiate this, the Commission relied on a ‘qualitative assessment of diversion ratios based on mobile number

⁶⁹ See the discussion on M.7018 *Telefónica Deutschland/E-Plus*, a 4-to-3 merger in the German mobile telecoms market wherein the Commission discarded the theory of repositioning, in Lars Wiethaus and Rainer Nitsche, ‘Upward Pricing Pressure Analysis: Critical Issues in Recent Applications’ *Journal of European Competition Law and Practice* (20 November 2014) 6 <http://awa2015.concurrences.com/IMG/pdf/wiethaus_nitsche.pdf>.

⁷⁰ Brittney Ervin, ‘The Four “P”s of Marketing: How do they apply in the Digital Age?’ *Business2Community* (24 June 2016 Online) <<https://www.business2community.com/marketing/four-ps-marketing-apply-digital-age-01576860>>

portability (MNP) data and diversion ratios based on a survey’⁷¹ The GC agreed with the applicant that the Commission failed to assess how close the parties were in effect.

Joint reading of article 2(3) and recital 25 of the Regulation 139/2004 ‘requires the elimination of important competitive constraints that the merging parties had exerted upon each other, which constitutes the most direct unilateral effect of a concentration on an oligopolistic market’.⁷²

The GC dismissed the Commission’s argument in light of the ‘weak probative value of the analysis of the closeness of competition’ between the merging parties. Following four factors contributed to GC’s conclusion as regards the ‘closeness of competition’. First, there existed little product differentiation in the reference market, and attempts to overcome this lack of product differentiation were met with very ‘limited success’.⁷³ Second, for a meeting of the threshold of ‘close competitor’, ‘rivalry between the merging parties’ was identified as the key. Commission’s contested decision indicated that there existed ‘closeness of competition between [H3G UK] and [Telefónica UK], on the one hand, and the other two mobile network operators on the other’.⁷⁴ Third, whereas the Commission’s diversion ratios were calculated based on a sample of only 100 users; applicant’s calculations were based on 200,000 MNP observations.⁷⁵ Moreover, Commission’s own diversion ratios contradicted the findings of its quantitative analysis in Annex A of the prohibition decision.⁷⁶ Fourth, based on some confidential calculations, (notably these were not contradicted by the Commission), it emerged that another MNO, and not Telefónica UK was H3G UK’s ‘closest competitor, and [that too] by a significant margin’.⁷⁷ Besides H3G UK was not active in the professional mobile telecommunications segment and thereby the merging parties did not compete in that important market segment.⁷⁸

In a four firm oligopolistic market, there remain multiple permutations and combinations in which firms may compete against each another. It is equally plausible that there exists localized competition between two merging firms, with there being aggressive localized competition between the other two firms. The fact that in a four-firm oligopoly, two merging firms compete

⁷¹ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 227; See also Monti on ‘closeness of competition’ in Giorgio Monti, ‘EU Merger Control After *CK Telecoms UK Investments v. Commission*’ *World Competition* 43, no. 4 (2020) p. 459-460.

⁷² Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 235.

⁷³ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 240.

⁷⁴ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), paras 241-242.

⁷⁵ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 243.

⁷⁶ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 243.

⁷⁷ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 244-45.

⁷⁸ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 246.

closely in one node with the remaining two competing more closely in another, in no way diminishes the probative value of this market reality. The following figure (*figure 3*) illustrates some such possibilities that may prevail in a four-firm market.⁷⁹ Kindly note that firms with the same color compete more closely than others.

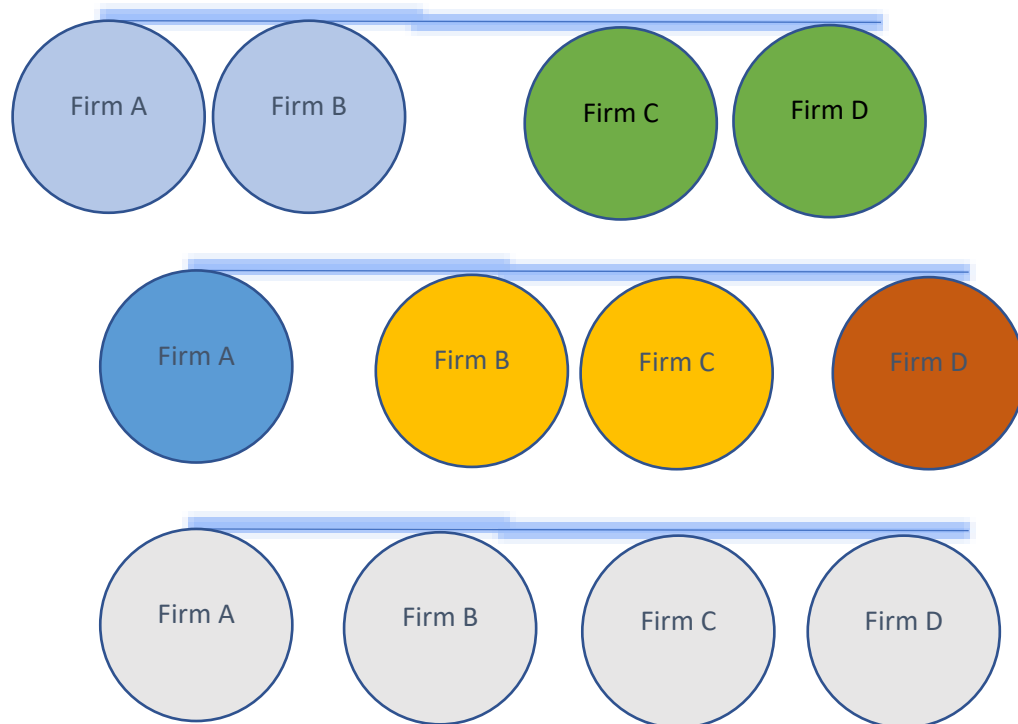


Fig. 4: Three distinct possibilities of localized (close) competition in a four-firm oligopoly

2.2.3 ‘The assessment of quantitative pricing effects of the concentration’

The Commission’s findings from the ‘upward pricing pressure’ analysis (UPP) were contested by the applicant on the following two counts – first, its lack of probative value and second, its irrelevance to the case under consideration.⁸⁰ The Applicant’s principal argument was that the UPP analysis was at best a ‘first “screen” [to determine] whether a merger merits closer investigation’.⁸¹ The GC agreed that even though the UPP analysis at best offered a first screen, however, considering that the Commission did undertake an elaborate Gross Upward Pricing

⁷⁹ The figure is based on author’s understanding of how firms may position themselves in a four-firm oligopoly. There exists a rich literature on the subject. See for example, Frank Verboven, ‘Localized Competition, Multimarket Operation, and Collusive Behaviour’ 39 *International Economic Review* 2 (May 1998) 371-298 <<http://www.jstor.com/stable/2527298>>. See also references therein.

⁸⁰ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 251-252.

⁸¹ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 253.

Pressure Index (GUPPI)⁸², questioning the quantitative analysis was not well-founded.⁸³ The Courts assessment of the application of the UPP test merits re-think.⁸⁴

Considering the economic complexity of these concepts, it may be useful to elaborate on the meaning of UPP and GUPPI. Simply put, the UPP test is used to assess the degree of ‘closeness of competition between the merging parties’ to find the post-merger increase in prices.⁸⁵ The analysis is premised upon ‘presumed profit margins’ and ‘diversion ratios’. It is notable that the onset of 4-to-3 telecom mergers, starting with the 2012 merger in the Austrian retail telecoms market⁸⁶ led to a widespread acceptance of the test in the EU Merger Control. The test has many variants, and degrees of sophistication, and is at best an initial screening mechanism to assess whether the merger may lead to price increase.⁸⁷ GUPPI indicates the expected increase in the marginal costs of the merging parties. GUPPI may be calculated by ‘multiplying a party’s diversion ratio with the margin earned by the other party’.⁸⁸ Further, it may be useful to add that these are the simplest and most straightforward definitions of UPP and GUPPI. In practice, and as the practice of the Commission indicates, there exists multiple variants of these tests, each with a varying degree of sophistication.

⁸² Contested Commission decision, paras 253-54 of Annex A

⁸³ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 257-259.

⁸⁴ Giorgio Monti, ‘EU Merger Control After *CK Telecoms UK Investments v. Commission*’ *World Competition* 43, no. 4 (2020) p. 453.

⁸⁵ Lars Wiethaus and Rainer Nitsche, ‘Upward Pricing Pressure Analysis: Critical Issues in Recent Applications’ *Journal of European Competition Law and Practice* (20 November 2014) <http://awa2015.concurrences.com/IMG/pdf/wiethaus_nitsche.pdf>; Oxera, ‘Unilateral Effects Analysis and Market Definition: Substitutes in Merger Cases?’ *Agenda: Advancing Economics in Business* (June 2011) 1 <https://www.oxera.com/wp-content/uploads/2018/03/Unilateral-versus-market-definition_1.pdf>; Jan Peter van der Veer, ‘UPP – frequently asked questions’ *Kluwer Competition Law Blog* <http://competitionlawblog.kluwercompetitionlaw.com/2012/12/04/upp-frequently-asked-questions/?doing_wp_cron=1595411887.9138109683990478515625>

⁸⁶ *Hutchison 3G Austria/Orange Austria* (Case COMP/M.6497) [2013] OJ C224/12

⁸⁷ Lars Wiethaus and Rainer Nitsche, ‘Upward Pricing Pressure Analysis: Critical Issues in Recent Applications’ *Journal of European Competition Law and Practice* (20 November 2014) <http://awa2015.concurrences.com/IMG/pdf/wiethaus_nitsche.pdf>; Oxera, ‘Unilateral Effects Analysis and Market Definition: Substitutes in Merger Cases?’ *Agenda: Advancing Economics in Business* (June 2011) 1 <https://www.oxera.com/wp-content/uploads/2018/03/Unilateral-versus-market-definition_1.pdf>; Jan Peter van der Veer, ‘UPP – frequently asked questions’ *Kluwer Competition Law Blog* <http://competitionlawblog.kluwercompetitionlaw.com/2012/12/04/upp-frequently-asked-questions/?doing_wp_cron=1595411887.9138109683990478515625>

⁸⁸ Lars Wiethaus and Rainer Nitsche, ‘Upward Pricing Pressure Analysis: Critical Issues in Recent Applications’ *Journal of European Competition Law and Practice* (20 November 2014) <http://awa2015.concurrences.com/IMG/pdf/wiethaus_nitsche.pdf>; Oxera, ‘Unilateral Effects Analysis and Market Definition: Substitutes in Merger Cases?’ *Agenda: Advancing Economics in Business* (June 2011) 2 <https://www.oxera.com/wp-content/uploads/2018/03/Unilateral-versus-market-definition_1.pdf>; Jan Peter van der Veer, ‘UPP – frequently asked questions’ *Kluwer Competition Law Blog* <http://competitionlawblog.kluwercompetitionlaw.com/2012/12/04/upp-frequently-asked-questions/?doing_wp_cron=1595411887.9138109683990478515625>

The second part of the complaint dealt with the Commission's 'manifest error of assessment' in drawing conclusions from the UPP analysis.⁸⁹ As per the Commission, in the case under consideration, the UPP analysis indicated that the price increase was 'between those which were predicted in the Irish [6.6%] and German [9.5%] cases' and moreover, the findings were used 'as part of an overall assessment of the body of evidence'.⁹⁰

The GC's principal concerns were as follows. First, Commission's quantitative analysis was based on 'a limited number of key inputs, particularly diversion ratios and margins'.⁹¹ Second, the Commission did not define a minimum threshold 'above which the predicted post-merger prices increase [could be] regarded as sufficiently significant'.⁹² Considering that 'the magnitude of price increase' was one of the many factors, the Commission did not quantify a minimum threshold 'above which a price increase indicated by an individual piece of evidence would be significant'.⁹³ The GC's third concern was that even if the Commission 'had proved to the requisite legal standard' a post-merger increase in prices, *the Commission had failed to demonstrate that in the case under consideration such a 'quantified price increase would be significant'*.⁹⁴ This third argument of the GC, seems most unconvincing.

With the above approach, it seems the GC slithered towards an acceptance that mergers would inevitably lead to price increases, and that this must be accepted as a reality. For such mergers to lead to SIEC, this price increase needs to be significant.

It is submitted that, first of all in the short term, as the GC itself admits mergers lead to price increase.⁹⁵ This as a matter of fact is also indicated by an ex-post econometric evaluation of the 4-to-3 telecom merger in the Austrian market highlighting that following the merger between H3G Austria and Telekom Austria, there was a short-term price increase of over 14-20%.⁹⁶

Second, on account of high barriers to market entry in the mobile telecommunications market, market entry in short or even medium term is at best uncertain. This is on account of substantial

⁸⁹ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 260.

⁹⁰ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 262-263, 273.

⁹¹ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 264-268.

⁹² Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 269.

⁹³ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 272.

⁹⁴ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 274.

⁹⁵ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 276.

⁹⁶ D Erharter and J Gruber 'The Austrian Market for Mobile Telecommunications Services to Private Customers: An Ex-post Evaluation of the Mergers H3G/Orange and TA/Yesss! <<https://www.bwb.gv.at/Documents/BWB2016-re-Ex-post%20evaluation%20of%20the%20mobile%20telecommunications%20market.pdf>>

sunk costs and legal barriers to market entry, such spectrum requirements in the mobile telecoms market.⁹⁷

These concerns certainly need to be effectively remedied by commitments, as has been the case in most 4-to-3 telecom mergers. Thus, raising the threshold for a finding of SIEC in such merger cases is tantamount to sailing the wind in the wrong direction. What is required is an effective remedial framework to address these concerns, an issue that is and must remain central as one observes a recurrent global wave of 4-to-3 telecom mobile mergers.

2.2.4 On Efficiencies

According to economic theory – efficiencies may be short term (variable cost efficiencies) and long term (fixed cost efficiencies). It is well-established that efficiencies are taken into consideration only when they are ‘likely to be realized and at least partly passed on to consumers’.⁹⁸ To benefit from such an efficiency defense, such efficiencies must ‘benefit’ the consumers, be ‘merger- specific’ and be ‘verifiable’. The Guidelines clearly state that marginal costs are more likely to be passed on the consumers than any fixed cost savings. This is also evident from Ryanair/Aer Lingus, a notable merger prohibition decision, wherein efficiencies were central to the assessment of the concentration, the Commission (decision subsequently upheld by the General Court) agreed that *only* operating costs that were variable in nature could benefit consumers, and therefore, be taken into account.⁹⁹

The GC, it emerges together dealt with short term and long-term efficiencies as is vivid from the following recital.

Similarly, any concentration will lead to efficiencies, the extent of which will also depend on external competitive pressure. Those efficiencies stem in particular from the rationalization and integration of production and distribution processes by the merged entity. Indeed, that entity will generally eliminate duplicate structures in the production and distribution chains, and will redeploy members of staff or make them redundant.

⁹⁷ Jörn Kruse, ‘Competition in Mobile Communications and the Allocation of Scarce Resources: The Case of UMTS’ in Pierre A. Buigues and Patrick Rey (eds) *The Economics of Antitrust and Regulation in Telecommunications: Perspectives for the New European Regulatory Framework* (Edward Elgar 2004) <<https://doi.org/10.4337/9781843769767.00024>>

⁹⁸ Jonathan Faull & Ali Nikpay (eds) *The EU Law of Competition* (Oxford University Press 3rd ed. 2014) p. 744. See, the discussion on Korsnäs/Assidomän Cartoonboard (2006), first merger case where the Commission took efficiency defense into account.

⁹⁹ Jonathan Faull & Ali Nikpay (eds) *The EU Law of Competition* (Oxford University Press 3rd ed. 2014) p. 744. See, the discussion on Ryanair/Aer Lingus.

Depending on the circumstances, those rationalization efforts may lead the merged entity to lower its prices.¹⁰⁰

In the GC's opinion, , the Court found that the Commission confused 'two types of efficiencies' – first those mentioned in Section VII of the Guidelines, and second 'those specific to each concentration'.¹⁰¹ Further, the GC almost concluded that there existed a positive correlation between reduction in the number of telecom operators from 4-to-3, even though this may or may not lead to an improvement in network quality.¹⁰² Assuming that the merger would lead to more investment in 5G, though not necessarily an improvement in the quality of the network, the GC shifted the burden on to the Commission to prove 'in accordance with the applicable standard of proof' that the merger would indeed lead to SIEC on account of 'degradation of network quality'.¹⁰³

This overall led the GC to conclude that the Commission flailed and therefore, its quantitative analysis lacked any 'probative value'.¹⁰⁴

Following three issues emerge as regards the GC's assessment of efficiencies.

First, with this, the GC seems to have set a new standard by asking the Commission to take into account efficiencies that are 'specific to each concentration'. This is the 'efficiency credit', that need not be proven by the parties and must instead 'be assumed by the Commission to arise directly from the merger'.¹⁰⁵ There seems to emerge a new standard for the assessment of concentrations, which is neither in alignment with the more recent post-Chicago economic thinking, nor does it add to any certainty. Recent works have demonstrated that mergers inevitably lead to price increases, and if at all, call for a stricter scrutiny of mergers.¹⁰⁶ In addition, in his recent work, Baker profoundly advises that the sooner competition authorities do away with the Chicago style thinking, the better they can serve the interests of consumers and innovation. Further claim for efficiencies, need more (and not less) scrutiny.¹⁰⁷ This, in

¹⁰⁰ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 277.

¹⁰¹ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 279.

¹⁰² Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 280-281. The GC's conclusion that merger would lead to investment in 5G network was based on the following report, that was also referred to in the Commission's prohibition decision: Christos Genakos, Tommaso Valletti and Frank Verboven, 'Evaluating Market Consolidation in Mobile Communications' *CERRE* (15 September 2015 Brussels) <https://www.cerre.eu/sites/cerre/files/150915_CERRE_Mobile_Consolidation_Report_Final.pdf>

¹⁰³ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 281.

¹⁰⁴ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 282-283.

¹⁰⁵ Giorgio Monti, 'EU Merger Control After *CK Telecoms UK Investments v. Commission*' *World Competition* 43, no. 4 (2020) p. 455-456.

¹⁰⁶ John Kwoka, 'Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy' (Cambridge, Massachusetts: The MIT Press. 2015 1 ed) 143 ff.

¹⁰⁷ Jonathan B. Baker, *The Antitrust Paradigm: Restoring a Competitive Economy* (Harvard University Press 2019)

short, for the purposes of the present discussion implies, an ever-stronger burden of proof on the merging parties that the merger would lead to efficiencies, and that these will likely benefit the consumers. Against the backdrop of this dynamic economic discourse on efficiencies, Court's deliberation on 'automatic efficiency credit' called for at least some reference to academic discussion on the debate.¹⁰⁸

Third, the GC also seems to have assumed that the merger would lead to more investments in 5G and therefore, it is incumbent upon the Commission to prove that there will be post-merger 'degradation of network quality'. Considering the substantial investment requirements for 5G (which are way higher than the previous generations on networks), reliance on only a handful of economic studies to establish whether (or not) 4-to-3 mergers will lead to accelerated transition to 5G does not do justice to the highly complex debate on competition and its impact on innovation.¹⁰⁹ If at all, more (and not) less rigorous assessment of such dynamic dimensions of the transaction are desirable. Also debatable is the conclusion on 4-to-3 concentration leading to increase in investments, particularly when the debate is far from settled in both law and economics (particularly Industrial Economics) academic literature.

2.2.5 'The overall assessment of non-coordinate effects'

Applicant's seventh plea was that the Commission failed to undertake an overall assessment of non-coordinated effects, and more particularly confused 'the reduction of competition between Three and O2' as the elimination of an important competitive constraint.¹¹⁰

¹⁰⁸ Giorgio Monti, 'EU Merger Control After *CK Telecoms UK Investments v. Commission*' *World Competition* 43, no. 4 (2020) p. 468.

¹⁰⁹ Giorgio Monti, 'EU Merger Control After *CK Telecoms UK Investments v. Commission*' *World Competition* 43, no. 4 (2020) p. 456.

¹¹⁰ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 284.

The Commission’s response was that it followed a three-step approach – first, a qualitative assessment; second, a quantitative analysis and finally an overall conclusion.¹¹¹

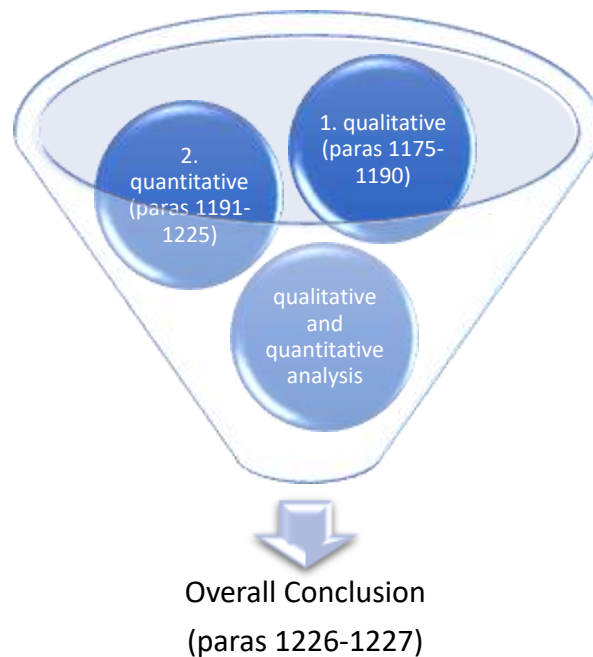


Fig. 5: Commission assessment of the non-coordinated effects in the contested decision (Diagram based on author’s understanding of the Commission’s arguments as stated in para 285 of the GC’s decision)

The General Court joined the Commission in the respect that the latter did undertake an overall assessment of unilateral effects.¹¹² Where the GC did differ from the Commission, and which also eventually led to an overturning of the Commission’s decision – particularly as regards finding of non-coordinated effects in the market for retail mobile telecommunications in the UK - was the fact that in the opinion of the GC, the Commission’s ‘global assessment’ was superficial in the sense that it was at best ‘cursory’ and the Commission failed to specify ‘whether the non-coordinated effects identified *would be “significant” or would result*’ in SIEC.¹¹³ It is this *substantial raising of the threshold* that led the GC to its conclusion on SIEC. In other words, the Commission could not meet the threshold for a showing of non-coordinated effects at this elevated (and unanticipated) threshold. As the foregoing discussion elucidates, the GC remarkably first raised the impediment for showing of non-coordinated effects in *gap* cases, and then brick-by-brick (such as on issues of quantitative assessment and efficiencies) raised the bar, and then eventually, reached the conclusion that the Commission had failed to

¹¹¹ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 285.

¹¹² Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 287.

¹¹³ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 290-91. Emphasis added.

meet this threshold.¹¹⁴ In the opinion of the author, quite contrary to its intention to simplify and clarify the conditions for a finding of unilateral effects in *gap* cases, the decision rather than building any bridges, raises the bar as well as uncertainty for a finding of SIEC. In addition, it also deviates from the more recent economic thinking on critical issues such as unilateral effects, the concept of an important competitive constraint and efficiencies. In other words, this calls for looking at the fruits in a bowl on a whole to be able to determine whether the bowl is empty or full.

2.2.6 Theory of Harm 2: Non-coordinated Effects resulting from the disruption of the Network Sharing Agreements

The merger was also expected to adversely impact the existing network sharing agreements (NSAs) between BT/EE and H3G UK (the MBNL network) on the one hand and Vodafone and Telefónica UK (the Beacon network) on the other (see *Figure 6 infra*).

In the UK market, the four MNOs share their networks. Whereas BT/EE and Three have a Mobile Broadband Network (MBNL) joint venture, Vodafone and O2 partner under the Beacon network sharing agreement (*fig. 6 infra*).

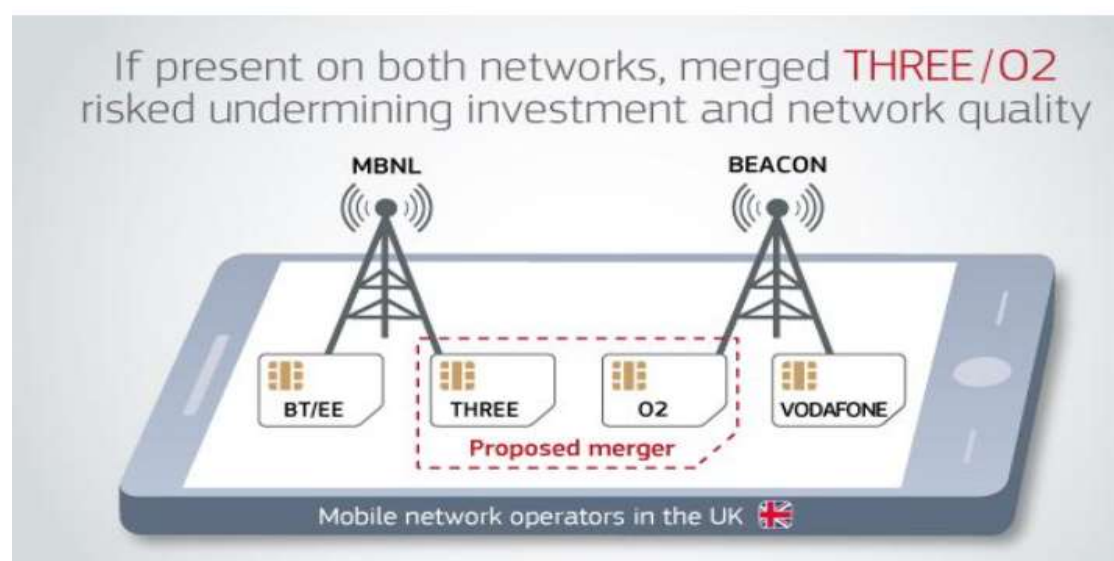


Fig.6: Network Sharing Agreements in the UK Mobile Telecommunications Market (Source: European Commission)¹¹⁵

The MBNL and the Beacon network are two different types of NSAs. Whereas MBNL is more passive that permits unilateral deployments, Beacon is more active wherein each party offers

¹¹⁴ Cleary Gottlieb ‘The General Court Raises the EC’s Bar for Mergers in Concentrated Markets’ *Cleary Gottlieb Alert Memorandum* (3 July 2020) <<https://www.clearygottlieb.com/-/media/files/alert-memos-2020/european-court-raises-the-ecs-bar-for-mergers-in-concentrated-markets.pdf>>

¹¹⁵ European Commission, Press Release: Mergers: Commission prohibits Hutchison’s proposed acquisition of Telefónica UK (Brussels 11 May 2016) <https://ec.europa.eu/commission/presscorner/detail/en/IP_16_1704>

the other access to its active network in one half of the UK.¹¹⁶ The merger was expected to disrupt these NSAs resulting in non-coordinated effects in the market for network sharing. The Commission further developed two additional sub-theories of harm – first, post-merger reduction in competitive pressure from the non-merging parties i.e. BT/EE and Vodafone¹¹⁷ and second, reduction in ‘industry-wide investments in network infrastructure’^{118, 119}. Decreased investments in network quality were in turn expected to lower the network quality as compared to the counterfactual.¹²⁰ As per the Commission, whereas higher incremental costs could lead to higher prices; higher fixed costs were expected to diminish the network quality.¹²¹

The merging parties proposed two potential network consolidation plans, though they did not commit to either of them. Both of these plans, and each one of the five potential integration possibilities therein - as per the Commission’s analysis – were, post-merger, expected to ‘significantly harm the competitive position of either one or both’ the non-merging parties that is BT/EE and Vodafone.¹²²

The applicant maintained that there were manifest errors in the above-referred theory on account of the following seven grounds: *first*, alignment of interests between parties to the NSA; *second*, possible developments of NSAs in the counterfactual; *third*, H3G UK’s ability to frustrate BT/EE’s unilateral investments in the NSA; *fourth*, potential of the merger to ‘harm competitors as opposed to competition’; *fifth*, negative impact on the competitive position of BT/EE and Vodafone; *sixth*, impact on overall network investments following increased transparency and *seventh*, assessment of the NSAs.¹²³

The Court considered only the first three grounds. As regards the first ground, the applicant argued that the theory that the merger would lead to alignment of interests between the parties to the NSA was both ‘novel’ and ‘counter-intuitive’, considering that it was for the first time that the Commission raised such a theory of harm in a telecom merger.¹²⁴ The GC held that the fact that a theory has been presented by the Commission for the first time in no way diminishes its significance. . The GC was of the opinion that the markets for NSAs were neither set in

¹¹⁶ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), paras 293-294.

¹¹⁷ *Hutchison 3G UK/Telefónica UK* (Case M.7612), Commission Decision [2016] OJ C 357/08, at para 1232.

¹¹⁸ *Hutchison 3G UK/Telefónica UK* (Case M.7612), Commission Decision [2016] OJ C 357/08, at para 1233.

¹¹⁹ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), paras 292-322; *Hutchison 3G UK/Telefónica UK* (Case M.7612), Commission Decision [2016] OJ C 357/08, at paras 1229-1234.

¹²⁰ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 309.

¹²¹ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 311.

¹²² Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), paras 315-318.

¹²³ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 323.

¹²⁴ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 325

stone nor were altogether incontestable. Subsequent alterations to NSAs following a merger did not lead an automatic presumption of an SIEC.¹²⁵ To assess the ‘new competitive balance on the market’, account needs to be taken of both – its ‘pro-competitive’ as well as its ‘anticompetitive’ effects.¹²⁶ The GC accepted the applicant’s argument that ‘mere loosening of ties within MBNL and Beacon following the concentration’ could act either ways – it could in fact even ‘encourage’ more infrastructure competition.¹²⁷ On the whole, the GC agreed with the applicant that the Commission erred in finding that a ‘lasting disruption’ to the NSAs would lead to SIEC ‘exerted by a partner to such an agreement’.¹²⁸

The applicants also contested that the merger would adversely impact the network investments by BT/EE.¹²⁹ The GC collectively evaluated the impact of the merger on the other two MNOs’ that is BT/EE and Vodafone.¹³⁰ The GC noted at the outset that a lack of ‘thorough examination’ and lack of ‘solid and convincing reasoning’ as regards (1) degradation of the merged entity’s services and quality of their network; (2) reduction of [competitive] pressure on the other MNOs and (3) the resulting impact on the ‘quality of the offer and choice made available to customers’ – were key weaknesses in the Commission’s assessment of non-coordinated effects.¹³¹

As regards the impact on the BT/EE, the Commission’s assessment of the NSA indicated that post-merger, the merged entity would have insufficient incentives to share the maintenance costs of ‘superfluous’ sites, which in turn had the potential to degrade the ‘network quality of one or the other’ NSAs.¹³²

The GC tested the Commission’s proposed theory of harm on the *higher threshold for a finding of SIEC*, ‘as set out in paragraph 111’, and quite unsurprisingly, the Commission failed to meet this higher threshold.¹³³ Further, the Commission also failed to meet the threshold for “elimination of important competitive constraints” (as set in para 96 of the GC’s decision).¹³⁴

The GC held that as there remained a possibility to establish ‘positive correlation’ between 4-

¹²⁵ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 340.

¹²⁶ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 341.

¹²⁷ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 346.

¹²⁸ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 348.

¹²⁹ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), paras 349-352.

¹³⁰ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 356-357.

¹³¹ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 358-361.

¹³² Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 364-367.

¹³³ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 368-372.

¹³⁴ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 370.

to-3 mergers and price increase, there also remained a possibility to establish correlation between such mergers and network investments.¹³⁵

It is remarkable and there is an evident need to introspect this dichotomy – whereas the GC positively considered the latter possibility that is possibility of increased network investment following the merger, it cautiously accepted the former that is post-merger price increase as a matter of fact.

The Commission's proposed theory of harm was also discarded on account of its failure to assess retaliatory measures by BT/EE, such as a 'possibility' to terminate or renegotiate the MBNL agreement, or re-considering the revised commitments offered by H3G UK.¹³⁶ It is notable that post-prohibition developments - that is BT's acquisition of EE – well underscore this observation of the GC. In fact, following the proposed merger, BT acquired EE to overhaul its network, and offer converged fixed/mobile services in the UK for telecommunications.¹³⁷

As regards the commitments offered, I elaborate on them in the following section.

Regarding the impact of the transaction on Vodafone, the Commission could not meet *the higher threshold* to establish that the merger would lead to SIEC.¹³⁸ As the Commission failed to show how the merger would adversely impact Vodafone's ability to compete effectively, or pass on any additional costs incurred on to consumers, the GC accepted the 'third, fourth and fifth part of the third plea' of the applicant in their entirety.¹³⁹

Interestingly, if on the one hand, the Commission is reproached for its failure to assess how the post-merger degradation of quality would adversely impact the customers; then on the other, the GC suggests

[...] the assessment of quality as one of the vectors of competition is often a complex and imprecise exercise, which requires, in each individual case, a weighing up of the means of perception of the various consumers, in particular in high-technology industries.¹⁴⁰

Commission theory's that increased transparency resulting from the merger would result in non-coordinated effects and diminish the overall investments in network infrastructure too was

¹³⁵ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 373, para 280.

¹³⁶ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), paras 374-379.

¹³⁷ For a discussion on the BT/EE merger, see Kalpana Tyagi, 'Fixed/Mobile Integration in the Telecommunications Sector: Substantial Issues in the EU Merger Control' (2018) 2 *European Competition and Regulatory Law Review* <<<https://doi.org/10.21552/core/2018/2/6>>

¹³⁸ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 380-389.

¹³⁹ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 390-397.

¹⁴⁰ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 390.

dismissed in entirety.¹⁴¹ The Commission's principal argument was that post-merger, the merged entity, in order to rationalize its cost structure, would have incentives to invest in one of the NSAs to the detriment of the other. Investment in one of the two NSAs would make the investment strategy and priorities of the merged entity transparent to the other two MNOs. This in turn would diminish the incentives of the two MNOs to take the lead in terms of investment in network infrastructure. The GC agreed that merger analysis in telecom markets must take due account of substantial sunk costs, such as long-term investments and long duration contracts between telecom companies and consumers; the Commission's principal failure lay, not so much in the time horizon under consideration, it was rather its failure to *inappropriately classify* the impact of increased transparency on network investments as a non-coordinated effect.

In tightly-knit oligopolies, mergers between competitors not only lead to an alternation in the incentives of the merged entity, they equally alter the incentives of non-merging entities. This can be well appreciated using insights from game theory. Simply put, game theory suggests that markets interact in a dynamic way, and mergers in an oligopolistic market not only alter the incentives of the merged entity, they may equally alter the incentives of the non-merging firms, to profitably respond to the post-merger market dynamics.¹⁴² These effects can occur both at the level of product as well as at the level of innovation.¹⁴³ The incongruity that mergers may sometimes impact non-merging firms more than the merged entity is referred to as the 'merger paradox'.¹⁴⁴

Moreover, a technical failure on the part of the competition authority to classify a non-coordinated effect as coordinated, does not mean that the effect be rejected in its entirety. A more judicious approach calls for reprimanding the wrong classification, as it leads to confusion; while simultaneously accepting the presence (or the lack thereof) of such an effect, or in the alternative asking the Commission to re-assess the transaction, particularly as regards the a correctly identified, but incorrectly classified issue.

¹⁴¹ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), paras 398-418.

¹⁴² William Rogerson, Vertical Mergers in the Video Programming and Distribution Industry: The Case of Comcast-NBCU (December 2012), in *The Antitrust Revolution* (6th edition), John E. Kwoka, Jr. and Lawrence J. White (eds.), Oxford University Press, (2013).

¹⁴³ Michael L. Katz and Howard A. Shelanski, 'Mergers and Innovation' (2007) 74(1) *Antitrust Law Journal* 1 <<https://law.bepress.com/cgi/viewcontent.cgi?referer=https://www.bing.com/&httpsredir=1&article=5363&context=expresso>>

¹⁴⁴ Klaus Gugler and Florian Szücs, 'Merger Externalities in Oligopolistic Markets' *Deutsches Institut für Wirtschaftsforschung: Discussion paper 1321/2013* (2013) <https://www.diw.de/documents/publikationen/73/diw_01.c.426970.de/dp1321.pdf>

2.2.7 Theory of Harm 3: Non-coordinated Effects on the Wholesale Market

Reduction in the number of MNOs from 4-to-3 diminished the number of host MNOs available to non-MNOs. H3G UK, was an ‘important competitive force that offered competitive wholesale access to non-MNOs for key technologies such as 4G.’¹⁴⁵ The applicant contested the Commission’s theory of harm on the following six grounds – *first*, the concentration would lead to SIEC in the wholesale market; *second*, H3G UK was an important competitive force in the wholesale market; *third*, post-merger, the merged entity would have diminished incentives to compete at the wholesale level; *fourth*, reduced incentives of the non-merging firms to compete at the wholesale level and *fifth*, Commission’s ‘reliance’ on statements by non-MNOs (third parties).¹⁴⁶ The GC dismissed the Commission’s theory of harm on the following grounds – *first*, mere reduction in the number of players from 4-to-3 does not establish SIEC in the wholesale market; *second*, H3G UK’s minimal market share in the wholesale market (0-5%); *third*, ‘mere’ post-merger combined market share of the merged entity [between 30-40%] was insufficient to establish SIEC or even dominance; *fourth*, the change in delta (difference between pre-merger and post-merger HHI) was ‘only [slightly] above the threshold’ than those specified in the 2010 EU HMG; *fifth*, the Commission failed to establish the significance of ‘gross add shares’ in the present case; *sixth*, the Commission’s failure to establish how H3G UK stood out ‘from other participants in the wholesale market’ and *finally*, lack of clear evidence indicating how H3G UK and Telefónica UK ‘exerted upon each other important competitive constraints which would be eliminated following the concentration’.¹⁴⁷

Overall, the GC dismissed the Commission’s decision in its entirety.¹⁴⁸

A raising of overall threshold is further evident from the following recital:

[...] although those factors permit the inference that [H3G UK] has the ability to compete with the other players in the wholesale market, that it is a credible competitor and has an influence on competition, even when it does not win bids, and that it strengthened its position on the market, they are not sufficient, in any event, to classify [H3G UK] as an ‘important competitive force’.¹⁴⁹

As with the first and second theories of harm, this third theory too, nosedived, *first* on account of raising a threshold for the finding of SIEC in non-coordinated effects cases, and *second*, the different spokes in the wheel of ‘important competitive constraint’ being seen in isolation,

¹⁴⁵ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), paras 419-423.

¹⁴⁶ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), paras 424-430.

¹⁴⁷ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), paras 434-454.

¹⁴⁸ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 455.

¹⁴⁹ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 450.

rather than as a connected whole. If the available evidence were to be looked at in totality, in other looking at the basket a whole – a practice also in alignment with Commission’s earlier approach in telecom mergers - this could have well led to an identification of an SIEC in the wholesale market.¹⁵⁰

Section 3: Remedies

Ground 3 and 5 of the applicant’s plea (see Fig. 1 *supra*) dealt with whether the commitments offered by the parties were sufficient to remove the competition concerns identified by the Commission. Considering that the GC rejected the Commission’s assessment of the theories of harm in their entirety, the GC did not quite evaluate the commitments submitted by the parties. Unconditional clearance of the H3G UK/Telefónica UK merger, it is feared, may set a wrong precedent that will invariably create a ‘significant impediment to effective protection of competition on [UK mobile telecommunications] markets for years to come’.¹⁵¹

In the opinion of the author, these commitments were in fact, the key that could have effectively unlocked the 4-to-3 H3G UK/Telefónica UK merger. For the sake of completeness, and a normative recommendation, it is therefore, imperative to discuss the remedies in 4-to-3 telecom mergers. This argument merits assessment as the Commission has, on earlier occasions conditionally cleared similar four 4-to-3 mobile telecom mergers during the Almunia administration – most notable being in the Austrian, Irish, German and Belgian market. Following, the entry of Commissioner Vestager as the then Commissioner in charge meant introduction of some changes to the acceptable merger remedies. Around the same time, as Commissioner Vestager came in, three notable 4-to-3 telecom mergers in the Danish, the UK and the Italian telecoms market were notified to the Commission. The Danish mobile telecom operators, fearing a prohibition decision, withdrew their notification, and the Italian JV offered substantial commitments to ensure that the merger received the Commission’s approval.¹⁵²

Considering that the German merger was the gold standard in terms of remedies during the term of Commissioner Almunia, whereas the Italy 4-to-3 JV indicates conditions acceptable to the Vestager regime, I take these two decisions as the benchmark, and compare them with the

¹⁵⁰ For a discussion on Commission’s approach in recent telecoms mergers, *see* Kalpana Tyagi, Four-to-Three Telecom Mergers: Substantial Issues in EU Merger Control in the Mobile Telecommunications Sector *IIC* (2018) 49:185-220 available at <https://doi.org/10.1007/s40319-018-0677-3>.

¹⁵¹ Richard Bunworth, *CK Telecoms UK Limited v. Commission – A Significant Impediment to Effective Protection?* *IIC* (2021) 52:283 available at <https://doi.org/10.1007/s40319-021-01031-3>.

¹⁵² For a critical assessment of these mergers, *see* Kalpana Tyagi, Four-to-Three Telecom Mergers: Substantial Issues in EU Merger Control in the Mobile Telecommunications Sector *IIC* (2018) 49:185-220 available at <https://doi.org/10.1007/s40319-018-0677-3>. See also the references therein.

commitments offered by the parties in the merger (in the UK) under consideration. Also notable is the fact that the three MS make for a good comparison, as they are three of the five biggest MS of the EU¹⁵³, and therefore, offer comparable conditions of competition, in light of analogous sizes of their economy. Simply put, *ceterius paribus*, remedies in the three mergers offer a good benchmark for comparison.

Telefónica Deutschland/E-Plus was a 4-to-3 telecom merger in the German mobile telecommunications market. Following a detailed phase-II investigation, the Commission conditionally cleared the merger subject to an extremely complex remedial package that included three principle components: first, ‘an MNO remedy’ that was meant to facilitate the entry of a new MNO, or in the alternative help an MVNO upgrade into an MNO, over a foreseen time period; the second component involved the possibility for other telecom players to purchase a ‘10 MHz of paired spectrum in the 2.6 GHz band’, along with additional passive network sharing possibilities and finally, the third component offered the removal of contractual restrictions for both the final customers in the retail market as well as the MVNOs in the wholesale market.¹⁵⁴ The commitments also included the appointment of a Monitoring Trustee and an alternative dispute redressal mechanisms such as arbitration and mediation.¹⁵⁵

In the case under consideration, that is H3G UK/ Telefónica UK, the merging parties offered to divest the entire stake of Telefónica UK in Tesco Mobile (an MVNO) to facilitate the creation of a bigger and effective competitor in the retail market (‘The Tesco Mobile Commitment’).¹⁵⁶ The second component was a New Entrant Operator (NEO) commitment that offered access to Telefónica UK’s network as a ‘perpetual fractional network interest’ to facilitate the entry of a new mobile network operator in the UK retail mobile market.¹⁵⁷ As part of the third commitment, also known as the ‘network sharing commitment’, the parties offered to pursue a ‘network integration plan’, meaning that they were to use certain pre-committed percentage of network availability both from the Beacon grid and the MBNL grid.¹⁵⁸ The fourth set of commitments involved continued ‘wholesale access’ for both the 4G and the then

¹⁵³ For the sake of simplicity, I do not contemplate the pre-Brexit and post-Brexit scenario here in this article.

¹⁵⁴ Telefónica Deutschland/E-Plus, paras 1303-1400. For a detailed discussion, see Kalpana Tyagi, Four-to-Three Telecom Mergers: Substantial Issues in EU Merger Control in the Mobile Telecommunications Sector *IIC* (2018) 49:185-220 available at <https://doi.org/10.1007/s40319-018-0677-3> p.201.

¹⁵⁵ Telefónica Deutschland/E-Plus, paras 1303-1400. For a detailed discussion, see Kalpana Tyagi, Four-to-Three Telecom Mergers: Substantial Issues in EU Merger Control in the Mobile Telecommunications Sector *IIC* (2018) 49:185-220 available at <https://doi.org/10.1007/s40319-018-0677-3> p.201.

¹⁵⁶ Commission Decision in H3G UK/Telefónica UK, at para 2734. For a detailed discussion, see Kalpana Tyagi, Four-to-Three Telecom Mergers: Substantial Issues in EU Merger Control in the Mobile Telecommunications Sector *IIC* (2018) 49:185-220 available at <https://doi.org/10.1007/s40319-018-0677-3>

¹⁵⁷ H3G/Telefónica UK, paras 2645; 2888-96.

¹⁵⁸ H3G/Telefónica UK, paras 2878.

upcoming 5G services, at a competitive rate, and on a comparable network quality to its then MVNO customers.¹⁵⁹ The commitments also offered quick dispute redressal mechanisms, firewalls in accounting, network sharing and wholesale access operations and the appointment of a monitoring and divestiture trustee to ensure effective implementation of the commitments. H3G Italy/Wind/JV, a four-to-three merger in the Italian mobile telecommunications market, received Commission's conditional approval as it offered a 'fix-it-first remedy' that ensured the timely entry of Iliad, an MNO from the neighbouring French market into the Italian mobile telecommunications market. The commitments also offered attractive wholesale access to MVNOs on 'very competitive terms'. In addition, the appointment of Monitoring Trustee and arbitration were also offered as part of the commitments.¹⁶⁰

A cursory comparison of the three mergers and the commitments offered indicates that the commitments in H3G UK/ Telefónica UK were closer to those offered in the Telefónica Deutschland/E-Plus merger; then the H3G Italy/Wind/JV.

It may be useful to add that H3G UK/ Telefónica UK was notified on 11 September 2015, and following a detailed phase 2 review and three suspensions of deadlines, was eventually prohibited on 11 May 2016¹⁶¹; H3G Italy/Wind/JV was notified on 5th February 2016, and following a phase II investigation, received Commission's conditional clearance on 1 September 2016¹⁶².

In principle, it seems, it was the 'fix-it-first remedy' in H3G Italy/Wind/JV, that helped the JV receive the Commission's conditional approval, unlike the H3G UK/ Telefónica UK, where the parties contested the decision all the way up to the General Court, and an appeal is currently pending before the CJEU.¹⁶³

Section 4: Conclusion

'While the individual is an insoluble puzzle, in the aggregate he becomes a mathematical certainty'¹⁶⁴

¹⁵⁹ H3G/Telefónica UK, paras 2912-13.

¹⁶⁰ Hutchison 3G Italy/Wind/JV (Case M.7758), Commission Decision, [2015] OJ C 391/05, paras 1767-1792.

¹⁶¹ H3G UK/Telefónica UK, information available on Commission's Website https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7612

¹⁶² H3G Italy/Wind/JV, information available on Commission's Website https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7758.

¹⁶³ Yanitsa Boyadzhieva (Online 30 July 2020) EC appeals court ruling on Hutchison, O2 UK Merger, *Mobile World Live* <https://www.mobileworldlive.com/featured-content/top-three/ec-challenges-hutchison-o2-uk-merger-in-top-eu-court>

¹⁶⁴ Arthur Conan Doyle, *The Sign of Four* (Spencer Blackett UK February 1890)

Intriguingly enough, a detective's words on the psychology of human behaviour, are just as relevant to appreciate the dynamics of something as economics-driven as telecom mergers.

The SIEC test was adopted to ensure more 'legal certainty', transparency and foreseeability in the Commission's assessment of oligopolistic merger transactions.¹⁶⁵

Interpreting Article 2(3) of the Regulation 139/2004 in light of recital 25, the Court found that for a finding of non-coordinated effects in oligopolistic markets that may lead to SIEC following two conditions be met cumulatively: '[first] "the elimination of important competitive constraints that the merging parties had exerted upon each other" and [second] "a reduction of competitive pressure on the remaining competitors"'.¹⁶⁶

Considering the inherent uncertainty in predicting the future, the Court required that the various 'scenarios and theories of harm' presented by the Commission must take into account the totality of circumstances and be 'sufficiently realistic and plausible', and not merely theoretical.¹⁶⁷

In an SIEC analysis, the Commission is required to show that there exists a strong probability that the merger would lead to SIEC.

In the case under consideration, the Court applied a '**stricter**' standard of proof 'than that under which a significant impediment to effective competition is "more likely than not", on the basis of a "balance of probabilities"'.¹⁶⁸

If significant impediment were a basket, then the different oranges, as discussed above, would certainly make for one such stuffed fruit basket. By taking out those oranges one by one, led to a lighter basket on the theories of harm, meaning that eventually the Commission could not meet this new found '**stricter**' standard of proof. Application of a 'variable standard [of proof]' in similar situations and application of unique standard to the case at hand, if accompanied by

¹⁶⁵ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 89.

¹⁶⁶ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 96.

¹⁶⁷ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 117.

¹⁶⁸ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 118. Para 118 reads thus: In the context of an analysis of a significant impediment to effective competition the existence of which is inferred from a body of evidence and indicia, and which is based on several theories of harm, the Commission is required to produce sufficient evidence with a strong probability the existence of significant impediments following the concentration. Thus, the standard of proof applicable in the present case is therefore stricter than that under which a significant impediment to effective competition is 'more likely than not', on the basis of a 'balance of probabilities', as the Commission maintains. By contrast, it is less strict than a standard of proof based on 'being beyond all reasonable doubt'. See also, Monti's elaborate discussion on the issue in Giorgio Monti, 'EU Merger Control After *CK Telecoms UK Investments v. Commission*' *World Competition* 43, no. 4 (2020) p.457 ff, 465.

a more detailed reasoning from the Court, would have been very insightful to understand why the Court applied a unique and distinct ‘standard of proof’ to the case at hand.¹⁶⁹

Considering the inherently dynamic nature of telecom markets, this article attempts to bring out how ‘fruits in a bowl’ approach, may be more helpful to determine *ex-ante* the competitive impact of a telecom merger. Application of the proposed theory will in future cases, also address GC’s criticism of the Commission ‘for not explaining clearly’ how distinct pieces of evidence may collectively suggest anticompetitive effects in the relevant markets.¹⁷⁰

As regards merger remedies, considering that the GC rejected the Commission’s assessment of the theories of harm in their entirety, the GC did not quite evaluate the commitments submitted by the parties. In the opinion of the author, these commitments were in fact, the key that could have effectively unlocked the 4-to-3 H3G UK/Telefónica UK merger. For the sake of completeness, and a normative recommendation, the article therefore, also makes reference to the remedial framework in H3G UK/Telefónica UK and compares them with other similar 4-to-3 telecom mergers in the EU.

Even though the debate on consolidation and investment in 5G networks is far from settled, mergers may after all, help aggregate the investment capacity of MNOs. Unless evidence establishes that merger would certainly lead to price increase and diminished innovation, a prohibition decision will lead to a false positive. To avert this and balance various aspects, remedies can help address this error resulting from prohibiting an otherwise pro-competitive merger. The article, therefore, accordingly compared the proposed remedies in other similar 4-to-3 telecom mergers in other EU Member States with similar demographics and conditions of competition.

On a forward-looking note, the GC noted that the theories of harm developed in earlier decisions do not limit the possibility for the Commission to test newer theories of harm.¹⁷¹ This is highly relevant as it underscores the receptiveness of the European courts to accept newer theories of harm, provided that they are grounded in sound academic research and reasoning. However, as is evident from above, with increased receptiveness comes a qualification for its

¹⁶⁹ Giorgio Monti, ‘EU Merger Control After *CK Telecoms UK Investments v. Commission*’ *World Competition* 43, no. 4 (2020) pp. 464-466

¹⁷⁰ Giorgio Monti, ‘EU Merger Control After *CK Telecoms UK Investments v. Commission*’ *World Competition* 43, no. 4 (2020) p. 467.

¹⁷¹ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 331. The relevant part of the para read thus: ‘However, the mere fact that a theory of harm formulated by the Commission in a decision is innovative does not, in itself, lead to the conclusion that it is, as such, unlikely or unfounded.’

acceptance. The GC re-emphasized (with the first emphasis in para 111 referred to above) the need for a higher threshold to admit such novel theories of harm.¹⁷²

From a policy perspective, the GC also highlighted at the outset that EU competition law, including merger control law, are meant to protect competition, and not competitors. In other words, even if the merger in a tight oligopoly adversely impacts competitors, for example, through ‘post-merger efficiencies’ – that fact in itself is insufficient to ‘give rise to competition concerns’.¹⁷³

Finally, it may be useful to conclude by adding that it is understandable that the post-Chicago thinking is complex and laden with inherently abstract concepts, unlike the very structured neo-classical thinking where assumptions are made to simplify complex interactions. Insights from game theory and incorporating these concepts in competition policy are bound to offer multiple potential paths to reach a given outcome, and this adds to the complexity in an already uncertain ex-ante merger analysis. A more economic thinking calls for a willingness to accept this inherent complexity in the more dynamic post-Chicago thinking. To understand the dynamics of 4-to-3 mergers in the innovation and investment-driven telecoms market, the proposed ‘*fruits in a bowl*’ approach can well be the *fine thread* to connect the complexities of post-Chicago thinking with the high (and also highly necessary) evidentiary standards of proof.

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¹⁷² Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 332. The relevant part of the para read thus: ‘In addition, and as is apparent from paragraph 111 above, the more prospective the analysis is and the chains of cause and effect dimly discernible, uncertain and difficult to establish, the more demanding the EU judiciary must be in terms of the specific evidence produced by the Commission.’

¹⁷³ Case T-399/16 *CK Telecom UK Investments Ltd. v. European Commission* (dt. 28 May 2020), para 362-363.

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