ESTUDIOS

JUDICIAL REVIEW OF PUBLIC ENFORCEMENT OF EU COMPETITION LAW: TRENDS AND CHALLENGES

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Table of Contents

Page

CHAPTER 7

THE JUDICIAL REVIEW OF ECONOMIC EVIDENCE IN EU MERGER CONTROL: IMPLICATIONS OF *UPS V COMMISSION*

CHAPTER 8

JUDICIAL REVIEW OF STATE AID CASES — A THIRD GUESS?

Chapter 6

Judicial review of European merger control: between effectiveness and legal certainty?

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1. INTRODUCTION

The enforcement of European merger control differs substantially from the enforcement of typical antitrust control. While the latter, especially since the 2000s, has been applied in an increasingly decentralized manner by both national courts and, above all, national competition authorities, merger control remains highly centralized in the European Commission. Indeed, when a merger has a Community dimension, in principle, the European Commission will be the only body competent to examine the transaction from a competition perspective. Even if it does not have a Community dimension but affects trade between Member States and is notifiable in more than one Member State, it will likely end up being decided exclusively by the European Commission, given the frequent use by national competent authorities of the referral option provided for in Article 22 of the European Merger Control Regulation (EUMR).[1] If the operation is notifiable at the national level in more than three Member States, the chances of it being decided by the European Commission increase significantly for two reasons: first, because the more parallel notifications at the national level, the more efficient it would be to forward it, in addition to the fact that more authorities can raise it; and second, because in these cases, the notifying

1. Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings ("Community Merger Regulation", OJ L 24, 29.1.2004, p. 1-22, hereinafter referred to as the EUMR.

parties themselves will be able to take the initiative and ask the European Commission to take over the case.[2]

Following communication to the competent Member States, and unless they object, the Commission will most likely decide the case on an exclusive basis. Given that, in this type of cases, the notifying parties will be the first to benefit from the one-stop shopping system—a single decision by a single authority in a single procedure and under a single set of regulations—it can be assumed that in the vast majority of cases the parties will activate this option. In practice, it is also becoming clear that national authorities rarely object to this request, as it benefits the system itself, saves unnecessary costs, and avoids the risks of inconsistency or lack of coordination arising from parallel procedures.

All these factors, combined with the lowering of thresholds in the late 1990s, the fact that these thresholds have not been updated subsequently, and the entry of new Member States, have led to an increase in the number of cases decided by the European Commission in merger proceedings, averaging between 350 and 400 in recent years. This is undoubtedly a very significant number, even if many of these cases are handled through a simplified procedure and/or resolved in the first phase without major complications. In fact, few transactions are prohibited, and the system seems to have shifted more towards negotiating the authorization conditions in the complex cases which raise objections.[3]

This centralization of decision-making in the European Commission has logical consequences in the area of judicial review.

The first is that, unlike what occurs in the area of antitrust, cases in which national courts refer preliminary rulings are logically almost nonexistent, and when they do occur, they do it indirectly, especially because of the intersection with the merger control system of other regulations, over which they do have jurisdiction. This means that preliminary rulings are rare in this area, while they are increasingly frequent in the area of antitrust. However, the period analyzed here reveals a very interesting example with the Towercast case.[4] It should be seen as the exception that proves the general rule.

2. Article 4.5 EUMR.
3. S Marco Colino and KLM Chung, Reshaping 'EU Merger Control: from Harm Detection to Harm Control' (2024) 15 Journal of European Competition Law & Practice 409.
4. Judgment of the Court of Justice (Second Chamber) of March 16, 2023, case Towercast SASU v. Autorité de la concurrence y Ministère de l'Économie., C-449/21,

The second point is that, therefore, judicial review of European merger control will only reach the EU courts in Luxembourg and will be channeled primarily through actions for annulment brought directly by companies, first before the General Court, with the possibility of a subsequent appeal to the Court of Justice. Standing to bring such actions is mainly limited to the companies to which the European Commission's decision has been notified or to others that can demonstrate direct and individual concern, which substantially reduces the number of potential plaintiffs. The matter will rarely attract the interest of more privileged actors, such as Member States or other institutions beyond the European Commission, unless it raises issues of quasi-constitutional importance regarding the division of powers, as occurred, for example, in the Illumina Grail case,[5] which we will analyze in this contribution.

Furthermore, the subject matter and the socioeconomic context surrounding these decisions must be considered. Indeed, in structural transactions, which fall under this regulation, timing and certainty are crucial. A transaction cannot remain in a limbo of uncertainty for long, pending future judicial review. If the Commission prohibits the transaction, even if it is challenged in court and the appellants win after a lengthy legal process, the transaction is unlikely to proceed. Markets do not tolerate prolonged uncertainty. This largely diminishes interest in such challenges, beyond the desire for clarification of the interpretation for the future, a symbolic victory, and, in some cases, potential future claims for damages. If the transaction is authorized, the legal battle may have a greater practical impact, although, when the challenge is eventually won years later, the market situation may be very different, and the transaction difficult to reverse. Again, this can discourage interest in these challenges.

On the other hand, merger control decisions often involve additional complexity stemming from the necessary prospective and counterfactual analysis. The transaction is notified ex-ante, and the European Commission must assess its potential future effects and compare them with a scenario in which it does not materialize. Unlike antitrust control, where the ex-post nature of the review allows for greater evidence availability, merger control is more complicated. Given this added complexity, one might think that,

ECLI:EU:C:2023:207.

5. See General Court Judgment of 13 July 2022, Illumina v Commission, Case T 227/21, EU:T:2022:447, and Judgment of the Court of Justice (Grand Chamber) of 3 September 2024, Illumina, Inc. and Grail LLC v European Commission, Joined Cases C-611/22 P and C-625/22 P; ECLI:EU:C:2024:677.

on the one hand, the Commission should be cautious when deciding on prohibitions and, on the other hand, that it should be given enough flexibility to carry out these complex assessments.

All of this might lead us to believe that judicial review in merger control proceedings, beyond some procedural or formal issues, would be scarce, almost anecdotal, especially on substantive matters. It might also suggest that, when such review does occur, given the added complexity and the resulting greater discretion for the authorities, judicial review would be limited and, except in extraordinary cases, confirm the assessments made by the Commission. One might even think that, for all these reasons, such judicial review would not yield significant contributions to the development of the subject matter (although it is true that in the past it had done it on a punctual basis).

However, an analysis of the last five years of judicial review in merger proceedings yields much more nuanced results. A quantitative review of the cases challenged and decided by the General Court and the Court of Justice during this period raises the list to over 40, an average of around eight per year. This is not a high number considering that the number of annual decisions is around 350-400, but it is not negligible. Although in the vast majority of cases the European Commission's decision is upheld, the courts appear to be delving increasingly deeper into the decisions, both from a procedural and formal perspective, and sometimes in substantive analysis, with significant reversals of the Commission's position, as we will explore later. Furthermore, and this is very significant, the contributions of case law to the development of European merger control have been qualitatively very relevant during this period. It is precisely on these qualitative contributions that I will focus the rest of my analysis, with two main cases in focus: Illumina Grail and CK Telekom.[6] I will use the lens of the debate between, on the one hand, promoting an effective merger control system and, on the other hand, ensuring legal certainty; the search for the best balance between these two objectives; and, where appropriate, within the context of the controversies and divergent reasoning between the General Court (GC) and the Court of Justice (CJ) on this matter. This does not preclude the use of other frameworks for this analysis, and it will indeed be interesting to see which of them best explains the solutions ultimately adopted: it may or may not be the dilemma of effectiveness versus legal certainty.

6. Judgment of the General Court (Enlarged First Chamber) of 28 May 2020, CK Telecoms UK Investments Ltd v European Commission, Case T 399/16, ECLI:EU:T:2020:217 and Judgment of the Court of Justice (Grand Chamber) of 13 July 2023, European Commission v CK Telecoms UK Investments Ltd, Case C-376/20 P, ECLI:EU:C:2023:561.

2. ILLUMINA GRAIL: LIMITS TO JURISDICTIONAL EXPANSION THROUGH INTERPRETATION

Although this case has multiple facets, I will focus my analysis on the interpretations that both the Commission and, especially, the two courts made of Article 22 of the EUMR and on the limits of jurisdictional expansion through interpretation that the CJ ultimately established.

The case originated when Illumina, a US company specializing in genetic sequencing and one of the main players in the European genomics market, announced its intention to acquire Grail, a US start-up specializing in early cancer detection using liquid biopsy technology.

Despite the significance of the transaction, it was initially not notifiable to either the European Commission or any of the NCAs, given that it had neither a Community dimension nor met the criteria for notification at the national level. It should be noted that Grail did not yet have operations in Europe and therefore did not meet the turnover and market share thresholds that existed at the European and/or national level at that time. However, the European Commission invited national authorities to consider referring the case in light of its Guidelines on Article 22 EUMR.[7] The French Competition Authority, later followed by other national authorities, finally referred the case to the European Commission.

The decision was immediately challenged by Illumina, which argued that the Commission lacked the authority to examine a transaction not subject to national notification requirements, directly challenging the expansive—and highly controversial—interpretation that the European Commission had made in its Guidelines on Article 22 EUMR. Thus, the case will become a testing ground and forum for debate on the limits of this expansive interpretation by the Commission and on finding the right balance between the effectiveness of control and legal certainty/predictability within the existing legal framework.

In 2022, the General Court upheld the Commission's position, concluding that Article 22 EUMR permitted referrals even in the absence of a national notification obligation.[8]

7. European Commission, Guidelines on the application of the referral mechanism established in Article 22 of Regulation No 139/2004 to certain categories of cases, OJ 2021, C 113, p. 1.
8. Judgment of the General Court of 13 July 2022, Illumina v Commission, Case T 227/21, EU:T:2022:447. For a critique of this judgment, see for example E.H Kim & M. Marquis,

This was based on an interpretation that was not only literal but also historical, contextual, and above all, teleological.

The literal interpretation allowed for this expansive interpretation and even seemed to support it by stating that

> "One or more Member States may request the Commission to examine **any concentration** that fits the definition in Article 3 and that does not have a Community dimension within the meaning of Article 1, but that affects trade between Member States and threatens to significantly affect competition in the territory of the Member State or Member States submitting the request" (emphasis added).[9]

According to the General Court, historical, contextual, and teleological interpretations supported this interpretation.[10]

From a historical perspective, the Court found, in the Green Paper on merger control reform and several of the amendments to the regulation itself, elements suggesting that the use of the referral mechanism in Article 22 was not restricted to cases where the transaction was notifiable under national law. In particular, the General Court paid attention to the history of the introduction of the mechanism in Article 4.5 EUMR, which referred to "mergers that may be subject to review under the national competition law of at least three Member States," and its difference from Article 22, which, according to the General Court, was not amended to introduce a similar reference to the necessary national competence mentioned in Article 4.5.[11]

From a contextual point of view, the General Court referred to Articles 352 and 103 TFEU, as well as to some expressions relating to the referral procedure itself in Article 22, paragraphs 2 to 5, to support its interpretation.[12]

But above all, the General Court relied on a teleological interpretation, based on the objective of the regulation itself (and its referral system) to guarantee an effective control system capable of detecting mergers that harm competition. It considered that the Commission's new Guidelines

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"Illumina/Grail, Chapter 1: The Unexpectedly Broad Merger Control Powers of the European Commission" (2023) 44(4) European Competition Law Review 162.

9. Article 22.1 EUMR.
10. Case T 227/21, Illumina, para. 91.
11. Ibid., paragraph 96 et seq. See also the judgment on appeal in paragraphs 138, 140 and 143.
12. Ibid, paragraph 118 et seq. See also the judgment on appeal in paragraphs 162 to 173 of the CJ judgment.

fell within the scope permitted by the Regulation, and especially Article 22.[13] For the Court, the referral mechanism had a corrective nature, seeking to complement the threshold system by allowing the referral to the European Commission of all mergers that, while not having a Community dimension, could affect competition in the territory of the referring Member States.

However, in its September 2024 judgment in the Illumina/Grail case, the Court of Justice of the European Union rejected the Commission's proposed broad interpretation of Article 22 EUMR.[14] It held that a Member State lacking the competence to review a transaction under its own national law cannot submit a referral. In doing so, the CJ gave preeminence to the principles of legal certainty and predictability in merger control, by limiting the scope of referrals to those situations expressly provided for in current legislation.

The Court of Justice accepted that literal reading allowed for an interpretation like the one promoted by the General Court, but considered that such literal interpretation was not decisive and that it was essential to supplement it with a historical, contextual, and teleological interpretation.[15] And in applying these, it reached the opposite conclusion to that defended by the General Court.

As regards the historical interpretation, the CJ made it clear that Article 22 EUMR was initially created to allow referrals from States that did not have their own mechanism at the national level,[16] and that there was no solid evidence in the preparatory work or subsequently that the referral was intended to be extended to all concentrations without a Community dimension that could have effects in the European territory, but rather the opposite: it seemed evident that the system did not intend that all such concentrations could be referred.[17]

As regards the contextual interpretation, the CJ does not find any of the arguments of the General Court in this respect convincing[18] and mentions

13. Ibid, paragraph 140 et seq. See also the judgment on appeal in paragraph 181-189 of the CJ judgment.
14. Judgment of the Court of Justice (Grand Chamber) of 3 September 2024. Illumina, Inc. and Grail LLC v European Commission, Joined Cases C-611/22 P and C-625/22 P; ECLI:EU:C:2024:677.
15. Ibid., paras. 121-123.
16. Ibid., para. 147. Originally this was the case of the Netherlands. That is why it was called the "Dutch clause".
17. Ibid., para. 148.
18. Ibid., paras. 172-175.

other contextual factors that should have been taken into account, especially that in the referrals of Article 22, it is the referring State that cedes to the Commission its competence to decide the matter and, therefore, in order to refer, the Member State must have prior competence; that is, the operation must be reviewable according to its national legislation.[19]

Finally, regarding the teleological interpretation, the CJ begins by highlighting the importance of legal certainty and predictability in merger control.[20] Operators must be able to know which transactions must be notified and which will be monitored. For the CJ, the referral under Article 22 EUMR does have a corrective nature, but only to, on the one hand, refer cases when the Member State does not have national merger regulations and, on the other hand, to preserve or promote the one-stop-shop system and facilitate the possibility that the case can be decided by the European Commission instead of by several national authorities.[21]

This ruling marks a significant shift in the ongoing debate on merger control, by questioning the expansive use of mechanisms such as Article 22 EUMR to circumvent the limitations of traditional notification thresholds and reopens the debate on the need for a structural reform of the European regulatory framework. The Advocate General's comments on this matter are particularly relevant in this regard:

> "I am certainly not excluding that, in a world which is increasingly based on an 'Economy 2.0', it may be desirable, and perhaps even necessary, to change the current thresholds for a merger review. In that context, it may be interesting to note that, very recently, two Member States (Austria and Germany) amended their domestic legislation to include thresholds based on deal values. Other States use different jurisdictional thresholds specifically conceived to permit a review of mergers despite the target company not generating any local revenue (such as the United Kingdom, with the 'share of supply test'). These and other options could naturally be considered with a view to amending the EUMR. **But that is the task of the EU legislature, not of the Commission**" (emphasis added).[22]

I believe this last point is not only at the heart of the Advocate General's opinion but also of the CJ's final judgment, and it can serve as a framework for interpreting everything that has happened in this case and the CJ's final position.

19. Ibid., paras. 177-180.
20. Ibid., para. 186.
21. Ibid., paras. 192 and 200.
22. Opinion AG Emiliou in joined cases Illumina and Grail/Commission (C 611/22 P and C 625/22 P, EU:C:2024:264), para. 220.

In my view, the Commission, driven by its legitimate interest in examining mergers that were neither of Community dimension nor subject to national review, but which could potentially cause significant harm to competition in the Common Market (for example, possible killer acquisitions[23]), ventured an overly broad interpretation of Article 22 EUMR.

The Commission could have chosen to propose a reform of the regulation to change the threshold system or clearly redesign the referral system, but the difficulties and risks of the process led it to discard this option. These difficulties arose because the reform, having to be based in part on Article 352 TFEU, required unanimity, and consensus would not have been easy to achieve. In any case, it would have required time and likely a burdensome process. It is true that the Regulation provided for a special procedure to change the thresholds by qualified majority in Article 1.5 EUMR, but there were doubts about the possibility of using it. Its wording could be interpreted as being intended only as a continuation of the previous report of 2009, to which Article 1.4 referred. Furthermore, there would have been a risk of opening the scope of the reform to other issues at a politically sensitive time.[24]

All of this, coupled with the fact that Article 22 EUMR, in its literal wording, left the field open to broad interpretations, may have led the Commission to prefer this option, even knowing that it would be controversial. Although it generated some uncertainty, the Commission was confident that its Guidelines and a measured use would be positive for a more useful, effective, and comprehensive European control system, filling some of the existing gaps.

The interpretation was not as contested as initially thought, since the General Court, as we have seen, even supported it in the first instance, but with weak and unconvincing arguments, as the CJ has finally ruled.

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23. The debate about this type of acquisition has been a constant in recent years. See C. Cunningham et al., 'Killer Acquisitions' (2021) 129 Journal of Political Economy 649; G. Crawford et al., '"How tech rolls": Potential competition and "reverse killer acquisitions"' (Vox EU, 11 May 2020); N. Levy et al., 'Reforming EU merger control to capture "killer acquisitions" — the case for caution' (2020) 19 Competition Law Journal 51; and M. Ivaldi et al., 'Killer Acquisitions: Evidence from European Merger Cases' (2024) TSE Working Papers 1420, available at <https://www.tse-fr.eu/>.
24. Some very important Member States (France and Germany) had major disagreements with the Commission over the ban—undesirable to them—on the Siemens-Alstom merger, and even threatened to promote changes in the Regulation to prevent similar cases in the future.

The key lies in the corrective nature of the referral mechanism and its objectives, which, in my view, are closely linked to promoting the one-stop-shop principle. It makes perfect sense when the same merger without a Community dimension would be subject to review in several Member States, leading to parallel proceedings before various authorities under different regulations, with all the risks and inefficiencies that this entails. Beyond this scenario, it was nonetheless surprising to interpret that there was a will to refer a case that was not reviewable under national law, a will to cede a power that, in reality, did not exist (and not only due to the absence of national merger control legislation, as was initially foreseen).

One might think that, faced with the dilemma of effectiveness versus legal certainty/predictability, the General Court preferred to promote the effectiveness of control (which would have led to expanding the European Commission's powers and the scope of its control through interpretation, albeit always at the request of the Member States), while the CJ opted to guarantee the legal certainty and predictability of the system as already designed.

However, it is worth noting that behind the CJ's decision may lie another dilemma regarding the allocation of powers between the European Union and its Member States, and the very limits of the interpretative path for expanding powers —-a question of a quasi-constitutional nature— rather than a debate between substantive principles. After studying the two judgments, one is left with the impression that the arguments for defending an expansive interpretation were weak and somewhat forced.

Whatever the case, the final message is clear: if this expansion —which may be laudable[25]— is desired, it cannot be imposed through interpretation but should be channeled through legislative reform (and therefore falls not to the courts, but to the European legislator). It remains to be seen whether the Commission will use its power of legislative initiative or at least explore this possibility and, if so, what its timeline will be. For now, there appear to be no significant developments in this direction.

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25. For a discussion of the risks of extending certain solutions, in line with the Commission's Guidelines, through a reform of the Regulation, see A. Burnside & A. Kidane, "Double Dutch: Illumina/GRAIL, Article 22 and the General Court" (2024) 8(3) Competition Law & Policy Debate 140, 149; and R. Fadiga, "Novel Merger Control Practices Expanded the Commission's Jurisdiction to Review Concentrations beyond EUMR Thresholds" (2024) 15(1) Journal of European Competition Law & Practice 3, 13, and P. Whelan, EU-Level Jurisdiction Over "Killer Acquisitions" In The Aftermath Of Illumina/GRAIL, Competition International, December 2024, p. 8.

Alternatively, the solution could lie in the initiative of Member States, which could amend their national regulations to broaden the scope of reviewable cases. If they do so and, moreover, seek criteria other than business thresholds or market share, such as transaction value or other factors, this could entail an expansion of national powers. Once transactions are reviewable at the national level, Article 22 EUMR could once again be fully operational for referring the case to the European Commission. In fact, some Member States already took this initiative even before the CJ ruling in the Illumina Grail case, and others have explored it since. This could be an indirect way to facilitate the review of new cases (including potential killer acquisitions) at the national or European level, partially filling the existing gap. Whether this leads to greater or lesser legal certainty and predictability will depend largely on the design of these national systems (whether it is solely ex-ante control or also ex-post, and under what conditions). It could undoubtedly contribute to a broader and more effective merger control system in Europe. Again, it would be important to strike the right balance between effectiveness and legal certainty in its design.

3. CK TELECOMS: ON LIMITING THE INCOMPATIBILITY STANDARD AND THE COMMISSION'S MARGIN OF DISCRETION

The CK Telecoms case is highly relevant, firstly because the Court had the opportunity to define, for the first time, how the compatibility test (significant impediment to effective competition, SIEC) is applied in the context of some mergers that would not create or strengthen a dominant position. But it has also opened a very important debate both among EU courts (the General Court and the Court of Justice) and in legal scholarship regarding the standard of proof and judicial review of these cases, which will affect the scope of discretion the Commission may have in these scenarios in the future.[26] The debate is especially important at a geopolitical moment like

26. See, among others, G. Monti, 'EU Merger Control After CK Telecoms UK Investments v. Commission' (2020) 43 World Competition 447; K. Fountoukakos and C. Puech-Baron, 'Towards a Higher Standard of Proof and a More Interventionist Judicial Review in Antitrust Cases Involving Complex (Economic) Assessments Following CK Telecoms?' (2020) 11 Journal of European Competition Law & Practice 460; E. Deutscher, 'Prometheus Bound? — The Uncertain Future of the Unilateral Effects Analysis in EU Merger Control after CK Telecoms' (2022) 18 Journal of Competition Law & Economics 323; or P. Ibañez, 'Judicial review in EU merger control: towards deference on issues of law?', European Law Open. 2025;4(3):441-463. doi:10.1017/elo.2025.10016.

the one we are living through and with a reform underway of the guidelines on compatibility of mergers with the Single Market.

The case focuses on the judicial review of the European Commission's decision in the Hutchison 3G UK / Telefónica UK case.[27] Three's acquisition of O2 UK was prohibited by the European Commission because it would have reduced the number of mobile network operators in the UK from four to three, limiting consumer choice, driving up prices, and stifling innovation. Following its Guidelines on Horizontal Mergers, the Commission conducted a comprehensive review of the factors involved (reiterating that it is not essential to consider each and every factor mentioned therein, a list which is not exhaustive).[28] For the purposes of subsequent judicial review, it is also important to note that the Commission specified: on the one hand, that two parties can be considered close competitors within the meaning of the Guidelines without necessarily being the "closest" competitors;[29] and, on the other hand, a significant competitive force does not necessarily have to be "particularly important" and, therefore, does not necessarily have to be the most prominent in relation to the rest of the operators.[30]

The General Court annulled the Commission's decision in 2020.[31] It is interesting to see how the Court tried to tighten the requirements for proving incompatibility:

– For example, according to the General Court, it would not be enough to demonstrate that the parties are close competitors, as the Commission argued in its decision. It would be necessary to prove that they are "particularly" close competitors; that is, that there is something in the competitive relationship between the parties that is qualitatively different from the relationship with other competitors, particularly that their products are considered the "only" two significant substitutes for each other.[32] Such a scenario would occur, for example, when the merged companies target the same customer niche or when the customers of one party only consider switching to the other.[33]

27. European Commission, Decision of 11 May 2016, Case M.7612 — Hutchison 3G UK/ Telefónica UK. A summary of the decision in Spanish can be found in OJ C 357 of 29.9.2016, pp. 15-28.
28. See paragraphs 313 and 321 of the decision.
29. Ibid, para. 324.
30. Ibid., para. 326.
31. Judgment of the General Court (Enlarged First Chamber) of 28 May 2020, CK Telecoms UK Investments Ltd v European Commission, Case T 399/16, ECLI:EU:T:2020:217.
32. Ibid, para. 241.
33. Ibid., paras. 246 and 248.

– Similarly, it would not be enough for the General Court to prove that the maverick firm involved in the merger is a "significant competitive force". It would have to demonstrate that it is a "particularly significant" competitive force, which requires it to exert a clearly outstanding competitive pressure compared to its rivals.[34] It would not be enough to simply add more dynamism to the market, or even to be a relevant source of dynamism; it would be necessary to prove that it is the "main responsible" for disciplining the behavior of the rest of the oligopolists.

– The General Court, relying on the Preamble to the EUMR,[35] introduced an additional overarching test, which should not be confused with or equated to the factors defined by the Commission in its Guidelines.[36] This test would consist of demonstrating cumulatively that the merger would lead to the elimination of significant competitive pressures exerted by the parties to the merger between themselves, as well as a reduction in competitive pressure on the remaining competitors.

The final outcome is that, in these scenarios, it would be much more difficult for the authority to demonstrate that the SIEC test is met and therefore to prohibit a merger or even raise objections to the transaction. Clearly, this would also substantially restrict the European Commission's discretion by subjecting the examination to a series of much more specific and difficult-to-meet parameters (and requirements). This would not only be a side effect, but is precisely what the General Court was very consciously pursuing with its judgment. The Court wanted to prevent the Commission from being able, in oligopolistic markets, almost always, or at least with great ease, to establish a positive SIEC test. And it believes that this would be the case in these markets because, without specifying and tightening the parameters, it would be easy to demonstrate that the parties were close competitors (at least to some extent) or that relevant competitive pressure would be reduced.[37] The risk this conclusion could entail is that it might ultimately become very difficult (at least much more difficult than before)

34. Ibid., paras. 246 and 248.
35. In particular recital 25 of the EUMR.
36. Case T 399/16 CK Telecoms, para. 173.
37. See, for example, paragraph 174 of the judgment, in which, in relation to the requirement of reducing a "significant competitive force", it considers that any company in an oligopolistic market would practically be in that situation since it would be rare for it not to exert relevant competitive pressure (to some extent).

to condemn these types of concentrations, thus excessively increasing the risk of false negatives.

It could be interpreted that the General Court is prioritizing legal certainty and predictability for operators in this case by limiting the European Commission's margin of discretion. It would also be a way to prevent judicial review from being limited to manifest errors when legal issues and factual assessments are intertwined in these complex evaluations.[38] This would therefore contribute to broadening the scope of a full judicial review in practice. This is especially relevant at a time like the present, when the guidelines are being reformed and there are indications that there will be more room to include other less traditional or more difficult-to-measure criteria, such as resilience, strategic autonomy, or innovation, in the compatibility assessment.

However, the Court of Justice overturned the judgment of the General Court and referred the matter back to that Court for re-examination.[39]

First, the Court of Justice considered it an error of law to assume that, in these scenarios, a prohibition can only be issued when two requirements are cumulatively demonstrated: that the concentration would imply both the disappearance of significant competitive pressures that the parties to the concentration exerted on each other, and also a reduction of competitive pressure on the remaining competitors.[40] According to the CJ, accepting the General Court's position would be incompatible with the EUMR's objective of establishing effective control over all concentrations that significantly impede effective competition in the internal market or a substantial part of it, including those that give rise to uncoordinated effects.[41] Furthermore, it would imply that the disappearance of the significant competitive pressures that the parties in the concentration exerted on each other and the unilateral increase in prices that could result from it would never be sufficient, in themselves, to demonstrate the concurrence of the SIEC test.[42] And none of these consequences are acceptable or in accordance with the European merger control system.

38. See in this regard, P. Ibañez, cited above, n. 27.
39. Judgment of the Court of Justice (Grand Chamber) of 13 July 2023, European Commission v CK Telecoms UK Investments Ltd, Case C-376/20 P, ECLI:EU:C:2023:561. The judgment largely follows the conclusions of Advocate General Kokott, ECLI:EU:C:2022:817.
40. Case C-376/20 P Commission v CK Telecoms, para. 114.
41. Ibid., para. 113.
42. Ibid., para. 112.

Regarding the meaning of a ”maverick” or “competitive force”, the CJ did not accept the interpretation of the General Court that required it to be a “particularly important” competitive force. It will suffice to consider the company as a maverick if the influence of the company in the competitive process is more important than what its market share or other similar indicators might suggest, which in turn enables more than one company to be considered a maverick or “an important competitive force”.[43] Nor is it essential that it be a “particularly aggressive” company in that market.[44]

Regarding the indicator of “close or immediate competitors,” the CJ ruled that it is not necessary to demonstrate that two parties are “the closest competitors” or at least “particularly close competitors.” Requiring such a level, as the General Court had done, would have required a very high degree of substitutability between the products of those parties in a market for differentiated products, and the CJ concluded that this level of substitutability is not necessarily required.[45] The degree of substitutability must be able to be assessed on a continuum: a greater degree of proximity of competition between the parties to a merger may constitute an indication that the SIEC test is more likely to be met, and a lower degree of proximity may constitute an indication in the opposite direction.[46]

Also of interest is the CJ’s reminder to the General Court that the Commission’s assessment should not be considered flawed simply because some of the factors challenged in the proceedings were incorrectly assessed. The CJ insists that it must be examined whether other factors analyzed (some of which were not challenged and must therefore be considered proven) and the Commission’s overall assessment are still sufficient to uphold the SIEC test. Failure to do so constitutes a significant error of law that justifies overturning the judgment and referring the case back to the General Court for further review.[47]

The final outcome is that, in these scenarios, the previous situation is reinstated: the authority is again subject to less stringent requirements for demonstrating compliance with the SIEC test, increasing its ability to raise objections to these types of transactions. This also, of course,

43. Ibid., para. 167. As already stated in para. 37 of the Guidelines on horizontal mergers.
44. Ibid., para. 163. As already stated in para. 38 of the Guidelines on horizontal mergers.
45. Ibid., para. 162.
46. Ibid., para. 189.
47. Ibid., para. 188. The Guidelines on Horizontal Concentrations (para. 28) and the conclusions of AG Kokott (para. 121) already pointed in this direction.

restores the Commission's margin of discretion. The risk this conclusion could entail is that it might ultimately become easier than desirable to condemn these types of mergers, thus excessively increasing the risk of false positives. This wouldn't necessarily happen every time, but it could occur if the Commission deemed it necessary, within the restored margin of discretion.

It could be interpreted that the CJ is prioritizing, in this case, the effectiveness of merger control, understood as the possibility of raising objections to the merger, over legal certainty and predictability for operators. By increasing the European Commission's discretion, this could, in turn, impact the scope of judicial review: as legal issues and factual assessments become intertwined in these complex evaluations, judicial review could be limited in practice more to manifest errors, reasonableness standards, or a more process-oriented approach.[48] This, in turn, may have its risks (or be desirable, depending on the perspective from which it is analyzed) at a time of the guidelines reform, with the possible future inclusion of new theories of harm or even less traditional or more difficult-to-measure criteria. It is true that the margin of discretion would, in any case, have its limits, since the CJ has made it very clear that it has full judicial review powers on all matters of law and could always invoke those powers to confirm or reject certain developments that the Commission might wish to pursue. But it is also true that, in practice, and without clear, pre-established parameters to serve as a reference, case-by-case application will likely prevail, and with it, a more limited scope of judicial review.

4. CONCLUSIONS

First. The very nature and design of European merger control would suggest that judicial review, beyond some procedural or formal issues, would be scarce, almost anecdotal, especially on substantive matters. It would also suggest that, when it does occur, it will be limited and, except in extraordinary cases, will frequently confirm the assessments made by the Commission. Initially, one might even think that, for all these reasons, such judicial review would not yield significant contributions to the development of the subject matter (although it is true that some significant contributions have been obtained in the past on a punctual basis).

Second. However, the analysis of the last five years of judicial review yields much more nuanced results. More than 40 cases (over eight per year)

48. Ibid., paras. 269 y 270.

is a modest but significant number. Although in the vast majority of cases the European Commission's decision is upheld, the Courts occasionally delve deeper into the Commission's decisions, both from a procedural and formal perspective and sometimes in substantive analysis, resulting in notable reversals of the Commission's position and very interesting debates between the two EU Courts. Most cases logically originate from annulment actions, but there can also be, albeit to a much lesser extent and more exceptionally, interesting preliminary rulings, as demonstrated by the Towercast case. Furthermore, the contributions of case law to the development of the application of European merger control regulations have been qualitatively very significant during this period, especially with the Illumina Grail and CK Telekom (also Towercast) cases.

Third. The Illumina Grail and CK Telecom cases could be interpreted in light of the debate between effectiveness and legal certainty, and in such a case, without a clear winner or a clear prioritization pattern for each court. In Illumina, the General Court prioritized effectiveness, while the Court of Justice leaned more towards legal certainty. In CK Telecom, the General Court prioritized legal certainty, while the CJ prioritized effectiveness. Ultimately, in one case (Illumina), the balance seems to tip in favor of legal certainty, and in the other (CK Telecom), more towards effectiveness. However, the effectiveness-legal certainty dilemma is not the only possible framework for interpretation (although it is certainly one of the important ones and the one most explicitly derived from reading the judgments).

Fourth. Indeed, there are other possible frameworks for interpreting the solutions laid down by these cases. The Illumina case may reflect a dilemma regarding the allocation of powers between the European Union and its Member States, and the very limits of the interpretative approach to expanding those powers—a question of a quasi-constitutional nature rather than a debate between substantive principles. The CK Telecom case could be interpreted more from the perspective of a model of judicial review in merger proceedings (and perhaps, by extension, in other areas of Competition Law): the dilemma concerning the practical scope of the full judicial review that characterizes questions of law versus a judicial review limited in practice to manifest errors, standards of reasonableness, or a more process-oriented approach. From this perspective, one could conclude that the CJ in Illumina sends a message of high standards when interpreting the European Union's powers expansively. This standard was not met in the specific case because the reasons and arguments presented by the GC were not sufficiently convincing. And in CK Telecom, the option was for a less invasive review model of the Commission's actions (which leaves more room for discretion to the Commission) and less scope in practice to full judicial review.

Fifth. In any case, in Illumina, the CJ definitively closes a debate that the Commission opened with its Guidelines on Article 22 EUMR. If this jurisdictional expansion is desired— which may be laudable, although its design would be controversial— it cannot be imposed through interpretation, but should be channeled through legislative reform (and therefore falls not to the courts, but to the European legislator). This opens up two further debates: first, whether the Commission will use its power of legislative initiative or at least explore this possibility and, if so, what its timeline, manner, and scope will be. For now, there is no significant movements in this direction; second, whether, alternatively, changes will be made to national merger control regulations that broaden their scope, which in turn would imply new possibilities for referral under Article 22 EUMR. Very significant movements are already taking place in this regard, which deserve specific study. And third, whether these developments satisfactorily fill the existing gap that the Commission's Guidelines were intended to address (capture of killer acquisitions and other scenarios that warrant review at the European level). One door closes and others open, to which we will have to pay close attention.

Sixth. In the CK Telecom case, the conclusion is not so clear-cut. First, because the CJ has referred the case back to the General Court for re-examination, so it remains to be seen what judgment will be issued and whether it will be appealed again to the CJ. The saga may therefore continue. Second, because the decision on the European model for judicial review of mergers is far from over: CK Telecom points in one possible direction, halting an attempt by the General Court to further specify the compatibility criteria and limit the Commission's discretionary power, but it is not out of the question that the General Court (or the CJ itself) may try other proposals in the future (as was done, for example, with the Airtours case law for a scenario of collective dominant position). Nor can it be ruled out that the Commission will take the initiative, either in reforming the guidelines or in new cases (and the Courts will ultimately have to rule on them). It is less likely since the Commission would be cutting back its own margin of discretion, but it would not be the first time it has done so, as shown by other guidelines it has adopted in the past in other areas of Competition Law (verticals or abuse, for example).

Seventh. In any case, this analysis of case law allows us to conclude that European merger control judicial review, even if limited, has been highly relevant during the period under examination, both in jurisdictional and substantive aspects, and contributed significantly to the development of the field, closing certain avenues and opening others, conditioning the model of judicial review in, at least, merger proceedings (although an indirect impact on other areas of Competition Law and other areas of EU Law cannot be ruled out). The debates between the two EU Courts served to enrich the results. They are welcome.

ESTUDIOS

In this collective book, we seek to identify recent trends and future challenges in the judicial review of decisions by the European Commission in the competition policy field.

It is the result of a research project, Judges and Competition Law (Ref. PID2020-115314GB-I00, Spanish Ministry of Science and Innovation), which was carried out over four years, led by the Center for Competition Policy and Regulation of the Royal University Institute of European Studies (San Pablo-CEU University, CEU Universities). It was preceded by a discussion session held at the Spanish Competition Authority (CNMC) headquarters, with the collaboration of the CNMC itself, the Spanish Association for the Defense of Competition (AEDC), and numerous judges. We also had another discussion seminar at the Spanish REPER in Brussels with representatives of the European Court of Justice, Legal Service of the European Commission, Directorate General for Competition, the CNMC, scholars, lawyers and other stakeholders.

This book contributes to the analysis of the evolving role of judges and courts in the application of Competition Law, its development, challenges, and impact on the field, specifically from the perspective of judicial review of public enforcement.

Focusing particularly on recent trends (but no only), the book covers all the major areas of application of EU Competition Law, such as restrictive agreements, abuse of dominant position, merger control, and public restrictions, in addition to examining cross-cutting issues such as the review of fines, the relationship between authorities and judges and the review of economic analysis before the courts.

It will be of great use to anyone interested in Competition Law and the judicial review of public enforcement by competition authorities. Lawyers, economic consultants, professors, researchers, economic operators, policymakers, advanced students —all will find in its pages support for understanding the importance and evolution of judicial review in this area and its impact on the future of Competition Law.

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