

| The legal standard of review under EU merger control

Beret Sundet, 16 September 2026

Copenhagen Conference on the New Horizontal Merger Guidelines

Agenda

PART I

What is the standard of proof in merger control?

The legal test the Commission must meet and why it does not vary by outcome or theory of harm

PART II

What does this mean for the new Merger Guidelines?

What is changing substantively, where the tension lies, and what it means in practice.

Merger control looks forward – and that shapes the standard

- The EUMR establishes a preventive system, distinct from ex post review under Art. 101/102 TFEU
 - Because the Commission is predicting the future, not reconstructing the past, an especially high standard of probability is precluded.
 - Forecasts regarding future events are, by definition, uncertain. The Commission not only needs to establish what available proof indicates about the present, it also needs to determine what present conditions predict for the future

C-376/20 P · CK Telecoms · 2023

(81) That review can therefore be distinguished from ex post review of agreements (...) in Article 101 TFEU and abuses of a dominant position referred to in Article 102 TFEU.

(86) [T]he prospective nature of the economic analysis which the Commission must carry out precludes a requirement for that institution to meet a particularly high standard of proof in order to demonstrate that a concentration would or would not significantly impede effective competition.

AG Cocott - (58) “[I]t is not possible to provide ‘objective’ proof of a forecast or for it to be free of uncertainties and doubts. Accordingly, on a general or abstract level, any prospective analysis relating to the future developments (...) can be based only on the determination of a more or less strong probability”

Clearance and prohibition are judged by the same yardstick

- The regulation does not favour either outcome. The Commission is not required to meet a higher standard to prohibit a merger than to clear one
 - No general presumption of compatibility – or incompatibility – can be inferred.
- This means that the Commission bears *the legal burden* of establishing overall whether a merger gives rise to a SIEC
 - The Commission bears the *evidential burden* of demonstrating any anticompetitive effects arising from the merger
 - The merging parties bear the *evidential burden* of demonstrating any alleged efficiencies stemming from the merger

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(70) *"there is nothing in those provisions which states that Regulation No 139/2004 imposes different standards of proof in relation to decisions approving a concentration...and decisions prohibiting a concentration"*

(73) *"the Commission is not required to comply with a higher standard of proof in relation to decisions prohibiting concentrations than in relation to decisions approving concentrations"*

(74) *"the requirements concerning the taking of evidence, including the standard of proof, do not vary according to the type of decision"*

Level of probability

“More likely than not” – not a “strong probability”

- In **CK Telecoms**, the Court of Justice overturned the General Court’s heightened “strong probability” test and confirmed the applicable standard of proof
- The Commission must show that it is **more likely than not** the concentration would (or would not) significantly impede effective competition
 - Confirmed again in ThyssenKrupp as the standard across all theories of harm

C-376/20 P · CK Telecoms · 2023

(87) “[I]t is sufficient for the Commission to demonstrate, by means of a sufficiently cogent and consistent body of evidence, that it is more likely than not that the concentration concerned would or would not significantly impede effective competition (...)”

Quality and strength of evidence

- The Commission's decisions must rest on a "**sufficiently cogent and consistent body of evidence**". This quality requirement is a separate, cumulative safeguard – it does not increase the probability threshold
 - The Commission may, in principle, rely on evidence of any kind, all evidence is admissible, and there exists no formal hierarchy between types of evidence
 - Even simple commercial and economic realities can amount to "convincing evidence" (ThyssenKrupp para. 92)
 - The balance of probabilities test applies to the entire body of evidence – not each item of evidence or circumstance
- Quantitative/econometric analysis can be dispensed with when not meaningful, without this being a procedural error
 - Sophisticated economic studies are not required
- Complexity of a theory of harm is a factor in assessing plausibility of the evidence – not the standard itself

C-376/20 P · CK Telecoms · 2023

(77) "The specific requirements relating to the quality of the evidence therefore do not, in principle, affect the standard of proof required"

(78)–(79) "the inherent complexity of a theory of competitive harm (...) does not, of itself, have an impact on the standard of proof (...) [which] does not vary (...) according to the inherent complexity of a theory of competitive harm"

C-581/22 P · ThyssenKrupp · 2024

ThyssenKrupp (99): "the evaluation of evidence should be unfettered (...) which does not negate the requirement (...) that the evidence must be sufficiently cogent, consistent, reliable and factually accurate"

The “margin of discretion”

- The Commission has a margin of discretion with regard to assessments of an economic nature (C-376/20 CK Telecoms, among others)
 - This “justifies the review by the EU Courts of a Commission decision relating to concentrations being confined to ascertaining that the facts have been accurately stated and that there has been no manifest error of assessment»(124)
 - Nevertheless, EU Courts must «establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent [and] contains all the information which must be taken into account (..) and whether it is capable of substantiating the conclusions drawn from it» (125)
- Where two equally plausible and diverging economic studies are presented, can the Commission choose – and what does this imply, in practice, for “more likely than not”?



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(32) – fn. 45 “This includes a margin of discretion as to the weight given to diverging economic analyses in the Commission’s assessment”

How far into the future can the Commission look?

- No statutory or fixed time limit in the Merger Regulation
- Outer boundary set out in case law - the analysis cannot exceed what the Commission can foresee with a sufficient degree of certainty
 - The further into the future the event to be foreseen, the greater is the uncertainty as to whether it will occur
- The time period which can be foreseen with a sufficient degree of uncertainty may depend on market characteristics
 - In most cases 3-5 years
 - Longer periods (up to 10 years) require that the Commission holds concrete information enabling it to predict market developments with reasonable certainty over that period
 - Several “new” theories under discussion (e.g. long-run dynamic or innovation effects) invite the Commission to look further ahead

T-312/20 · EVH v Commission (RWE/E.ON) · 2023 (C-464/23 P · upheld on appeal)

(234) [T]he Commission is expected to carry out an assessment (...) over a period (...) which cannot exceed – with a sufficient degree of certainty – the time frame within which certain events may occur. The further into the future the event to be foreseen, the greater is the uncertainty as to whether it will occur.

T-399/16 · CK Telecoms · 2020

(121) The foreclosure effect feared by the applicants therefore depends on a series of factors in relation to which it is not certain that they might all occur in a sufficiently near future, such as is necessary in order for the prospective analysis of the effects of the concentration not to become purely speculative. (...) a period of three years (...) is relatively long where, as in the present case, the sector concerned is a new technology sector which is characterised by relatively short innovation cycles

Complexity affects plausibility, but standard of proof remains unchanged

- As the new guidelines embraces more complex theories of harm (dynamic competition, innovation, future constraints, long-run foreclosure, ecosystems innovation effects and long-run foreclosure (dynamic incentives), entrenchment and portfolio effects – a natural question is whether the Commission must meet a higher bar
 - Standard of proof remains unchanged – more likely than not
 - The quality requirement (“sufficiently cogent and consistent”) is particularly important for complex theories of harm
 - Cook & Kerse: In practice, the Commission needs materially more and better evidence to reach “more likely than not” where the theory starts from a less intuitive competitive relationship

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(32) On the basis of an overall assessment of the facts and evidence, including facts and evidence provided by the parties regarding any claimed efficiencies, the Commission concludes whether a merger's impact on the competitive process is 'more likely than not' to result in a SIEC. This standard applies to all mergers reviewed by the Commission irrespective of the nature and the complexity of the theories of harm or benefit, the stage of the procedure or the ultimate result of the Commission's investigation

C-413/06 P · Bertelsmann / Impala · 2008

Bertelsmann/Impala (51): "the inherent complexity of a theory of competitive harm. (...) is a factor which must be taken into account when assessing the plausibility of the various consequences (...) but such complexity does not, of itself, have an impact on the standard of proof"

The increased importance of efficiencies – balance between competitive harm and benefits

- Benefits will have a more prominent place in the review of mergers – what has been the last resort will be part of the core assessment
- Verifiable and merger specific efficiencies that will benefit consumers
 - Direct efficiencies (costs, scale)
 - Dynamic efficiencies (innovation, investments and faster commercialisation)
- The same standard and quality of proof applies to theories of benefit as for theories of harm?
 - What will be the implications of a merger generating direct efficiencies but more distant harm?
- Practical implications
 - Benefits should be identified and quantified early in the transaction process
 - Direct and dynamic efficiencies
 - Benefits should be presented early in the process

Who decides which parameters and objectives matter more?

- The new horizontal guidelines signals a willingness to consider a greater range of non-price parameters of competition and EU policy objectives
 - As stated by the Commission: «Many non-price parameters are not readily subject to quantification»
- The weighing of non-price and price parameters of competition, in particular where non-price parameters relate to non-economic EU policy objectives, may afford greater leeway for the Commission to exercise its margin of discretion in concrete cases

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(20): "Some of [the parameters of competition], among other things, may also reflect the objectives of EU policies recognised by the Treaties. The Commission enjoys a margin of discretion in weighing such price and non-price parameters of competition in the balancing exercise in order to establish an overall assessment of the merger's effects on businesses and consumers."

| Key takeaways

One standard, no presumption

"More likely than not," supported by a sufficiently cogent and consistent body of evidence — symmetric for clearance and prohibition, constant across theories of harm, and distinct from the ex post standard in behavioural cases.

Preventive review shapes the test

Merger control's prospective, ex ante character precludes an especially high standard, and sets real limits on how far into the future the Commission's analysis can extend.

Complexity is not a loophole

New and more complex theories of harm under the new Guidelines is likely to raise the evidentiary bar in practice, through plausibility, but not the legal standard itself.

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