SHOULD THE DOMINANCE TEST HAVE BEEN CHANGED?

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Abstract: *Even though the legal substantive test has been changed from the "dominance test" to the SIEC in the Recast ECMR, and thus would appear to rectify the "gap" in the European Community merger regime, the occurrences of such "gap" cases may not cease under national laws that still adhere to the traditional dominance test. This paper will address initially through caselaw analysis the issue of mergers leading to non-coordinated effects in oligopolistic markets ("non-collusive oligopolies" or "gap" cases); examine how the legal substantive test deals with non-collusive oligopolies; and identify such cases in the current case law.*

I. INTRODUCTION

The purpose of the ECMR lies in sustaining an effective and well-functioning internal market by effectively ensuring that reorganisations in the market will not induce an adverse impact on competition. Mergers may eliminate any competition that exists between the merging parties and may lead to a reduction in the number of firms competing in the market. Where this reduction has a substantial adverse effect on overall market competition, the market will be less oriented to consumer and efficiency goals, even in the

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absence of breaches of competition legislation. This paper aims to address the change in the legal standard of merger assessment due to the reform in the ECMR that occurred in 2004.[1]

As regards the substantive reforms, the substantive test was changed from the dominance test to the significant impediment to effective competition test. This paper will address initially through caselaw analysis the issue of mergers leading to non-coordinated effects in oligopolistic markets ("non-collusive oligopolies" or "gap" cases); examine how the legal substantive test deals with non-collusive oligopolies; and identify such cases in the current case law.

Thus, this paper will first briefly present the substantive reforms in the legal standard and then adopt a caselaw approach in identifying gap cases. The proof of the existence of such cases signifies the need of the reforms to the legal test of the original ECMR.

II. REFORM IN THE LEGAL STANDARD

In order to accomplish the target of sustaining the competitive structure of the post-merger market, the competition authority must apply a legal substantive test in order to determine the likelihood of an adverse impact of the merger on competition; it must also know what level and quality of evidence it needs in its assessment of whether the merger should be prohibited. The Recast ECMR applies the Substantial Impediment to Effective Competition ("SIEC") test[2] as the legal substantive test for the assessment of concentrations. The issue of evidence is a matter that has been determined by the CFI and the ECJ.

The legal substantive test in the Recast ECMR, the SIEC test, is intended to fill the perceived gap in the application of the dominance test which was illustrated by cases such as *Airtours/First Choice*[3] and *Heinz*.[4] The term "non-coordinated effects in oligopolistic markets" was introduced in Recital 25 of the EC Merger Regulation.[5] The Recast ECMR explicitly recognised the

1 *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation*), ("Recast ECMR"), OJ L24, 29.01.2004, pp. 1-22.

2 Article 2(3), see note 1.

3 Case M1524 *Airtours/First Choice* [2000] OJ L93/1 ("*Airtours/First Choice*").

4 US District Court, Columbia, *FTC v HF Heinz Company et al.*, 00-5362a, 2000.

5 See note 1.

concept of non-collusive oligopolies as a result of the prevailing perception that some mergers could lead to a harmful effect on competition that could not be addressed using the existing concepts of single firm and/or collective dominance.

The "gap" corresponds to the situation where the post-merger entity's market share falls below the level required for dominance and where the merger may nonetheless still lead to unilateral effects. The two terms "mergers leading to non-coordinated effects in oligopolistic markets" and "non-collusive oligopolies" refer to situations where the remaining firms in the post-merger market have the incentive and ability to adopt conduct inducing an adverse impact on competition, and thus profit from exerting their market power in the post-merger market, without being dependent upon a coordinated response on the part of the other members of the oligopolistic market structure.[6] This adverse impact on competition is induced by the merger.

The most direct impact on competition will be the elimination of the competitive constraints that the merging firms exerted on each other prior to the merger. In addition, non-merging firms can also benefit from the reduction of competitive pressure that results from the merger since the merging firms' price increase or output reduction may induce the switching of some demand to the rival firms, which, in turn, may find it optimal to increase prices. This might happen in particular in differentiated product markets[7] where a merger can lead to incentives for conduct having an adverse impact on competition, without creating a single leading player, and without significantly increasing the feasibility of tacit collusion. The latter situation, which cannot be dealt either as single-firm dominance or as collective dominance, is known as the "gap" in the application of the dominance test.[8]

Until the adoption of the recast ECMR in May 2004, there was no published decision under the original ECMR alleging the creation of non-

6 See further: paragraph 25, *Commission Notice on the appraisal of horizontal mergers under the Council Regulation on the control of concentration between undertakings*, COM/2002, 11/12/2002.

7 The significance of product differentiation may be diminished if it is possible for competitors to reposition their products to compete directly with the merging parties' products, (e.g. by engaging in brand repositioning or introducing new brands).

8 The term "multilateral effects" has also been used to describe these effects. Mergers inducing multilateral effects are equivalent to non-collusive oligopolies. Fingleton J. (2002), "Does Collective Dominance Provide Suitable Housing for All Anti-competitive Oligopolistic Mergers", in Hawk B. (2003), *"Antitrust Law and Policy"*, Fordham University Law School, Corporate Law Institute. At page 190.

coordinated effects in oligopolistic markets.[9] In order to address the problem that there are few, if any decisions, adopted explicitly on the basis of non-collusive oligopoly theory, this paper will include a comparative approach of examining two mergers assessed under the ECMR. These mergers were assumed to lead to collective dominance rather than non-coordinated effects in oligopolistic markets. When the decisions in these merger cases were taken, the concept of non-collusive oligopolies was not recognised in the original ECMR.[10] However, the market features that contribute to non-collusive oligopolies might have been in existence and prevalent in these market structures. Hence, this paper will provide evidence of non-collusive oligopolies and thus confirm the need to reform the substantive test of ECMR.[11] This paper will attempt to assess the impact of the mergers on competition.[12]

III. JOHNSON AND JOHNSON/GUIDANT[13]

Analysis of the case

The Commission received a notification of a proposed concentration by which the undertaking Johnson&Johnson ("J&J") would acquire control of the whole of the undertaking Guidant Corporation ("Guidant") by way of a purchase of shares.

The transaction involved four main areas within the cardiovascular medical products business: i) interventional cardiology devices; ii) endovascular devices; iii) cardiac surgery devices; and iv)cardiac rhythm management devices. All markets were deemed to be national in scope.

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9 Assonime, "*Comments on the Draft EC Commission Notice on the Appraisal of Horizontal Mergers*", available from http://europa.eu.int/comm/competition/mergers/review/contributions.html. Although there are cases that were arguably decided based on a rationale that resembles the one under the SIEC test. Such cases include Case M1672 *Volvo/Scania* [2001] OJ L143/74, Case M2817 *Barilla/BPL/Kamps* [2002] OJ C198/4, as well as Case M2861 *Siemens/Drägerwerk/JV* [2003] OJ L291/1 and Case M3083 *GE/Instrumentarium* [2004] OJ L109/1.

10 As the Financial Times mentioned in an article, the Commission may be constrained by current rules, which do not explicitly permit it to ban mergers that could give rise to "non-collusive oligopolies", such as the one Brussels suspects may arise between Oracle and SAP. See www.ft.com, article of 28/03/2004.

11 Such cases include: *Airtours/First Choice*, *Oracle/PeopleSoft*, Case M3333 *Sony/BMG* [2005] OJ L62/30.

12 The evidence for this analysis is taken from the published decisions.

13 Supra note 405.

Interventional cardiology is a field of heart medicine dedicated to research and technology for minimally invasive procedures to treat Coronary Artery Diseases. These procedures include the dilatation of narrowed or blocked coronary blood vessels using a balloon catheter and often a stent,[14] which is inserted into the cardiovascular system via an artery most often using the groin as an entry point.[15]

As regards interventional cardiology devices, the Commission found that Coronary Bare Metal Stents ("BMS") and Drug Eluting Stents ("DES") constituted separate markets. In addition, the Commission concluded that coronary guiding catheters, coronary steerable guidewires and coronary Percutaneous Transluminal Coronary Angioplasty ("PTCA") Balloon catheters formed relevant product markets. A guiding catheter is a long, hollow tube manufactured from a polymer blend that is inserted into the radial or femoral artery and is advanced to the origin of the coronary arteries. A steerable guidewire ("SGW") is a very thin and flexible wire which is advanced though the guiding catheter beyond the narrowed area of the artery which requires dilatation. A PTCA balloon catheter is a long, flexible, hollow tube with a balloon at the end.

Endovascular devices are used for the minimally invasive treatment of peripheral vascular (or endovascular) diseases. The Commission identified markets for endovascular stents, which are small expandable tubes designed to treat a narrowing or blockage in a peripheral artery. The market inquiry confirmed separate markets for Balloon Expandable Stents ("BX") and Self Expandable Stents ("SX") due to the different applications, price (SX stents are more expensive than BX) and limited supply side substitutability between SX and BX stents (due to different design, material, deployment techniques, and manufacturing processes). Furthermore, within the SX stents, a separate market for carotid stents was defined.[16] The Commission concluded that there were separate product markets for carotid stents, for non-carotid SX

14 A stent is a small expandable wire tube that is used to support the walls of the coronary artery.

15 See paragraph 9 of *Johnson and Johnson/Guidant*.

16 As the Commission noted, no other stent can be marketed as a carotid stent, and stents designed for carotid applications are usually not used for any other procedure. Thus, there was neither demand-side nor supply-side substitutability between carotid and other endovascular stents.

stents and for BX stents. The latter market in particular included highly differentiated products, such as renal stents and iliac-femoral stents.[17]

Moreover, the Commission identified separate product markets for the endovascular products: (i) guiding catheters, (ii) SGWs, (iii) Percutaneous Transluminal Angioplasty ("PTA") balloon catheters.[18] The Commission further concluded that Embolic Protection Devices ("EPDs") formed a relevant product market. EPDs are small umbrella-type devices that are mounted on a catheter and placed beyond the lesion with the aim of trapping any material or debris dislodged during the angioplasty procedure.[19]

As far as cardiac surgery devices are concerned, the Commission defined a market for Beating-Heart Stabilisation Systems.[20] It also defined a market for Blowers/Misters and Endoscopic Vessel Harvesting Systems. Blowers/misters are ancillary products that are used in conjunction with the stabilisation systems. Endoscopic Vessel Harvesting ("EVH") systems enable the surgeon to harvest the vein necessary for Coronary Artery Bypass Graft surgery ("CABG") procedure via a keyhole-sized incision in the leg or in the arm.

Finally, the Commission left open the market for Cardiac Rhythm Management devices due to the inexistence of a horizontal overlap. Cardiac Rhythm Management devices are used for the treatment of severe heart rhythm disorders as arrhythmia (irregular heart beat), bradycardia (abnormally slow heartbeat) and tachycardia (abnormally fast heartbeat).[21]

As far as steerable guidewires are concerned, the merger would result in a quasi-monopoly situation in some Member States. Guidewires in general are only moderately differentiated products.

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17 See paragraph 47 of *Johnson and Johnson/Guidant*.

18 Endovascular guiding catheters, SGWs, and PTA balloon catheters performed a similar function to the corresponding products in interventional cardiology. Each of these endovascular accessories was sold in different sizes and dimensions, there was no supply side substitutability across accessories, and they were in distinct markets from the coronary corresponding products (guiding catheters, SGWs, and PTCA balloon catheters). In addition, prices between the two lines of products tended to differ significantly and, from the supply side point of view, there was not a high degree of substitution between endovascular and cardiology devices.

19 Paragraph 53 of *Johnson and Johnson/Guidant*.

20 Beating-heart CABG stabilisation systems enable the surgeon to perform Coronary Artery Bypass Graft ("CABG") surgery on the heart while beating.

21 The Commission did not analyse the competitive effects in this market since there were no horizontal overlaps.

The merger was likely to result in a significant impediment to effective competition in the common market and the EEA for steerable guidewires as a result of the strengthening of Guidant's dominant position.[22]

As far as the market for endovascular devices is concerned, J&J supplied the following endovascular devices in Europe: (i) stents, (ii) PTA balloon catheters, (iii) guiding catheters, (iv) diagnostic catheters, (v) catheter sheath introducers, (vi) steerable guidewires, (vii) diagnostic guidewires, (viii) embolic protection devices, (ix) venous products, (x) thrombectomy systems, (xi) AAA stent graft systems, and (xii) accessories.[23] Guidant produced and sold a more limited line of endovascular products including: (i) stents, (ii) PTA balloon catheters, (iii) guiding catheters, (iv) steerable guidewires, and (v) embolic protection devices.[24]

As far as the balloon expandable stents of the endovascular stents were concerned, J&J and Guidant were two of the strongest players, and there were high barriers to entry and insufficient countervailing buyer power. The merger would combine the leader and the number two in the BX stent markets. The Commission concluded that in the markets for BX stents in Austria, Belgium, France, Germany, Italy, Luxembourg, Netherlands, Portugal and Spain, the concentration would result in the removal of the closest and strongest competitor to the market leader J&J. The merger would therefore significantly impede effective competition in the markets for BX stents in the above mentioned countries, in particular as a result of the creation of a dominant position.[25]

As far as the carotid stents of the endovascular stents were concerned, the three main players were J&J, Guidant and Boston Scientific, together accounting for between 83 and 96 per cent of the market. The concentration would either reinforce the leadership of J&J or Guidant (in Austria, Finland, Netherlands, Portugal and Spain), or combine the second and third player to create a new market leader (in Belgium, Germany and Italy).

The Commission concluded that given the characteristics of the markets of carotid SX stents in Austria, Belgium, France, Finland, Germany, Italy, Luxembourg, Netherlands, Portugal and Spain in terms of concentration,

22 Paragraph 198 of *Johnson and Johnson/Guidant*.

23 Paragraph 197 of *Johnson and Johnson/Guidant*.

24 Paragraph 199 of *Johnson and Johnson/Guidant*.

25 Paragraph 287 of *Johnson and Johnson/Guidant*.

barriers to entry, customer loyalty, closeness of substitution, and as a result of the elimination of a major competitive constraint, the concentration would give rise to non-coordinated adverse effects in those national markets and would therefore impede effective competition in the common market and the EEA as a result of the creation or strengthening of a dominant position.[26]

As far as the non-carotid stents of the endovascular stents were concerned, both J&J and Guidant market non-carotid SX stents in the EEA. The Commission's market investigation indicated that J&J and Guidant products were considered to be the closest substitutes by the majority of respondents who procured non-carotid SX products. J&J and Guidant non-carotid SX stents were high quality products, and close substitutes due to their superior performance compared to competing stents. The Commission concluded that given the characteristics of the markets of non-carotid SX stents in Austria, Belgium, Germany and Netherlands in terms of concentration, barriers to entry, customer loyalty, closeness of substitution, and as a result of the elimination of a major competitive constraint, the concentration would give rise to non-coordinated adverse effects in those national markets and therefore impede effective competition in the common market and the EEA as a result of the creation or strengthening of a dominant position.

In conclusion, in the market for endovascular stents the concentration would either consolidate an existing leadership position of one of the merging parties or create a new market leader. The relevant product markets were characterised by differentiated products with J&J's products being closer substitutes to Guidant's products. The Commission further stated that there were considerable barriers to entry in the form of IP rights, know how, access to customers and reputation of the firms, as well as large sunk costs.

As far as the market for cardiac surgery devices was concerned, J&J was active through products such as: (i) minimally invasive access devices for valve surgery, (ii) stabilization systems for beating-heart surgery, (iii) stabilisation system accessories, (iv) endoscopic vessel harvesting devices, and (v) devices for non-surgical ablation. Guidant was active through (i) stabilisation systems for beating-heart surgery, (ii) stabilisation system accessories, (iii) anastomosis assistance devices, and (iv) devices for surgical ablation.

26 Paragraph 301 of *Johnson and Johnson/Guidant*.

The parties offered commitments to alleviate the Commission's concerns.[27] The Commission considered that the commitments were suitable for remedying the significant impediment to effective competition caused by the merger in the markets mentioned above.

The Commission concluded, on the basis of these remedies, that the notified operation whereby Johnson&Johnson would have acquired sole control of Guidant should be declared compatible with the common market and with the functioning of the EEA Agreement.[28]

A Gap case?

In some of the markets analysed above, the Commission argued that the merger would significantly impede effective competition, however, it might not have concluded that the merger would lead to a creation or strengthening of dominant position if the merger had been assessed under the dominance test.

Steerable Guidewires

In the market for steerable guidewires used in interventional cardiology, the Commission stated in paragraph 196 that[29]

> *The concentration enables the merging parties to strengthen Guidant's uncontested leadership, by removing one of the only two main competitors in this market. On the basis of the information at the Commission's disposal, it seems unlikely that remaining competitors and potential entrants can constitute a sufficient and timely competitive constraint such as to prevent a unilateral increase in prices by the merged entity. Further, it cannot be excluded that the remaining firms in the market may even be expected to benefit from the reduction in competition which will result from the merger; the increase*

27 The parties' commitments in the Steerable Guidewires business consisted of the parties' proposal to divest the assets associated predominantly with the supply, marketing and sale of J&J's Steerable Guidewires business in the EEA. In the Endovascular area, the parties proposed to divest the entire operations (products, logistics, inventory, customer list, sales force, brand names, and intellectual property) of Guidant in the EEA. For the Cardiac Surgery area, the parties proposed to divest any of the following: (i) J&J's Endoscopic Vessel Harvesting products and endoscopic radial artery harvesting; (ii) Guidant worldwide assets and personnel of Cardiac Surgery business division; or (iii) Guidant's endoscopic vessel harvesting products, namely procedural kits for EVH.

28 On 5 December 2005, Boston Scientific preliminary offered $25billion to buy Guidant. J&J raised its offer to $24.2billion. Subsequently, Boston Scientific raised its offer to $27billion, which was accepted by Guidant. Thus, Guidant paid J&J a termination fee of $705 million to withdraw from that deal.

29 Paragraph 196 of *Johnson and Johnson/Guidant*.

> *in concentration may provide them the opportunity to attain higher prices than would otherwise have been the case. The merger is therefore likely to result in a significant impediment to effective competition in the common market and the EEA for steerable guidewires as a result of the strengthening of Guidant's dominant position.*

The Commission reached this conclusion by analysing the competitive landscape of the post-merger market. It reviewed the market shares of the merging parties and concluded that the significant market shares reinforced Guidant's uncontested leadership in the steerable guidewire markets. It added that Guidant's steerable guidewire was perceived by customers as being of superior quality to other guidewires and was their guidewire of choice. Customers valued the Guidant steerable guidewire product because of its superior nature but were also loyal to the Guidant brand because of its perception as a mark of quality and reliability.

The Commission concluded that post merger there would clearly be a reduction in customers' competitive alternatives. If the merged entity raised prices post merger although Boston Scientific would be the only credible competitor it would not be able to provide sufficient competitive constraint such as to mitigate the significant impediment to effective competition induced as a result of the merger.

As paragraph 196 of the Commission's decision indicates, the Commission did not clearly articulate within which specific Member States it considered that the merger would lead to a significant impediment to effective competition. As this paragraph further indicates, the Commission expected the competitors of the merged entity to be able to raise prices induced by the reduction of competition resulting from the merger. Thus, it expected the merger to have non-coordinated effects in oligopolistic markets.

In most Member States the merger represented the addition of the number one player, Guidant, with the number three player, J&J, and would lead to the post-merger entity having a market share between 55 and 100 per cent in certain Member States. However, in Hungary the merged entity would have 35 - 45 per cent combined share, with number two player Boston Scientific having 15 - 25 per cent. In Sweden, the merged entity would have a combined market share of 35 - 45 per cent. The HHI in the post-merger market in these two countries would be 3,558 with a dHHI equal to 576 in Hungary and 4,696 with a dHHI of 490 in Sweden.

Using the assumption that paragraph 196 indicates that the Commission considered that the merger would lead to a significant impediment to effective competition, *inter alia*, in Hungary and Sweden, it is arguable whether the Commission would be able to show that the merger would lead to a strengthening or creation of a dominant position had the merger been assessed under the dominance test of the original ECMR.

The product was moderately differentiated, broadly interchangeable, with no significant technical differences. The Commission mentioned that in the post-merger market there was a reduction in the customers' competitive alternatives and in response to a price increase customers would switch to other competitors (Boston Scientific) in proportion to their market shares. As the Commission further stated, the closeness of substitution did not play a significant role and the market shares remained a good indicator of market power. These factors would be conducive to an argument that the merger would led to a strengthening or creation of a dominant position.

However, the low market shares in Hungary and Sweden paint a different picture. The absolute level of the HHI can give an initial indication of the competitive pressure in the market post-merger. As the Commission noted, for moderately differentiated products, market shares remain a good indicator of market power.[30] Notwithstanding the HHI ratios and the increments, the low market shares might have prevented the Commission from concluding that the merger would have led to a creation or strengthening of dominance.

In the context of Article 82, the threshold of market share for an allegation of single dominance to be upheld can be at 50 per cent, as has been identified in case law: *AKZO*.[31] In Recital 32 of the preamble of the ECMR a reverse indication or presumption can be made that dominance exists where the market share of the undertakings exceeds 25 per cent. In the *Carrefour/ Promodes*[32] case, most of the Commission's concerns essentially related to the absolute size of the merged entity. Buyer power arguments were used to suggest that a post-merger market share of 30 per cent could still raise serious dominance concerns.[33]

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30 Paragraph 192 of *Johnson and Johnson/Guidant*.

31 Case 62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359.

32 Case M1684 *Carrefour/Promodés* [2000] OJ C164/5.

33 Although the merger did not raise issues of single firm dominance. Collective dominance was also ruled out. Lexecon, (2001), *"Buyer Power"*, http://www.lexecon.co.uk/assets/buyer_power.pdf, p. 2.

In *Johnson&Johnson/Guidant*, market shares of 35 - 45 per cent in Hungary, with number two player Boston Scientific having 15 - 25 per cent and market share of 35 - 45 per cent in Sweden,[34] in combination with the remaining features of the post-merger market mentioned above (e.g. countervailing buyer power, innovative market[35]), do not give in my opinion much credibility to an argument of single firm dominance.

As regards collective dominance, an argument can be made that the incumbents in the post-merger market would engage in tacit coordination of their conduct and thus enjoy a position of collective dominance. The Commission did not allege that the merger would lead to coordinated effects but rather to non-coordinated effects. This in itself provides support to the argument that the post-merger market would not exhibit the features of collective dominance.[36] The degree of differentiation of the products and the variation in the post-merger incumbents' market shares, as well as the existence of IP rights,[37] would not lend credibility to the argument that the merger might have led to a creation or strengthening of a collective dominant position.

The Commission stated that, in general, interventional cardiology accessories tended to be more and more "commodity" like items, to the extent they were relatively simple and homogeneous products. As a consequence, compared to the market for stents, there was less differentiation and stronger price competition between a large number of suppliers, including some local players.[38] However, the trend towards commoditisation was perhaps less accentuated for some of these items, such as, in particular, guidewires, where quality remained one of the key criteria driving customers' choice and constituted a differentiation factor of these products. Thus, arguably, the steerable guidewires were moderately differentiated products.

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34 There is no evidence available of the second largest firm in the post-merger market in Sweden.

35 Albeit a low degree of innovation.

36 The Commission might have evidence of transparency, monitoring possibilities as well as of the countervailing impact of buyers and competitors and based on this evidence it decided not to pursue a possible allegation of collective dominance.

37 IP rights can provide asymmetric market power to the firms engaging in collective dominance and thus, undermine the sustainability of the collective dominant equilibrium.

38 Paragraph 171 of *Johnson and Johnson/Guidant*.

In addition, interventional cardiology accessories were low margin products, and dependent to some extent upon the primary markets for stents. The Commission further stated that parties and their competitors' market shares across various segments of the interventional cardiology, i.e. accessories and stents, were pretty uneven. Furthermore, some market share fluctuations within each segment were also recorded over time. This was explained by the fact that sourcing through formal tendering and by single item was also common, thus creating room for contestability.[39]

Thus, the discrepancy in the market shares of the merged entity and Boston Scientific (at least in Hungary where information is available), the fact that the steerable guidewires were moderately differentiated products, as well as the fluctuation in the market shares and the tendering form of procurement by customers (hospitals who can multi-source), do not lend credibility to the argument that the two post-merger firms might be able to successfully tacitly coordinate their behaviour and thus enjoy a collective dominant position in the post-merger market.

Thus, the Commission might not have been able to successfully argue that the merger would lead to a creation or strengthening of dominance in these two countries if it assessed the merger under the dominance test. However, the Commission would most likely have prohibited the merger or accepted remedies under the dominance test as well, since the merger would lead to a creation or strengthening of dominant position in a substantial part of the common market.[40]

Carotid Stents

Turning to the market for carotid stents of endovascular stents, the Commission concluded that[41]

> *Given the characteristics of the markets of carotid SX stents in Austria, Belgium, France, Finland, Germany, Italy, Luxembourg, The Netherlands, Portugal and Spain in terms of concentration, barriers to entry, customer loyalty, closeness of substitution, and as a result of the elimination of a major competitive constraint, the concentration will give rise to non coordinated adverse effects in those national markets and therefore impede*

39 Paragraph 173 of *Johnson and Johnson/Guidant*.

40 Excluding Hungary and Sweden.

41 Paragraph 301 of *Johnson and Johnson/Guidant*.

effective competition in the common market and the EEA as a result of the creation or strengthening of a dominant position.

The merger would reduce the number of competitors from three to two in the carotid stents market. The merged entity would have a market share of 45 - 55 per cent in the EEA, with an HHI of 3663 and increment of 1176.[42] There were three main players in the carotid stent market: J&J, Guidant and Boston Scientific. Together they accounted for between 83 [43] and 96 per cent of the market. In Belgium, Germany and Italy the merger combined the second and third largest players and would have led to the biggest firm in the post-merger market with market shares of 45-55 per cent, 45-55 per cent, and 40 - 50 per cent respectively. Furthermore, in France the post-merger entity had a market share of 35-45 per cent; in Spain it was 45-55 per cent.[44] The other large firm, Boston Scientific can be conservatively estimated to have had a market share of 35-45 per cent in Belgium, 25-35 per cent in Germany, 30 - 40 per cent in Italy, 45-55 per cent in France and 25-35 per cent in Spain.[45]

As aforementioned, the Commission stated that neither fast market growth nor new entry weakened the strong market presence of J&J and Guidant in the carotid stent markets. In addition, J&J and Guidant's positions were reinforced by the considerable financial resources they were devoting to the teaching of carotid stenting techniques, thereby increasing their market recognition and brand reputation. The Commission emphasised the high degree of differentiation of these products[46] and that the market shares of endovascular devices had been fairly stable over the last three years. It also noted the significant barriers to entry in the market[47] (due, *inter alia*, to the existence of IP rights) and the low degree of innovation due to the

42 J&J would have 15 -25 per cent and Guidant 20 -30 per cent.

43 70 - 80 per cent in the tiny Luxembourg market.

44 The merger reinforces the leadership of J&J or Guidant.

45 Based on tables J and P of the Commission's decision *Johnson and Johnson/Guidant*.

46 Paragraph 265 of *Johnson and Johnson/Guidant*.

47 Paragraph 232 of *Johnson and Johnson/Guidant*.

differentiation of the products which induced highly diversified demand and lower expected returns from innovation.[48]

The demand for these products was constituted by hospitals which had strong countervailing buying power; this was particularly due to the fact that they had several alternatives at their disposal and were arguably able to play suppliers off against each other.[49] The great majority of buyers practiced multiple sourcing. There were infrequent problems of interoperability between products sourced from alternative suppliers. Multiple sourcing allowed the hospitals to obtain the best device for each medical application; it also allowed them to avoid any disruption to their activities in case of a problem in the supply of a specific device. The Commission acknowledged the countervailing buyer power of hospitals, but opined nonetheless that the closeness of substitution between Guidant and J&J undermined vigorously the alleged lack of competition concerns resulting from multiple-sourcing.

Had the Commission assessed this merger under the dominance test, it would have proved difficult to allege that the merger would lead to single firm dominance in Belgium, Germany, Italy, France and Spain since the merger would lead to a market share for the combined entity of between 35-55 per cent and for the second largest firm, Boston Scientific, of between 25-55 per cent. Although the remaining factors that could substantiate an allegation that a merger could lead to single firm dominance were present (barriers to entry, low innovation, relatively stable market shares), taking into account the significant countervailing buyer power and the low market shares of the merged entity as well as of Boston Scientific in the post-merger market, the Commission would have taken a substantial risk of a successful appeal by the parties by concluding that the merger should have been prohibited under the dominance test based on the argument that the merger would lead to the creation or strengthening of a dominant position.

As regards collective dominance between the merged entity and Boston Scientific, the features of the post-merger market cannot, in my opinion, support such an allegation. The Commission did not allege that the merger would lead to coordinated effects, which in itself provides support for the argument that the post-merger market would not exhibit the features of

48 Paragraph 205 of *Johnson and Johnson/Guidant*.

49 Paragraph 237 of *Johnson and Johnson/Guidant*.

collective dominance.[50] The significant degree of differentiation of the products, the substantial countervailing buyer power, the likely asymmetric cost structures due to the fact that the industry was characterised by innovation and R&D investments, and the existence of IP rights,[51] ensured the attainment and viability of a collectively dominant position would be difficult and unlikely.

Thus, as the above analysis indicates, if the Commission had assessed the merger under the dominance test, it would have proved quite difficult to argue that the merger would lead to an adverse impact on competition in Belgium, Germany, Italy, France and Spain, either on the grounds of single firm dominance or collective dominance.[52] The conclusion of the Commission's assessment would have been different under the dominance test. It might have resulted in a different set of remedies proposed by the merging parties.

Non-Carotid Stents

Finally, turning to the market for non-carotid stents of endovascular stents, the Commission stated that[53]

> *In conclusion, given the characteristics of the markets of non-carotid SX stents in Austria, Belgium, Germany and The Netherlands in terms of concentration, barriers to entry, customer loyalty, closeness of substitution, and as a result of the elimination of a major competitive constraint, the concentration will give rise to non coordinated adverse effects in those national markets and therefore impede effective competition in the common market and the EEA as a result of the creation or strengthening of a dominant position.*

The merger would reduce the number of competitors from four to three in the non-carotid stents market. At EEA level, the combined entity had a market share of 30-40 per cent (J&J: 20-30 per cent, Guidant: 10-20 per cent). J&J's market share had been relatively stable for the past three years.

50 The Commission might have evidence of transparency, monitoring possibilities as well as of the countervailing impact of buyers and competitors and based on this evidence it decided not to pursue a possible allegation of collective dominance.

51 IP rights can provide asymmetric market power to the firms engaging in collective dominance and thus undermine the sustainability of the collective dominant equilibrium

52 The extent to which these countries may have constituted a substantial part of the common market in which the merger would lead to a creation or strengthening of dominant position is unclear.

53 Paragraph 311 of *Johnson and Johnson/Guidant*.

Conversely, Guidant entered the market in 2000 and since then its market position constantly grew to reach 10-20 per cent. After the transaction the HHI would be 2,691, with an increment of 600. In Belgium and the Netherlands the combined market share would be 45-55 per cent; in Germany it would be 40-50 per cent. In these markets, J&J was market leader, while Guidant was the third player in Belgium (after Bard) and the fourth in Germany and the Netherlands (after Boston Scientific and Bard). Together, J&J, Guidant, Boston Scientific and Bard accounted for 85-95 per cent in Belgium, 80-90 per cent in Germany and 80-90 per cent in the Netherlands,[54] while the concentration ratio of the three largest firms was 70-80 per cent in Belgium, Germany and the Netherlands.

The features of this market were very similar to the one for carotid stents as regards the high degree of product differentiation, significant barriers to entry, substantial countervailing buyer power and low degree of innovation and the existence of IP rights.[55] It is unlikely that the Commission would have been able to argue adverse impact on competition on the basis of single firm dominance had it assessed this merger under the dominance test. With such low market shares as well as countervailing buyer power and the presence of at least one more significant competitor in the post-merger market, the Commission would not, in my opinion, be able to allege that the merger would lead to single firm dominance.

As regards collective dominance between the incumbents in the post-merger market, the features of the post-merger market could not, in my opinion, support such an allegation. Furthermore, the Commission did not allege that the merger would lead to coordinated effects but rather to non-coordinated effects, which provides support to the argument that the post-merger market would not exhibit the features of collective dominance.[56] Similar to the market for carotid stents, the significant degree of differentiation of the products, the substantial countervailing buyer power, the likely asymmetric cost structures due to the fact that the industry was characterised by innovation and R&D

54 Paragraph 306 of *Johnson and Johnson/Guidant*.

55 IP rights can provide asymmetric market power to the firms engaging in collective dominance and thus undermine the sustainability of the collective dominant equilibrium.

56 The Commission might have had evidence of transparency, monitoring possibilities as well as of the countervailing impact of buyers and competitors and based on this evidence it decided not to pursue a possible allegation of collective dominance.

investments, as well as the existence of IP rights, render the sustainability of a collusive equilibrium unlikely.

As regards the market for endovascular stents in general (including balloon expandable stents,[57] carotid and non-carotid stents),[58] the Commission noted that[59]

> *The concentration will reduce the number of most important competitors from three (the third being Boston Scientific) to two in the BX stents and carotid stents markets and from four (the third and fourth being Boston Scientific and Bard) to three in the non-carotid SX stent market. These restricted number of players account for the lion's share of the market in all countries considered above. Further competitors, although numerous, have failed so far to grab significant market shares. The concentration will either consolidate an existing leadership position of one of the merging parties or create a new market leader.*

And concluded that[60]

> *there is sufficient evidence showing with the requisite degree of confidence that the operation will give rise to important non-coordinated effects and will substantially impede effective competition in the Common Market and the EEA for the endovascular stents.*

The merger between Johnson&Johnson and Guidant would lead to a significant impediment to effective competition. The transaction was allowed to proceed after substantial remedies were proposed by the parties and accepted by the Commission. In both the market for steerable guidewires and endovascular devices, the parties committed to divest the whole of the Guidant's operations in the EEA, an indication of the significant adverse

57 *The merger will therefore significantly impede effective competition in the markets for BX stents, in particular as a result of the creation of a dominant position* (see paragraph 287 of the Commission's decision). The merger would lead to a firm with market shares ranging between 35%-45% and 90%-100% in the Member States.

58 The Commission looks at the subsegments of the stents (carotid, non-carotid and balloon expandable stents). It analyses the impact of the merger in each of this segments and in paragraphs 312-323 concludes on the whole market after conducting a per-segment assessment.

59 Paragraph 312 of *Johnson and Johnson/Guidant*.

60 Paragraph 323 of *Johnson and Johnson/Guidant*.

competitive effects of the merger and the need to be rectified by an equally substantial remedy.

The results arising from the event study[61] indicated that the Commission's decision coincided with the investors' perception on the day of the initial significant dissemination of information regarding the adverse effects of *Johnson and Johnson/Guidant* on competition.

As the above analysis indicated, if the Commission had assessed the merger under the dominance test, it might not have been able to convincingly argue that the merger would have induced an adverse impact on competition in the markets analysed above, mainly due to the differentiation of the products, asymmetric cost structure, the countervailing buyer power and the low market shares of the merged entity. In these markets the merger would give rise to neither single-firm dominance nor collective dominance. However, the incumbents in the post-merger market would be able to unilaterally increase their prices and thus the merger would have non-coordinated effects in these oligopolistic markets.

This likely outcome was also acknowledged by the Commission when, in referring to the steerable guidewires of the interventional cardiology devices, it stated that[62]

> *…it cannot be excluded that the remaining firms in the market may even be expected to benefit from the reduction in competition which will result from the merger; the increase in concentration may provide them the opportunity to attain higher prices than would otherwise have been the case..*

In addition, in referring to the endovascular devices, the Commission stated that[63]

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61 Chapter 5 involves the implementation of an event study. In order to evaluate investors' perceptions and expectations, the abnormal increase/decrease of the share prices of the merging firms and their competitors on the official announcement day will be calculated by comparing the share price of both merging firms and their main competitors with an index of all market shares on the event day of the announcement of the merger in the news. Conducting an event study analysis for the merging parties as well as for rival firms, by comparing their actual stock price returns around the announcement date with a counterfactual measure of what the return would have been had the merger not taken place, would provide useful insights of the likely expectation of the market of the profitability of the firms resulting from a merger.

62 Paragraph 196 of *Johnson and Johnson/Guidant*.

63 Paragraph 323 of *Johnson and Johnson/Guidant*.

there is sufficient evidence showing with the requisite degree of confidence that the operation will give rise to important non-coordinated effects.

This merger would likely have led to non-coordinated effects in oligopolistic markets, as suggested by the Commission. These adverse effects on competition might not have been able to be fully captured if the merger had been assessed under the dominance test as the above analysis illustrated.

IV. T-MOBILE/TELE.RING[64]

Analysis of the case

T-Mobile was a provider of mobile and fixed telephony services in Austria. Its parent company, Deutsche Telekom, was a world player in the telecommunications industry. Tele.ring was a provider of mobile and fixed telephony services in Austria.

The proposed transaction involved T-Mobile acquiring all the shares in EHG Einkaufs- und Handels GmbH, the sole owner of the Tele.ring group, which comprised Tele.ringTelekom Service GmbH, TRA 3G Mobilfunk GmbH and EKOM 3G Mobilfunk GmbH.

T-Mobile and Tele.ring operate mobile networks in Austria and were also active on related end-customer and wholesale markets. They also both provided fixed network services; but the Commission argued that the merger had no effect on these markets.

As regards the provision of mobile telecommunications services to end customers, the Commission assessed previous cases on the basis of a single market for the provision of mobile telecommunications services to end customers.[65] It concluded that a single market existed for the provision of mobile telephony services to end customers, in so far as they could be provided on both a 2G and a 3G basis. The issue whether there was a separate market for specific applications available only on the basis of 3G technology was left open since, *inter alia*, multimedia services had recently become available on the market. The geographic scope of the market was defined as national.

64 Case M3916 *T-Mobile/Tele.ring*, 26/04/2006.

65 Case M3530 *TeliaSonera/Orange* [2004] OJ C263/7 and Case M3776 *Vodafone/Oskar Mobile*, 25/05/2005.

As regards the wholesale market for call termination,[66] as established in previous Commission decisions,[67] there was no substitute for call termination on each individual network since the operator transmitting the outgoing call can reach the intended recipient only through the operator of the network to which the recipient is connected. The Commission thus argued that each individual network constituted a separate market for termination. According to the Commission the geographic markets for call termination in mobile and fixed networks were national.[68]

Finally, concerning the wholesale market for international roaming,[69] demand for wholesale international roaming services came from foreign mobile operators who wished to provide their own customers with mobile services outside their own network and, downstream, from subscribers wishing to use their mobile telephones outside their own countries.

The Commission in earlier decisions reached the provisional conclusion that each network constituted a separate market for the provision of wholesale international roaming services.[70] However, network operators could to a great extent choose the network in which their customers can make calls abroad. Any foreign network operator may be selected.

As regards the geographic market, the Commission has previously,[71] concluded that the market was national in scope. This analysis was based on the fact that wholesale international roaming agreements could be concluded only with companies which had an operating licence in the relevant country,

66 Call termination is the service provided by network operator B to network operator A whereby a call originating in operator A's network is delivered to the user in operator B's network.

67 Case M1493 *Telia/Telenor* [2001] OJ L40/1, Case M2803 *Telia/Sonera* [2002] OJ C201/19, and Case M3806 *Telefónica/Cesky Telecom*, 10/6/2005.

68 This is essentially owing to regulatory barriers as the geographical scope of licences is in principle limited to areas which do not extend beyond the borders of a Member State.

69 International roaming is a service which allows mobile subscribers to use their mobile handsets and SIM cards to make and receive calls/texts/data services even when abroad. In order to be able to offer this service to their customers, mobile network operators conclude wholesale agreements with one another providing access and capacity on mobile networks in the foreign country.

70 See IP/05/161 "*Commission challenges international roaming rates for mobile phones in Germany"* and IP/04/994 "*Commission challenges UK international roaming rates".*

71 Case M2726 *KPN/E-PLUS* [2002] OJ C79/12, Case M2469 *Vodafone/Airtel* [2001] OJ C207/1, Case M1863 *Vodafone/BT/Airtel* [2001] OJ C42/11, Case M2803 *Telia/Sonera* [2002] OJ C201/19, and Case M3806 *Telefónica/Cesky Telecom*, 10/6/2005.

and that licences to provide mobile services were restricted to national territory.

Turning to the competitive assessment, there were four main companies on the Austrian market operating mobile telephone networks based on GSM technology. They were Mobilkom (a subsidiary of Telekom Austria), T-Mobile, ONE and Tele.ring.

The market share of the merged entity was 30-40%, while Mobilkom had 35-45%, ONE had 15-25% and H3G had under 5%.[72] These market shares were calculated on the basis of turnover, but did not change if the market shares were calculated according to the number of customers.[73]

The Commission concluded that the elimination of Tele.ring as an independent network operator, the emergence of a market structure with two large network operators of similar size (Mobilkom and T-Mobile), a far smaller operator (ONE), and a very small operator (H3G)[74] would give rise to non-coordinated effects, even though T-Mobile would not have the largest market share after the merger.

The Commission analysed nine factors in order to assess the adverse impact of the merger on competition. It analysed the market shares, the HHI, customer switching, price development, incentive structures, importance of national network, network capacity, the role of other competitors, as well as the future development of Tele.ring.[75]

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72 H3G (a subsidiary of Hutchison) entered the market in May 2003 and provides mobile telephony services purely on the basis of a UMTS network. H3G buys airtime access to Mobilkom's GSM network on the basis of a national roaming agreement. In the areas not covered by H3G's own network, H3G's customers therefore make their calls using Mobilkom's GSM network.

73 The market shares expressed in terms of turnover relate to all revenue from mobile telephony and therefore include turnover from international roaming and call termination. With respect to the end-customer market, the parties could only provide the Commission with data based on market research. The end-customer market shares established during the market investigation essentially correspond to the market shares by turnover given above. The same problem does not arise with respect to the market shares by customer number, as this is the figure that relates to the end-customer market.

74 Another service provider was YESSS!, which, after entering the market in April 2005, by December 2005 had a market share of around 5% (in customer terms). However, it should be noted that YESSS! was not an independent service provider, but a subsidiary of the network operator ONE and also offered its services over ONE's network. YESSS! offered only pre-paid packages and only through a discount food store and the Internet.

75 This case presents a structure for the analysis of unilateral anticompetitive effects especially in network industries.

Market shares

In the last three years, Tele.ring has more than doubled its market share, from 5-10% in terms of turnover, or even almost tripled it, from 5% to 5-15% in terms of customers. By contrast, of the three established network operators Mobilkom, and T-Mobile in particular, had lost significant market shares in the same period. The proposed merger would lead to close symmetry between the two largest suppliers, Mobilkom and T-Mobile. The analysis of market shares alone showed not only that Tele.ring had played an active role on the market in the last three years but also that it had been the only company to play such an active role, in terms of increased market share. Tele.ring, as a maverick, had a much greater influence on the competitive process in this market than its market share would suggest.[76]

HHI

The HHI and delta values were well above those defined as not giving rise to concern in the Commission's Guidelines.[77] The Commission argued that they showed that this was a highly concentrated market and that the proposed merger, in view of the high delta value, would bring about a significant change in market structures.

Customer Switching

The market-share data in itself suggested that a large proportion of customers who had left T-Mobile and Mobilkom had become customers of Tele.ring. The data collected by the Austrian regulator on the basis of number portability further supported this interpretation. In 2005 more than half of all customers who switched provider and made use of number portability went to Tele.ring, and between 57% and 61% of those who left T-Mobile and Mobilkom with their telephone numbers switched to Tele.ring. In second place behind Tele.

76 The use of the term "maverick" has been criticised as misleading. This term is unconventional as it is usually used in the context of coordinated effects. http://www.crai.com/ecp/assets/Tele.ring_Mobile.pdf. However, the Horizontal Merger Guidelines in the analysis of unilateral effects refer to mergers eliminating an important competitive force (i.e. maverick) and state that: *Some firms have more of an influence on the competitive process than their market shares or similar measures would suggest.*(paragraph 37-38).

77 Post-merger HHI was 3000-3500 with a Delta of 500-600 both by turnover and by customers.

ring in 2005 was H3G, which picked up around some 20% of all customers switching provider and using number portability.[78]

Price Development

The Commission's analysis illustrated that, overall, prices constantly fell in the reference period and that Tele.ring offered its services since the third quarter of 2002 at significantly lower prices per minute than the other three network operators and that since the first quarter of 2002 at lower prices per minute than the market average. Tele.ring's prices were well below the per-minute prices charged by the three leading operators.

The Commission concluded that during the period under investigation (from 2002 to 2005) Tele.ring was the most active player in the market, and that it exerted considerable competitive pressure on T-Mobile and Mobilkom in particular and played a crucial role in restricting their freedom on pricing. The price analysis therefore suggested that Tele.ring's role in the market was that of a maverick.

Incentive Structure

The incentives for an operator to attract new customers to an existing network by offering aggressive prices were determined by the size of the customer base. The mobile telephone industry was characterised by high investment costs in building up a network to cover 98% of the population (a regulatory requirement for 2G services), network operating costs that were largely independent of the actual amount of airtime used, and relatively low variable costs. The initial incentive for network operators was therefore to exploit their capacity to the full by having as large a customer base as possible. This was particularly true of network operators that first have to build up their customer base in order to be able to recoup the network investment costs and cover the network operating costs.

It was therefore important for such network operators to attract new customers by adopting an aggressive pricing policy, as they did not have a secure and adequate customer base. In time, however, lower tariffs for new customers always had medium-term implications for the customer base, as

78 The Commission assumed that the data collected by the Austrian regulator on switching behaviour based on number portability related to a representative section of the market as a whole and constituted a more reliable sample than customer surveys by commercial market research institutes, which necessarily included a smaller number of customers.

existing customers would not tolerate discrimination over a longer period and might therefore go elsewhere. So, the bigger the customer base, the less likelihood of low price offers aimed at attracting new customers, as the threat of lost income from existing customers would no longer be offset by the additional income to be expected from new customers.

The Commission concluded that Tele.ring's incentive to charge very competitive prices was a consequence of the number of its existing customers. T-Mobile had not pursued such a strategy and the combination of T-Mobile and Tele.ring would have even less incentive to do so in future. Tele.ring's was regarded by customers as particularly inexpensive, but was not highly rated on other factors such as quality, innovation or service.

National Network

The importance of a national network with maximum possible network coverage stemmed in the first instance from customer demands. Investments and network operating costs did not constitute variable costs for a network operator and therefore had no direct bearing on the price of airtime sold to customers. With regard to these costs, the network operator had in particular an incentive to achieve economies of scale. There appeared to be no major differences in the incentives of Mobilkom, T-Mobile, ONE and Tele.ring as all these network operators had GSM networks with nationwide coverage of at least 98% (a regulatory requirement).[79]

Network Capacity

Sufficient network capacity[80] was a *sine qua non* for supplying services to existing customers and, in theory, an incentive to attract new customers. On the other hand, if a mobile operator seeking to maximise profits had sufficient network capacity, this did not necessarily mean that when it had spare capacity it would lower its prices to attract new customers and use that

79 H3G, whose network covers around 50% of the Austrian population purchases airtime under a national roaming agreement with Mobilkom in order to cover the rest of the population. As a result, H3G has variable costs for each minute used by its customers outside its own network, and this has implications for its pricing. H3G's incentives are also fundamentally different here as it cannot achieve economies of scale for that airtime comparable with those of a network operator.

80 Network capacity is determined on the basis both of the frequency spectrum available and of the number of carriers within a cell that transmit the radio signal between the mobile terminal equipment and the antenna.

capacity to the full, since this might reduce the profitability of its existing customer base.

Mobilkom's network was suitable as a reference here as it had the highest use of airtime. In comparison with Mobilkom's network, the current volume of traffic on Tele.ring's network was such that it could still absorb a limited amount of additional traffic, while T-Mobile's network was used to a much lesser extent and could still absorb significantly more traffic. ONE had spare network capacity somewhere between that of Tele.ring and T-Mobile and could therefore take up more new users than Mobilkom. From a structural point of view, Tele.ring's network was also suited to absorbing extra customers over and above its current capacity.

After completion of the proposed merger, not only would the Tele.ring network be eliminated, but, presumably, the T-Mobile network would be used to full capacity to a far greater extent than was the case at that point in time. The proposed merger would therefore lead to a situation where instead of there being three operators the considerable reduction in spare capacity would also reduce the incentives for network operators to attract new customers by offering low prices in order to use up significant spare capacity. Thus, the merger would lead to a significant overall reduction in capacity in the market. According to the Commission, this reduction in available capacity would suggest that the merger would have a considerable impact on competition.[81]

Role of Other Competitors

The Commission found no signs that a new network operator might be intending to enter the Austrian market. It concluded that it was unlikely that H3G or ONE/YESSS! would occupy a place in the market comparable with Tele.ring once the transaction was completed or that they would have been able to discipline the competitive behaviour of T-Mobile and Mobilkom in particular. Similarly, service providers would also not be able to assume such a role.

81 The setting of prices and acquisition of new customers did not necessarily depend on the (spare) capacity available but were determined primarily by the incentives in the light of the existing customer base. So the existence of spare capacity among competitors amounting to 10% of T-Mobile and Tele.ring customers did not point to the conclusion that the competitors would inevitably plan to attract those customers at the expense of the profitability of their own customer base.

Future Development of Tele.ring
The Commission concluded that Tele.ring would continue to operate in future as a price-aggressive service provider on the Austrian mobile telephone market.

Conclusion on unilateral effects arising from the merger
As the above analysis indicates, as far as non-coordinated effects are concerned, the Commission concluded that, with the elimination of the maverick in the market and the simultaneous creation of a market structure with two leading, symmetrical network operators, it was likely that the merger would produce non-coordinated effects and significantly impede effective competition in a substantial part of the common market.

The Commission added that:[82]

> *It is therefore probable that the proposed merger will have a tangible effect on prices in the Austrian end-customer market for mobile telephony services. Even if prices do not rise in the short term, the weakening of competitive pressure as a result of tele.ring's elimination from the market makes it unlikely that prices will continue to fall significantly as in the past.*

Turning to coordinated effects, the Commission argued that such effects may be induced as a result of the merger; but it did not offer definitive conclusions on this issue as the commitments proposed by the notifying party ruled out the possibility that the transaction would lead to coordinated effects.

After commitments submitted by the parties, the merger was declared compatible with the common market and with the EEA Agreement.

A Gap case?
This is a case that clearly indicates the existence of gap cases. The Commission seems to analyse most of the factors that are essential in order for a merger to lead to non-coordinated effects in oligopolistic markets. The merged entity would have the second place in the post-merger market with 30-40%, while Mobilkom would have 35-45%. In addition, HHIs indicated a significant

82 Paragraph 125 of the Commission's decision.

degree of concentration in the post-merger market. In the post-merger market there would be limited customer switching between the merged entity and Mobilkom, since once Tele.ring disappeared from the market, H3G would be the major destination of customers who would like to switch as is indicated by eliciting the 20% of all customers switching provider and using number portability.

Limited switching between the merged entity and Mobilkom, the two largest firms in the post-merger market, indicated that both firms were likely to increase prices without having any significant risk of customers switching to the other. Although customers of both firms could have switched to the other competitors, as the Commission argued, it was unlikely that H3G or ONE/YESSS! would occupy a place in the market comparable with that of Tele.ring once the transaction was completed, or that they would be able to discipline the competitive behaviour of the merged entity and Mobilkom. Thus, both these firms could unilaterally increase prices in the post-merger market.

This case shows that the finding of non-coordinated effects is not limited to a situation where the merging parties are the closest competitors to each other. In addition, the merged entity had the second largest market share in the market, with Mobilkom being the largest firm. It is inconceivable that the Commission could allege that the merger would lead to the creation or strengthening of a dominant position, had the merger been assessed under the dominance test.

The Commission did not rule out the possibility that the proposed merger, besides producing the non-coordinated effects as described above, may also lead to a weakening of competitive pressure as a result of coordinated effects. These coordinated effects would result in prices on the market rising higher than if they were dictated only by the individual, non-coordinated, profit-maximising behaviour of each individual competitor. The merger would lead to two network operators of roughly equal size, Mobilkom and T-Mobile, which together would account for a market share of 60-80% on the Austrian mobile communications market. In addition, the merger would remove the price-aggressive maverick, leaving no other service provider that would be able to take over its role in the short to medium term. As mentioned above, the remaining competitors in the post-merger market were unlikely to pose significant constraints on the merged entity and Mobilkom.

Although the Commission alleged that coordinated effects could arise, it excluded their analysis from the decision.[83]

Although the Commission might not have been able to block the merger under the dominance test based on the allegation that the merger would lead to the creation or strengthening of a dominant position, the Commission might have been able to allege that the merger would lead to the creation or strengthening of a collective dominant position. Thus, it could have achieved the same outcome (i.e. clearance with remedies) under the dominance test that it achieved under the SIEC test.

V. CONCLUSION

The cases analysed herein provide examples where caselaw analysis illustrated gap cases. Although these cases needed to be prohibited or cleared with remedies, they were cleared unconditionally due to the inability of the dominance test to apply to mergers that induce non-coordinated effects in oligopolistic markets. Thus, the gap in the dominance test of the original ECMR was existent and thus the substantive reforms and the adoption of the SIEC test were necessary in order to improve the effectiveness of merger legislation and the accuracy of the legal standard for merger assessment.

Even though the legal substantive test has been changed from the "dominance test" to the SIEC in the Recast ECMR, and thus would appear to rectify the "gap" in the European Community merger regime, the occurrences of such "gap" cases may not cease under national laws that still adhere to the traditional dominance test. Such regimes are likely to experience cases where they will be facing a merger which will have the features of a non-collusive oligopoly but the competition authorities will be unable to apply the dominance test, and will thus resort to other methods of trying to deal with the adverse effects on competition of a merger; this will lead to legal errors, uncertainty and likely (successful) appeals against the authorities' decisions. The evidence of cases in the case law which illustrate the existence of a gap in the application of the dominance test is a fact that needs to be taken into consideration by these Member States in order to enable them to efficiently and accurately assess the adverse impact on competition.

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83 www.internationallawoffice.com. As mentioned in the introduction of this thesis, although non-coordinated and coordinated effects are unlikely to occur simultaneously, it is possible that the merger may lead to non-coordinated and coordinated effects occurring sequentially.

In addition, complications may arise from the application of Articles 4(4) and 9 of the ECMR. Under both these Articles a concentration may be referred to a Member State for assessment. In case the merger is likely to lead to non-coordinated effects in oligopolistic markets, it will not be blocked in a Member State which applies the dominance test, whereas it would have been blocked under the SIEC test of the Recast ECMR. Thus, a tendency may be observed of parties, where appropriate, requesting referrals to Member States that apply the dominance test in the assessment of mergers, since mergers inducing non-coordinated effects in oligopolistic markets are unlikely to be blocked in these Member States. The latter fact may create distortions in the merger referral and assessment process.

Improved understanding of mergers leading to non-coordinated effects in oligopolistic markets, as well as of the contributing factors, firmly rooted in economic theory is essential in three respects: reducing the number of transactions with adverse impact on competition, increasing the number of beneficial transactions, and reducing the uncertainty surrounding merger approval. The new ECMR by rectifying the gap of the dominance test contributed greatly to the improvement of merger assessment.