In this issue:

Page 1: **Orange/Jazztel: Convergence meets Consolidation in the Spanish Telecoms Sector**

The Orange/Jazztel transaction takes place in a market that tipped toward fixed-mobile multiple play offers. The forward-looking analysis in this case included an assessment of the parties' likely future roll-out of fibre networks with and without the merger. Efficiency claims relating to the elimination of double marginalisation have been partly accepted. The remedies address the concerns in a structural manner.

Page 6: **Zimmer/Biomet: White-label licence as a viability add-on remedy**

The case is an interesting example of a merger where geographic markets are national because of procurement characteristics and national registries, but where manufacturing needs scale that goes beyond individual countries. It also demonstrates the importance of competition agencies fostering international cooperation, and convergence in complex cases.

Page 9: **Merck/Sigma-Aldrich: the 200,000 products case**

In the life science case Merck/Sigma-Aldrich, the Commission focused for the first time on "laboratory chemicals", a term that covers hundreds of thousands of specialty chemicals. The Commission identified concerns regarding the supply of solvents and inorganics on the basis of a largely qualitative analysis based on closeness of competition. The concerns were solved in phase I with a tailored upfront buyer remedy covering the entire supply chain.

Page 13: **Cargill/ADM: How far would you go for chocolate?**

This case involved assessing the horizontal overlaps between two of the top three producers of industrial chocolate in Europe. Key elements were the reconstruction of market shares based on a customer- and plant-based definition of the geographic market, as well as the assessment of current and future capacity levels. Whilst the specific features of the market (limited number of suppliers, product homogeneity) enabled an extensive market reconstruction in this case, these features are not present in all cases.
Orange/Jazztel: Convergence meets Consolidation in the Spanish Telecoms Sector

Salvatore De Vita, Sebastian Müller, Violeta Staykova and Marc Zedler

Introduction

In May 2015, the Commission cleared the acquisition of the Spanish telecom operator Jazztel by the French-based telecom operator Orange, subject to conditions, after completing an in-depth investigation.1

Jazztel has been a successful fixed telecommunications operator in Spain using the incumbent Telefónica’s unbundled fixed copper network and increasingly its own Fibre-To-The-Home (FTTH) network, which is the second largest fibre network in Spain. It has also offered retail mobile telecommunications services based on wholesale access to Orange’s mobile network. In Spain, Orange operates a mobile network, using Telefónica’s network for providing fixed telecommunication services, and has started to roll out its own FTTH infrastructure. This transaction follows the acquisition in 2014 by Vodafone of the Spanish cable company Ono.2 Orange submitted that the transaction will allow it to compete better with the two larger telecom operators, Telefónica and Vodafone.

In Spain, converging fixed-mobile offers combining mobile telecommunication services with fixed services into dual, triple and quadruple play packages have quickly become very popular. A further peculiarity of the Spanish market is that all four nationwide fixed telecommunication operators, namely Telefónica, the parties and Vodafone/Ono, are deploying next generation access (NGA)3 networks more widely across the country.

These two market features raised three challenging issues for the Commission’s assessment. First, how to define the relevant markets in the context of a swift market transition towards multiple play packages of varying compositions. Second, how to assess the effects of the merger from a forward-looking perspective when the market is in the midst of a technology transition. This aspect played a crucial role in the Commission’s assessment of claimed efficiencies. Third, in the light of both market trends, how to design a remedy that alleviates the competition concerns, whilst also being proportionate.4

Multiple play

Traditionally, different telecommunication products have been sold separately. In recent years, so-called multiple play offers have been on the rise. They combine two5 or more of the following services: fixed voice services, fixed Internet access services, mobile telecommunication services and/or TV services. In a nutshell

The Orange/Jazztel transaction takes place in a market that tipped toward fixed-mobile multiple play offers.

The forward-looking analysis included an assessment of the parties’ likely future roll-out of fibre networks with and without the merger.

Efficiency claims relating to the elimination of double marginalisation have been partly accepted.

The remedies address the concerns in a structural manner.

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2 Commission decision of 2 July 2014 in Case M.7231 – Vodafone/ Ono.
3 Definition from 2010/572/EU Commission Recommendation on regulated access to NGA: ‘Next generation access (NGA) networks’ means wired access networks which consist wholly or in part of optical elements and which are capable of delivering broadband access services with enhanced characteristics (such as higher throughput) as compared to those provided over already existing copper networks.”
4 An additional challenge related to the parallel review by the Spanish telecommunication regulator Comisión Nacional de los Mercados y la Competencia (CNMC) of the regulatory framework for wholesale access to fixed networks. In late 2014, the CNMC published a draft regulation and launched a public consultation, proposing, amongst others, to introduce wholesale access to Telefónica’s FTTH network. Given that the ultimate regulatory changes including issues such as access prices and geographic scope remained uncertain, the Commission did not rely upon the CNMC’s draft regulation for the purpose of the competitive assessment.
5 In other cases, the Commission reviewed multiple play offers consisting of at least three components; see for example Commission decision of 20 September 2013 in Case M.6990 – Vodafone/ Kabel Deutschland, paragraph 254; Commission decision of 10 October 2014 in Case M.7000 – Liberty Global/ Ziggo, paragraph 144.

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at a discount compared to the aggregated prices of the individual components.

Depending on how many of these services are combined, the resulting bundles can be distinguished as dual-play offers (mostly combining fixed voice and fixed Internet access services), triple-play offers (dual-play plus either mobile telecommunication services or TV services) and quadruple-play offers (combining all four services). 6

The following illustrates the different bundles common in Spain:

<table>
<thead>
<tr>
<th>Dual-Play</th>
<th>Triple-Play w/ mobile</th>
<th>Triple-Play w/ TV</th>
<th>Quadruple-Play</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fixed Voice</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Fixed Internet</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Mobile</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>TV</td>
<td>✓</td>
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<td>✓</td>
</tr>
</tbody>
</table>

In most markets, fixed voice services and fixed Internet access services are sold together nowadays. Technically, they are provided using the same (fixed) infrastructure: copper, cable or fibre lines.

The success of triple- or quadruple-play offers varies widely across different national markets within the EU. In Spain, multiple play offers have been particularly successful in recent years. In 2011, the vast majority of fixed Internet access lines were purchased together with fixed voice services (i.e., as dual-play bundles). The remainder was bought as stand-alone products (i.e. fixed Internet access only). Triple- or quadruple-play offers did not exist. Only two years later, the landscape completely changed and more than half of all fixed Internet access services were provided as part of a triple- or, to a significantly lesser degree, quadruple-play offer. According to data from the Spanish telecommunication regulator CNMC, in 2013 alone, more than four million new customers subscribed to a triple-play offer. That is more than a third of the entire market in terms of subscribers.

Interestingly, most triple-play bundles in Spain combine fixed voice services, fixed Internet access services and mobile telecommunication services. According to the Commission’s calculations, the trend toward triple- or quadruple-play products continued in 2014: at the end of that year, more than 60% of users had subscribed to such packages.

The main reason for this drastic shift towards multiple play offers seems to be price-related. According to the CNMC, the price of multiple play offers is 3% to 19% lower than the sum of the prices for the respective individual products. The market investigation in this case confirmed that price is by far the most important driver of convergence.

These developments raise the question of how multiple play offers should be treated from a competition law point of view. Do they form a separate market or should they be regarded as a bundle7 of products from different markets? Key to answering this question are considerations relating to demand and supply-side substitutability. 8 In particular, from a demand-side perspective, it seems likely that, should the price for the bundle exceed the sum of the prices for the individual products, a significant number of consumers would switch to buying these services individually. However, whether a sufficient number of consumers would switch in response to “a hypothetical small, lasting change in relative prices” 9 to make such increase “unprofitable because of the resulting loss of sales” 10 depends on the discount at which multiple play bundles are currently sold. For the upper end of the discount range mentioned by the Spanish regulator (19%), it seems questionable whether a small, lasting increase of 5-10% would be sufficient to induce many consumers to switch to buying individual components instead of purchasing a multiple play bundle.

If one were to conclude that multiple play bundles form one or several separate product market(s), one would also have to answer the follow-up question of which bundles belong to such separate market(s). Possible multiple play markets include notably a general market for all multiple play products, individual markets for dual-, triple- and quadruple-play products each, or combinations thereof.

In previous cases, the Commission had left open whether multiple play services are to be regarded as a market separate from the markets of the individual components. 11 In the present case, the position of the parties in a potential market for triple-play services 12 would have been stronger than in an overall market for all products including a fixed Internet access service component. However, after assessing all potential markets, including the

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6 Telefónica recently introduced quintuple-play services, which add security monitoring of customers’ premises, including access control, video cameras and remote recording via mobile applications.

7 Bundling refers to selling different products for one fixed price. Bundling products that are also sold separately is called ‘mixed bundling’, see Guidelines on the assessment of non-horizontal mergers, 2008/C 265/07; paragraph 96.

8 Commission note on the definition of relevant market for the purposes of Community competition law, 97/C 372/03, paragraphs 13 et seq.

9 Commission note on the definition of relevant market for the purposes of Community competition law, 97/C 372/03, paragraph 15.

10 Commission note on the definition of relevant market for the purposes of Community competition law, 97/C 372/03, paragraph 15.


12 As triple-play services in Spain usually include fixed voice, fixed Internet access and mobile telecommunication services, the decision did not distinguish between triple-play bundles including a mobile or a TV component.
different multiple play markets outlined above, the Commission concluded that the transaction as originally notified would have given rise to non-coordinated anti-competitive effects regardless of the precise market definition. Because the remedies address these concerns (see below) irrespective of the exact market definition, the Commission left open the precise market definition in this case.

Concerns identified in the retail markets including fixed Internet access service

This case is a so-called ‘gap case’, as the Commission’s finding of a significant impediment to effective competition was based neither on the creation of a dominant position nor on coordinated effects. As set out in the Merger Regulation, the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors may significantly impede effective competition even if the merger does not create a dominant merged entity.

As of the end of 2014, the four largest providers of fixed Internet access services, Telefónica, Vodafone, Orange and Jazztel, accounted together for more than 90% of the market in terms of revenue. Telefónica is the clear market leader with a revenue market share of more than 40%. Vodafone was, pre-transaction, the second largest operator with a market share of 18%. Orange and Jazztel had 16% and 14%, respectively. The transaction reduces the number of players operating a fixed network at national level from four to three, with the merged entity becoming number two in the market accounting for a revenue market share of around 30%. The remaining part of the market is served by the three regional cable operators (Euskaltel, R Cable and Telecable) operating in Northern Spain, as well as by largely service-based fringe firms.

Out of the four major retail providers of fixed telecommunication services in Spain, Orange and in particular Jazztel have been the two most dynamic fixed Internet services operators in recent years. Both have increased their respective market shares in terms of both number of subscribers and revenue. To assess the competitive constraints that Orange and Jazztel have exerted upon each other and on the other players, the Commission reviewed a large number of the parties’ internal documents, and looked into the evolution of market shares and gross add shares. Gross add shares in particular are an indicator of how successful a provider is in attracting new customers within the relevant period and capture better current market dynamics and market strength than the more static indicator of shares of current customers. In Orange/Jazztel, the gross add shares show that both Orange and Jazztel have attracted more customers than would be expected based on their market share. The transaction would therefore eliminate an important competitive force.

According to the Commission’s assessment, the transaction would also lower the incentives of the merged entity to compete aggressively on the market in comparison to Orange’s and Jazztel’s incentives on a standalone basis. This conclusion was mainly based on the Commission’s review of Orange’s internal documents.

In order to determine the magnitude of possible price increases resulting from the transaction, the quantitative analysis focused on two types of bundles that include fixed Internet access: dual-play and an aggregation of triple- and quadruple-play services. The analysis was based on a calibrated merger simulation approach. This approach is more extensive than techniques such as Upward Pricing Pressure (UPP) or Illustrative Price Rises (IPR), in particular because it also captures the expected pricing reaction of competitors.

Overall, the results of the quantitative analysis indicated that Orange and Jazztel impose a significant competitive constraint on each other and on the other players, in particular as regards triple- and quadruple-play products. This translates into a prediction that prices will increase significantly as a result of the transaction. The conclusions of the quantitative analysis were consistent with findings of other elements of the Commission’s investigation, such as the assessment of relevant internal documents describing the expected consequences of the transaction.

Finally, the Commission found that new entry into the retail markets involving fixed Internet access was unlikely, due to the existing entry barriers related mainly to the significant investment needed to deploy the access infrastructure for delivery of the fixed Internet services at retail level.

13 With the exception of the potential standalone quadruple-play market, given that Jazztel did not offer TV services of its own and Orange had only a very limited market share in such services.
14 See Merger Regulation, recital 25. For an in-depth discussion of gap cases and the legal test, see Competition Merger Brief, Article ‘No magic number to dial – The Commission’s review of mobile telecoms mergers’.
15 Gross adds refer to the total amount of new customers gained by each operator while net adds represent the difference between gross adds and the customers lost to the competitors.
16 The quantitative analysis focused on a combined triple- and quadruple-play potential market because of the negligible presence of the parties in the quadruple-play segment.
17 A calibrated merger simulation uses observed diversion ratios between competitors and observed margins and shares of new customers to calibrate demand and predict the likely price effects of the transaction.
18 Given that the important competitive pressure exerted by the parties prior to the merger on all other competitors would be significantly reduced post-transaction, the incentives of the other two main players, Telefónica and Vodafone, to compete will also be reduced.
Efficiencies in a market shifting toward convergence and high-speed

A merger between two firms can result in efficiencies that may alleviate or, under certain circumstances, even outweigh its anti-competitive effects. In order for the Commission to take into account any potential efficiency as a factor offsetting competitive harm, they have to fulfil three cumulative criteria set out in the Horizontal Merger Guidelines: the efficiencies should benefit consumers, be merger-specific and verifiable. The burden of proof for claimed efficiencies lies with the parties to the merger.

Orange submitted, first, that one of the main rationales of the transaction was the increased ability and incentive of the merged entity significantly to increase its FTTH roll-out, thereby competing more effectively with the two leading operators Telefónica and Vodafone. Second, Orange claimed that the merger would eliminate the double margins Jazztel had to pay to the access to Orange’s mobile services.

With respect to the first claim, the Commission rejected the parties’ efficiency claim with respect to NGA deployment. The rapid pace of rolling out four NGA networks across the country is one of the striking characteristics of the Spanish telecommunications market. The four main nationwide suppliers of fixed Internet access services (Telefónica, Vodafone, Orange and Jazztel) all have been deploying their own NGA network to the home. At the end of 2014, Telefónica had by far the largest NGA network, connecting more than 10 million houses or apartments (taken together, so-called building units). Following the acquisition of Ono, Vodafone has a network of approximately 7.5 million buildings units. Jazztel built, under a co-deployment agreement with Telefónica, a fibre network connecting approximately three million building units and Orange, under a co-investment agreement with Vodafone, a fibre network of less than one million building units.

All operators publicly announced plans to increase their NGA footprint significantly within the next few years. To decide on Orange’s first efficiency claim, the Commission had the challenging task of determining not only the likely roll-out of NGA networks by Orange and Jazztel on a standalone basis, but also as a merged entity. In its assessment, the Commission gave higher evidentiary value to internal documents discussing the future fibre deployment plans, drawn up in the ordinary course of business, than to a theoretical model prepared by the parties’ external consultants for the purposes of the merger procedure.

The Commission was able to reach a reliable estimate of the likely roll-out figures until the end of 2015 for both parties due to detailed plans available from the parties at building unit level. For the likely roll-out after 2015, the Commission relied on internal targets and objectives set out in internal strategy documents at city level. The Commission found no convincing evidence that the merger would lead to the deployment of NGA networks in a significantly larger area than the area that Orange and Jazztel would have likely rolled out without the merger.

In addition, the claimed additional fibre deployment was not deemed to be merger-specific. Fixed operators in Spain had entered into a number of co-deployment agreements for FTTH networks in recent years. Similar co-deployment agreements would still be an option for future roll-out plans.

The Commission accepted Orange’s second efficiency claim regarding the elimination of double marginalisation. Prior to the merger, Jazztel bore the cost of wholesale access to Orange’s mobile infrastructure in order to provide mobile communication services to its retail customers. The transaction reduces Jazztel’s variable costs in the provision of mobile services, as it eliminates the wholesale margin that Jazztel was paying to Orange for wholesale access to its mobile network. This efficiency claim is based on the elimination of so-called ‘double marginalisation’. These cost savings have been considered to be: (i) verifiable due to the availability of data to calculate costs, prices and margins; (ii) merger-specific, since there are no realistic alternatives or less anti-competitive ways to achieve a similar result; and (iii) they are likely to benefit consumers since these are variable cost savings and as such are likely to be passed on, to a certain extent, to end customers.

The Commission thus acknowledged that the transaction may have a positive impact, reducing Jazztel’s costs for providing mobile services to end customers. However, the Commission also established that the accepted efficiencies only marginally offset the estimated anti-competitive effects of the merger.

Divestiture and access remedies to preserve competition

In order to address the competition concerns identified by the Commission, Orange submitted a remedy aiming at facilitating the entry or expansion of a nation-wide player able to replicate the competitive pressure exercised by Jazztel and lost as a result of the transaction.

First, the remedies package accepted by the Commission includes the divestment of a coherent FTTH network covering nearly 0.7 million building units located in five of the six largest Spanish

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19 Horizontal Merger Guidelines, paragraph 78.
20 Horizontal Merger Guidelines, paragraph 87. For an in-depth analysis of the efficiencies’ criteria, see Competition Merger Brief, Issue 1/2014 – November, Article ‘No magic number to dial - The Commission’s review of mobile telecoms mergers’.
21 The term building units (BUs) comprises both residential buildings and offices. The total number of BUs in Spain is around 25 million, with the total number of residential BUs being around 18 million.
22 Notably, Jazztel and Telefónica co-deployed FTTH networks, and so did Orange and Vodafone.
23 The wholesale margin is the difference between Orange’s costs to provide network services and the charged average wholesale price.
cities, Barcelona, Madrid, Malaga, Sevilla and Valencia. Such a structural remedy is a standard way of eliminating competition concerns resulting from horizontal overlaps.

Second, the divestiture is complemented by wholesale access to Jazztel’s copper-based ADSL network for up to eight years. It gives the purchaser immediate access to a nationwide Internet access network for an unlimited amount of subscribers. While Internet access based on copper connections is expected to be gradually superseded by NGA technology, it is still by far the predominant technology today and in the near future.

The agreed wholesale access remedy has been designed with the objective of replicating the effects of a divestiture as closely as possible. The Commission has ensured that the rates and prices the purchaser has to pay per subscriber replicate the current variable cost Orange and Jazztel incur per additional subscriber. This should provide the purchaser with similar ability and incentive to compete as the parties had prior to the transaction. Moreover, the commitments provide that any fixed payment for such access (which allows Orange to monetise its investments despite the low variable access prices) can be negotiated freely between Orange and the purchaser as long as the fee does not depend on the number of subscribers acquired by the purchaser.

Third, the commitments provide that in the event the purchaser does not have access to a mobile network including 2G, 3G and 4G services, Orange commits to provide such wholesale mobile access to the selected purchaser on terms that are equal to or better than the terms it had granted to Jazztel. This element is necessary to enable the purchaser to commercialise attractive converging mobile-fixed bundled services, which are essential to compete in the Spanish market that is rapidly converging to multiple play products.

On 16 October 2015, the Spanish company Másmóvil – an MVNO that also offers fixed telecommunication services in Spain – announced that it had completed the purchase of the divested assets.

Conclusion

The telecommunication markets investigated in the Orange/Jazztel case included two interesting characteristics: a rapid shift towards multiple play bundles and swift roll-out of fibre networks by several players. While these trends can also be observed in other European telecommunication markets, the scale and pace tend to be more limited.

In acknowledging some of the efficiency claims of Orange, the Commission confirmed that vertical integration within telecommunication markets can have positive implications for consumers. These effects, however, only partly offset the competition problems created by the merger between Orange and Jazztel.

To address these concerns, the Commission accepted commitments that remedy the loss of competition for products including fixed Internet access services by divesting a FTTH network as well as giving wholesale access to Jazztel’s DSL network.

24 Since the divested network covers buildings located on parts of Jazztel’s fibre network that do not overlap, the commitments attribute to Orange an indefeasible right of use of 40% of the capacity of the divested FTTH network for 35 years against the payment of a one-time fee and a recurrent fee covering maintenance costs.

25 The wholesale ADSL access is provided as a national bitstream service with interconnection at one single point of presence. The bitstream access will use as an input the regulated direct access to Telefónica’s copper network and will also allow the purchaser to provide fixed telephony services using voice over Internet Protocol technology.

26 The lack of any capacity cap eliminates the risk that the entrant will reach the capacity limit, which could potentially undermine the entrant’s incentives to compete aggressively. This is a notable difference to the capacity-based MVNO remedies that were adopted in recent mobile telecommunication cases, where capacity was limited to a certain percentage of a network’s capacity.
Zimmer/Biomet: White-label licence as a viability add-on remedy

Eleni Gouliou and Christos Tsoumanis

Introduction

On 30 March 2015, the European Commission conditionally cleared Zimmer’s acquisition of Biomet, following an in-depth investigation. Zimmer and Biomet are two of the five leading competitors in the medical implants industry.

The transaction was initially notified on 3 June 2014, without any pre-notification contacts, and was declared incomplete by the Commission, as it did not contain all information necessary for its assessment. Zimmer submitted the missing information and the notification was deemed effective as of 29 August 2014.

The transaction was reviewed in parallel by the US Federal Trade Commission (US FTC) and the Japan Fair Trade Commission. The Commission cooperated closely with these agencies in a bid to ensure convergence in terms of both substantive assessment and remedies.

This article discusses the main aspects of the Commission’s competitive assessment as well as key points regarding remedies offered, suitability of potential purchasers and the Commission’s international cooperation with other reviewing agencies.

Orthopaedic implants: market definition

The merger affected a number of markets for joint reconstructive implants (knee, elbow, hip and shoulder implants) which are used to replace damaged joints, bone cement and bone cement accessories which are used to aid fixation of reconstructive implants, pulsed lavage, a wound irrigation system, spinal devices for correcting various spine conditions, trauma devices that treat bone fractures, and dental implants, a type of dental prosthetic.

The concerns identified related to joint reconstructive implants only. In defining the relevant product market, the investigation carried out by the Commission indicated different ways of segmenting the joint reconstructive implants, depending on the joint.

The Commission assessed the market for reconstructive knee implants by implant type (total versus partial knee implants1) and by level of intervention for which they are used (primary versus revision knee implants2). The scope of the market for extreme orthopaedics (bone cement accessories which are used to aid fixation of reconstructive implants, pulsed lavage, a wound irrigation system, spinal devices for correcting various spine conditions, trauma devices that treat bone fractures, and dental implants, a type of dental prosthetic.

1 A partial knee implant is used in surgery to replace only one part of a damaged knee. It can replace either the inside (medial) part, the outside (lateral) part, or the kneecap part of the knee. Implants used to replace the whole knee joint are called total knee implants.

2 Primary knee implants are used where an entire joint is replaced for the first time. In case of failure of the primary implant or infection, a revision implant is used.

3 In Commission decision of 27 May 2003 in case M.3146 – Smith&Nephew/Centerpulse, paragraphs 13-14, the Commission carried out its assessment based on a single product market for knee implants.

4 Extreme orthopaedics is an area of orthopaedics dedicated to providing solutions for complex revision of joint replacements and oncology.

5 With unconstrained implants there is no physical connection holding the parts of the implant together; ligaments and muscles maintain the contact between the moving parts of the implant. With semi-constrained implants, the components of the implant are connected together.
product market for elbow implants open, since the competitive assessment did not change under any of the plausible alternative product market definitions and the commitments submitted by the parties would remedy concerns in relation to each of these potential markets.

The Commission defined an overall relevant product market for hip implants on the basis of demand and supply side substitutability. This was supported by the mixing and matching that takes place between hip components of the same supplier given that all players have hip implant systems allowing such modularity. The product market definition in relation to shoulder implants was left open, since the proposed transaction did not significantly impede competition under any of the plausible alternative product market definitions.

In line with past decisions concerning orthopaedic medical devices, the Commission concluded that the geographic markets for orthopaedic medical devices are national in scope, notably due to the fact that market structures differ from country to country (in light, for example, of different public reimbursement systems and hospital purchasing behaviour) and due to the importance of local/national sales force.

The Commission’s assessment

The Commission conducted a thorough market investigation covering approximately 500 affected national markets. The investigation involved a significant number of telephone interviews with those on the customer side (key opinion leaders, national reimbursement systems, surgeons and hospital purchasing departments). A targeted market reconstruction was carried out and the Commission also examined the parties’ tender and transaction data to establish the degree and intensity of competition.

Concerns were identified in 17 national markets for partial knee implants, in 12 national markets for elbow implants and in two national markets for total knee implants. The Commission found that the knee and hip implant markets are large, mature markets with high value sales and established players. The smaller joint implant markets (elbows and shoulders) are relatively new markets which are currently small in value but which have opportunities for growth.

The Commission found that significant barriers to customer switching exist in all implant markets. Entering the market with an entirely new product, without a solid track record developed over the years, is difficult. Surgeons are reluctant to switch suppliers because this may require retraining and may materially affect their success rates. This is more prevalent in partial and revision implants, which require more complex surgery and thus additional training. Procurement takes place through tendering; however, the investigation indicated that surgeons influence the drafting of tender specifications and the hospitals’ tendering processes often accommodate surgeons’ preferences.

The in-depth market investigation confirmed that the parties were the two leading players in the market for partial knee implants. In such a concentrated market the merged entity, with significant combined market shares of above 50% and in some countries of above 90%, and significant increments of sometimes more than 40%, would become the market leader in almost every country of concern.

The elbow implants market is a small but relatively new and growing market which appears to be very concentrated. Elbow arthroplasty is a difficult surgical procedure. Fewer surgeons practice elbow arthroplasty than those who practice hip and knee arthroplasty. The parties would become the market leader in all 12 problematic countries with particularly high market shares of above 60% to above 90%. In addition, the market share increments brought about by the proposed merger would exceed 20% in most countries of concern.

As regards total knees (primary/revision), the merger would reduce the number of competitors from three to two in Denmark and from four to three in Sweden. Entry barriers in these countries are especially high because of the particularly strict requirements of national registries and health authorities.

The Commission considered that the merger would create or strengthen a dominant position in 31 national markets in total. In these markets, the merged entity would face insufficient competitive constraints from the remaining players, which were much smaller. In light of the market structure, surgeons’ preferences and barriers to switching and entry, the Commission concluded that the parties would probably be in a position, post-merger, to increase prices or otherwise worsen the conditions of competition.

Remedies

To address the Commission’s competition concerns, Zimmer offered to divest both the Zimmer Unicondylar Knee implant (ZUK) and Biomet’s Discovery Elbow (Discovery) across the EEA. Zimmer also committed to supplying the ZUK and Discovery product lines at reasonable conditions for a transitional period. This divestment effectively eliminated the overlap in the partial knee and elbow implant markets of concern.

As regards total knee implants, the parties offered to divest the Biomet Vanguard total Knee system for primary and revision implants (Vanguard Knee) in Denmark and Sweden. The Vanguard Knee is Biomet’s best-selling knee implant in these two countries. The Vanguard Knee divestment also eliminated a significant proportion of the overlap.

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The Commission’s remedies market test indicated that manufacturing the Vanguard Knee for only two countries would disproportionately increase the cost of production for the relatively small volumes and would render the business uncompetitive. In addition, the purchaser of the divestment business would not have the incentive to further develop the Vanguard Knee product line only for two countries. In light of this, Zimmer committed to granting to the purchaser of the Vanguard knee in Denmark and Sweden an EEA-wide, non-exclusive license to the rights and know-how used and needed for the manufacture, marketing and sale of an exact copy of the Vanguard Knee (under a different brand name) and for the development of Vanguard pipeline projects at the time of the transfer.

The Commission found that this EEA-wide licence would enable the purchaser of the divestment business to reach the needed scale to manufacture and further develop the Vanguard Knee viably in the two countries of concern. The larger volume could justify the investment of setting up manufacturing operations and commercial channels.

**Purchaser suitability and additional purchaser criteria**

The Commission’s remedies market test revealed a number of important criteria which the suitability of the purchaser would need to be assessed against. Experience in orthopaedic implants markets would be necessary, experience in the relevant implant market would be advantageous. Also, the market test indicated that the businesses divested would only be viable if the purchaser had an established presence or willingness to expand its presence in a significant proportion of the EEA countries where the three businesses are currently active.

In the light of the implementation risks posed by the proposed remedies, and in particular the limited pool of purchasers with suitable relevant experience which could acquire the divested businesses without causing *prima facie* competition concerns, Zimmer committed to not implementing the transaction before one or more suitable purchasers were found and approved by the Commission for all of the divested businesses.

On 13 April 2015, the Commission approved Lima (a European manufacturer and supplier of orthopaedic implants) as the purchaser of the three businesses. The Commission considered that Lima had the requisite experience in manufacturing and marketing of hip, knee, shoulder and small joint reconstructive implants as well as presence across a significant proportion of the EEA territory.

**Cooperation with US Fair Trade Commission and Japan Fair Trade Commission**

In an attempt to foster international cooperation and convergence, the Commission worked closely with the US Fair Trade Commission and the Japan Fair Trade Commission at key decision-making stages of the case.

Timing alignment of key decision-making stages of the case as well as regular discussions pursuant to waivers of confidentiality enabled effective collaboration between the Commission and the US FTC in relation to remedy design and implementation issues.

From an early stage the agencies discussed issues faced in relation to product market definition and the theories of harm, as well as the general views of market participants regarding the transaction. The agencies also kept each other informed about process in their respective jurisdictions.

There were some factual differences in terms of the competitive situation in the EEA compared to the US and Japan. For instance, whilst the Commission identified competition concerns in relation to total knee implants, in the US and Japan the respective agencies raised no concerns, given the presence of other significant players in those markets.

The Commission exchanged views with its counterparts on the types of remedies needed to address common concerns as well as potential scope of the remedies, including the need for and duration of transitional arrangements. In designing the remedy package, the Commission discussed the viability of the business proposed for divestiture and implementation risks, in particular the risks relating to the identification of a suitable purchaser, and possible ways to mitigate such risks.

Indeed, this case is a good example of competition agencies working together early on in the process with a view to identifying potential risks of inconsistent remedy implementation outcomes and possible ways to avert these. Should the parties have proceeded to propose a global remedies package, certain potential purchaser candidates might have raised *prima facie* competition concerns in the EEA and/or the US. The Commission and US FTC engaged in constructive dialogue regarding the suitability of potential purchasers. Ultimately, the parties proposed different buyers for the US and EEA divestment businesses respectively.

**Conclusion**

In short, the Zimmer/Biomet case is an interesting example of a merger where geographic markets are national because of the procurement characteristics and national registries, but where manufacturing needs scale that goes beyond individual countries. In the light of the specifics of this case, the EEA-wide Vanguard licence was considered to be an acceptable solution to boost the scale of a divested business and ensure its viability. Moreover, the case demonstrates the importance of international cooperation in complex cases.
In a nutshell

In the life science case Merck/Sigma-Aldrich, the Commission focused for the first time on "laboratory chemicals", a term that covers hundreds of thousands of specialty chemicals.

The Commission identified concerns regarding the supply of solvents and inorganics on the basis of a largely qualitative analysis based on closeness of competition. The concerns were solved in phase I with a tailored upfront buyer remedy covering the entire supply chain.

The ultimate challenge of this case related to the design of an appropriate remedy to replicate competitive pressure that existed before the transaction. The Commission concluded that the remedy needed to cover the entire value chain of laboratory chemicals supply. The reason is that the key factors for success in this field lie in setting up a sophisticated supply chain and distribution network to provide high quality products efficiently and quickly to a very fragmented customer base. These were precisely the strengths of both parties.

In this case, the Commission cooperated closely with the US Federal Trade Commission prior to notification. However, the timing for the review of the deal was not aligned. When Merck filed the transaction with the Commission, the transaction had already been cleared in the United States. Unlike the situation in the EEA, Merck was not among the biggest competitive forces in the US. Indeed, a main reason for the transaction appeared to be the reinforcement of Merck’s US footprint.

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II. Competitive analysis

Market structure, supply chain and market definition

The supply of laboratory chemicals requires building a highly specialized business model to reach efficiently a scattered customer base with a broad offer of chemicals.

The value added is not only in the manufacturing of the products, but also in additional steps such as down-filling the chemicals in small packages, controlling the customers’ quality requirements, and offering the chemicals in well-labelled, user-friendly packages. Marketing and brand awareness play an important role, brands being seen by customers as a guarantee of the products’ high quality and consistency.

Another key element of the value chain is the construction of an efficient distribution network to reach customers even within 24 hours, as these products are bought in small quantities from very wide catalogues and are not stocked by customers. In this respect, the parties had different business models. Merck was supplying its products via one of the most important distributors of life science products in Europe, VWR, which is a former subsidiary of Merck spun off in 2004. Sigma was selling directly to its customers through an e-commerce platform widely recognised as the most sophisticated in the industry.

In a market characterised by hundreds of thousands of products and where most players are active with different business models in manufacturing and distribution, market definition was a critical issue.

None of the Commission’s recent cases assessed laboratory chemicals, which was the main area of overlap between Merck and Sigma.\(^2\)

Each laboratory chemical supplied by Merck and Sigma has specific chemical composition and features so that, from the demand side, customers most often need a specific product for a specific use. However, from a supply-side perspective, evidence gathered by the Commission indicated that, with few exceptions, a competitor active in a broad family of laboratory chemicals would be capable of supplying any product within that category, switching production to the relevant products, and marketing them in the short term without incurring significant additional costs or risks. On this basis, the Commission defined separate product markets for solvents, inorganics, organics and other laboratory chemicals.

When assessing the geographic dimension of these markets, the Commission found that even if the products concerned can be transported and sold to customers throughout the EEA, there are still certain features which remain national, as witnessed by the presence of some local players, and confirmed by the persistence of price discrepancies across Member States against a trend for a broader market. The geographic market definition was thus ultimately left open.

Market investigation and qualitative analysis

One of the main challenges in assessing the position of Merck and Sigma on the relevant markets was the unavailability of reliable sources for market shares. Both the merging parties and the Commission made attempts at reconstructing the effective market situation by comparing Merck and Sigma’s revenues from the products concerned with an estimated size of the market based on available data. Any estimate, however, was subject to a wide margin of error, due for instance to the fact that suppliers in this market sometimes sell to distributors, and in other cases to final customers. The mere comparison of the revenues generated thus faced the challenge of discounting a varied distributor’s margin. Moreover, a sizeable portion of the market for laboratory chemicals is very fragmented, with several niche manufacturers offering products which, under certain circumstances and for certain purposes, compete with those produced by Merck and Sigma.

It was undisputed that Merck and Sigma were market leaders in the supply of many laboratory chemicals, and in particular of solvents and inorganics. Despite their claims that these products are widely commoditised and can be manufactured easily, the market investigation indicated that brands, quality and channels to the market play a fundamental role in the supply of laboratory chemicals.

In such a context, particularly in view of the absence of precise market shares, an important role was played by the analysis of the closeness of competition between the parties. The market investigation was conclusive in offering evidence that Merck and Sigma were not only leading suppliers of laboratory chemicals, but also each other’s closest competitor in solvents and inorganics.

Closeness of competition was assessed on the basis of a number of factors, which were ranked consistently by market participants among the main drivers of competition. The first is quality: it is fundamental for certain customers (for instance pharmaceutical companies) that the product is of the highest available quality, that it can be used in a reliable manner, and that it can ensure the consistent performance over time of a specific chemical in laboratory tests, as even a minimal variation in the product’s chemical composition or purity may affect the test result. This consideration is so important that it may also prevail over price as a parameter among certain customers, in particular because the cost of laboratory chemicals is
comparatively small compared to input costs faced by the companies that use them. Merck and Sigma were regarded as the companies that could ensure the highest quality and purity, consistency and reliability of the product and the broadest product portfolios, as well as security of supply. This enabled them to command a strong position on a market in which switching costs for customers can be very high.

Brand recognition is also a very important factor, as customers are very aware of brands, and of the different reputation for quality they convey. Merck and Sigma were referred to as the companies owning the strongest brands, associated on the market with the highest quality and purity.

The perception of market participants not only explained the leading position of the merging parties as suppliers of solvents and inorganics, but was also confirmed by Merck’s and Sigma’s own understanding of the market. Internal documents showed that each merging party regarded the other as the most significant competitor for a wide range of products.

Finally, aside from manufacturing know-how and brand reputation, the market investigation also underscored the competitive edge enjoyed by Merck and Sigma as regards access to customers. Sigma owns a very well-known and best-in-class website through which it sells a significant part of its products directly to customers. Merck operates mainly through distributors, and has a very close relationship with VWR, one of the leading distributors of laboratory chemicals in the EEA, and the leading player in several Member States. The merger would thus have led to the combination of two of the most effective channels to the market for the supply of solvents and inorganics.

The situation was not the same for other laboratory chemicals, such as organics. Not only did the market investigation reveal that the parties’ market position was not as strong as in solvents and inorganics, but there appeared to be a number of other players capable of competing and exercising a constraint on the parties following the merger.

The Commission concluded that the transaction raised serious doubts of compatibility with the internal market because the parties were the leading players for solvents and inorganics at EEA level as well as in most Member States, closely competing in offering high quality products, the broadest product portfolios, recognised brands, and having access to two of the most effective channels to the market.

Remedy design

To address the competitive concerns identified by the Commission, Merck agreed to divest a great majority of Sigma’s solvents and inorganics business in the EEA. The remedy was designed to cover the entire value chain of the products, and, being deeply embedded in Sigma’s overall laboratory chemicals business, presented interesting separation issues.

A remedy covering the entire value chain

The remedy package was designed to fully cover these essential aspects of the value chain:

1. Manufacturing. The majority of Sigma’s solvents and inorganics production was at its Seelze (Germany) site, which was shared with Honeywell International Inc. The remedy package therefore included all assets owned by Sigma in Seelze, as well as all assets and equipment solely or predominantly used at sites other than the Seelze plant, for the manufacturing of Divestment Business products.

2. Brands. Sigma was operating its solvents and inorganics business under two main brands, ‘Fluka’ (generally perceived by customers as a premium brand) and ‘Sigma-Aldrich’ (the umbrella brand covering its entire chemicals portfolio). The remedy package included worldwide rights to the Fluka brand, as well as a temporary licence to the Sigma-Aldrich brand for solvents and inorganics in order to allow for rebranding by the purchaser of the divestment business during the period of the temporary licence. To avoid brand confusion, during the rebranding period Sigma is prohibited from using the Sigma-Aldrich brand in relation to solvents and inorganics in the EEA (black-out period). Given that the business was structured around these brands, they were also instrumental in identifying the product scope, which consisted of solvents and inorganics sold under the Fluka brand worldwide (for brand consistency reasons), and under the Sigma-Aldrich brand in the EEA.

3. IP. The yardstick governing IP transfer was the relevance of Sigma’s know-how and associated IP rights for the Divestment Business: if these were used primarily or exclusively for the Divestment Business, they should be assigned to the purchaser; otherwise, they should be accessible under a royalty-free irrevocable non-exclusive licence.

4. Sales and customer relationship. In addition to the customary personnel and customer lists which were divested, a solution had to be ensured to replicate as closely as possible Sigma’s best-in-class e-commerce platform, essential to cater for a very fragmented customer base (individual public and private

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5 For brand consistency reasons, the key brand Fluka and its associated business were divested on a global basis.

4 A number of ancillary trademarks (such as Riedel-de Haën, a historical trademark which identifies production in the Seelze plant) associated to the business were also transferred.
laboratories across the EEA). Accordingly, the remedy package included all product descriptions and product-specific information displayed on Sigma’s e-commerce platform, a transitional support agreement to assist the purchaser in developing its e-commerce platform, as well as, in the meantime, an access obligation to Sigma’s e-commerce platform.5

5. **Logistics and distribution.** Part of Sigma’s success in the laboratory chemicals business lies in its efficient logistics and distribution organisation, allowing for rapid delivery of a very large catalogue of chemicals to demanding customers. In addition to the distribution contracts related to the Divestment Business, Sigma agreed to grant the purchaser temporary access to an order entry and distribution service, in particular through its distribution centres and warehouses.

Through a combination of divested tangible and intangible assets covering the entire value chain, as well as temporary access rights to Sigma’s sales and distribution organisation, the remedy package aimed at ensuring that the purchaser could swiftly replicate Sigma’s position in the relevant markets.

**An upfront buyer scenario**

The solvents and inorganics business divested in the case was deeply embedded in Sigma’s overall laboratory chemicals business. First, a number of products manufactured at the Seelze site (e.g. organics) fell outside the scope of the Divestment Business and had to be carved out. Second, a number of products which were included in the Divestment Business were manufactured at sites other than Seelze (e.g. in Buchs, Switzerland, and Steinheim, Germany).

This remedy structure, combined with certain other factors (particularly the fact that the Seelze site was shared between Sigma and Honeywell pursuant to a set of agreements, as well as the existence of a fragmented customer base for which solvents and inorganics represent only a fraction of purchases from Merck or Sigma), posed implementation risks which were mitigated through an upfront buyer clause and stringent purchaser criteria.

On 20 October 2015, Merck announced that it had agreed to sell the remedy package to Honeywell, giving the latter full control of the Seelze site.6

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5 In order to create as little disruption to the customer experience as possible, the access obligation included redirection to the purchaser’s platform (if available), as well as a disclaimer that the sales are made on behalf of the purchaser.

6 The sale of the remedy package to Honeywell is subject to the Commission’s approval and customary closing conditions, including regulatory review.
Cargill/ADM: How far would you go for chocolate?

Luca Aguzzoni, Thomas Büttner, Jean-Christophe Mauger, Jullien Sylvestre

1. Introduction

In July 2015, following a phase II in-depth investigation, the Commission cleared the acquisition of the industrial chocolate business of Archer Daniels Midland (ADM) by Cargill, subject to conditions.1

This merger brought together two of the three largest suppliers of industrial chocolate in Europe (the third one being Barry Callebaut, which has the highest share of the European market). Cargill operates seven plants and ADM operates three industrial chocolate plants in the European Economic Area (EEA).

The transaction is the latest in a chain of consolidations in the chocolate industry. In previous transactions, smaller suppliers were acquired by larger vertically integrated producers.2 However, this deal between Cargill and ADM involved two of the three major vertically integrated suppliers of industrial chocolate in Europe.3 In contrast to these three firms, smaller market participants in Europe typically have stronger national ties and are often not (or to a lesser extent) vertically integrated upstream: examples include Cémoi in France, Belcolade in Belgium and Ritter in Germany.

The Commission’s investigation showed that the transaction as notified would reduce competition in the already concentrated market for industrial chocolate and risked increasing industrial chocolate prices and reducing choice for customers (especially small and mid-sized customers) located near the parties’ German plants, where the parties’ combined market share exceeded 55%. The Commission’s approval was therefore contingent on the divestment of ADM’s plant in Mannheim (Germany).

Reconstructing the sales pattern (from origin to destination) for all main suppliers was a key element in assessing the case. This allowed for a detailed factual understanding of the geographic elements of the industrial chocolate market and of competition in the market. The assessment of the transaction also required understanding and careful analysis of present and future capacity levels of the parties, and especially of their competitors.

The chocolate value chain and the concerned product markets

Industrial chocolate is an intermediary product which is used as an input for end-consumer chocolate products such as chocolate bars, tablets, pralines, biscuits, bakery goods, ice cream and cereals (see graph below).

The chocolate value chain starts at the plantations where cocoa beans are grown, then harvested, dried and fermented. They are then processed and ground to produce cocoa liquor. Cocoa liquor can then be further pressed to separate cocoa butter (~45%) and cocoa cake (~55%), which is pulverized to produce cocoa powder. Cocoa liquor and cocoa butter together with sugar and milk powder (in varying proportions) are raw materials for the production of chocolate.

In a nutshell:

This case involved assessing the horizontal overlaps between two of the top three producers of industrial chocolate in Europe. Key elements were the reconstruction of market shares based on a customer- and plant-based definition of the geographic market, as well as the assessment of current and future capacity levels. Whilst the specific features of the market (limited number of suppliers, product homogeneity) enabled an extensive market reconstruction in this case, these features are not present in all cases.

2 M.5431 ADM/ Schokinag 27 May 2009; M.6132 Cargill / KVB, 29 April 2011.
3 Both Cargill and ADM, as well as Barry Callebaut, are industrial chocolate producers vertically integrated upstream in the production of cocoa input and cocoa sourcing. However, they are not vertically integrated downstream in the production of end-consumer chocolate-based products.
Industrial chocolate is delivered to industrial customers either in liquid form (in heated delivery trucks) or in solid form. It is then used in the production of end-consumer chocolate products such as chocolate confectionery, biscuits, bakery goods, ice cream and cereals.4

The chocolate value chain

Key concern: a significant horizontal overlap in Germany

This transaction led to horizontal overlaps in the industrial chocolate market throughout Western Europe and particularly in Germany. At national level, the merged entity would have market share above 55% in Germany. In the plant-centred catchment areas around the parties’ German plants, market share for the merged entity would be in the range of 50–60%. Furthermore, the markets for industrial chocolate around the parties’ German plants were found to be highly concentrated, and the transaction as such would have led to a sizeable increase in concentration levels as measured by the HHI indexes.

The case also involved strong vertical links which ultimately turned out to be unproblematic.

4 Whereas industrial chocolate was the main area of focus, the case also involved chocolate compound, which raised no concerns. It is a cocoa-flavoured fat-based coating and filling which is sometimes used instead of chocolate in the production of end-consumer products because of its specific product properties or its lower price.

5 M. 7510 OLAM/ADM, 10 June 2015.
2. Customer-/plant-based market reconstructions

The market reconstruction was of key importance for understanding geographic elements of the market.

Although liquid chocolate can theoretically travel relatively long distances and across national borders, the initial market investigation revealed several elements indicating that demand and physical characteristics of industrial chocolate limit the delivery distance. Cost factors and especially security of supply (to feed just-in-time production) matter.

The extent to which competition is national, regional or EEA-wide hence became one of the key points of the assessment. To analyse this key question, the Commission engaged in a market reconstruction in addition to its typical market investigation and market assessment.

The Commission collected transaction-level data (with origin and destination details, at post code level) for the years 2013 and 2014 from the parties and their main industrial chocolate competitors. The delivery patterns show that around 80% of solid and liquid industrial chocolate is sold within a distance of about 500km. In addition, liquid chocolate is transported over relatively shorter distances compared to solid chocolate (80% of liquid chocolate is sold within distances of less than 500km and 90% of liquid chocolate is sold within distances of less than 550km).

The market investigation confirmed these figures: a majority of customers explained that they rely on just-in-time deliveries, particularly because of limited storage capacities, and that therefore they source liquid chocolate over relatively short distances. Moreover, the factory reach analysis also showed the importance of national borders over the simple geographic distance between customers and plants. The analysis indicated that industrial chocolate was more likely to be shipped over longer distances within national borders rather than across them. For example, the Commission’s analysis showed that 70% of the liquid chocolate used in Germany is produced in Germany. These figures are even higher for France (76%), the UK (90%), the Netherlands (86%) and Belgium (98%) and show that cross-border purchases by customers are limited overall.

On the basis of this evidence, the Commission rejected the notifying party’s argument that the relevant geographic market was EEA-wide. Instead the evidence indicated that the relevant geographic markets corresponded to catchment areas of about 500km distance either from the parties’ plants or from the parties’ customers. As some evidence also pointed towards the existence of national markets, and as the transaction resulted in a significant impediment to effective competition both on national markets and geographic markets delineated based on a customer- or plant-centred approach, the Commission left the geographic market definition open.

The market reconstruction was a useful tool to properly assess the magnitude of trade flows of liquid chocolate from and to Germany

The market reconstruction was a key factor in this case to verify the parties’ geographic market definition and their market share estimates. While the analysis proposed by the parties had to rely on their estimates of the sales made by third parties, the Commission was able to obtain actual transaction-level data from third parties. Based on that detailed information on the origin and destination of deliveries, the Commission could adequately reconstruct market shares at national level and within catchment areas (of varying radii) around groups of customers and plants.

This helped in narrowing down the geographic areas of concern and was crucial to understanding the actual extent of each competitor’s local presence. Together with the evidence collected in the market investigation, it also helped to assess the effective competitive constraints that competitors could exert on the merging party, especially in areas around Germany. For instance, this analysis substantiated the initial finding that exports to Germany by firms not located in Germany (for instance by Italian or French producers) were minimal.

However, a useful reconstruction has to tackle substantial practical hurdles

The detailed market reconstruction was feasible in this case because there was only a limited number of suppliers and because the product was relatively homogenous. First, dealing with a small number of suppliers considerably eases the collection and processing of data (for instance with the data of 12 suppliers more than 95% of the sales around Germany were covered). Second, homogeneity of the product facilitates pooling data originating from different businesses.

More generally, the active cooperation of direct competitors is essential. Their willingness to provide precise and extensive customer data may be present initially but it can wane over time (also due to technical difficulties). Guarantees as regards confidentiality may be important; also the technical back-and-forth that may be required to refine the data may not be compatible with a tight schedule.

Extensive market reconstruction can provide useful insights into the market structure even if it would need to be complemented by other elements

The market reconstruction provided a helpful and detailed fact-based insight into the industrial chocolate market. Nevertheless, this assessment is mostly static in nature and might not necessarily represent in full possible dynamic reactions to the merger, e.g. changes in delivery patterns and incentives to serve some customers if market conditions change. The competitive assessment should still consider the incentive of the competitors to constrain possible anti-competitive effects of the merger. For this reason, the market reconstruction was followed by a
thorough competitive analysis that considered several other factors. For instance, the extent of the impact of future capacity expansion and lack of future entry also weighed heavily in the balance.

3. **Assessing current and future capacity**

During the proceedings, Cargill argued that all industrial chocolate manufacturers had increased their chocolate capacity in recent years to accommodate market growth and that rivals planned further capacity expansions. Accordingly, Cargill argued that, post-merger, these increased capacities would constrain the pricing behaviour of the merged entity (as customers could switch away from the merged entity in response to a price increase). The Commission’s assessment however indicated that this claim was untenable.

The Commission’s analysis of historical capacity development showed that more than two-thirds of past expansions had been carried out by the top three players, Barry Callebaut, Cargill and ADM. Other smaller players had either not expanded or increased capacity mainly for internal use for their downstream business. The Commission’s assessment indicated that currently most of the parties’ competitors face capacity constraints and thus do not have the immediate ability to increase supply to a sufficiently large extent to defeat a potential price increase by the parties after the transaction.

As regards future expansion, the Commission found that the vast majority of suppliers in Germany did not have any concrete expansion plans and none indicated any willingness to expand their capacity at current margin levels. The Commission considered that the plans of Barry Callebaut – the parties’ main competitor – to expand its capacity in Western Europe would not provide it with additional incentives to defeat a price increase in liquid chocolate, as its main publicly-stated objective was to develop business in emerging markets through strategic partnerships with very large customers.

In light of the significant barriers to entry and based on the Commission’s contacts with potential market entrants (including vertically integrated chocolate producers), the Commission considered it unlikely that there would be future market entry in industrial chocolate in the sales regions around the parties’ German plants. In addition, no conclusive evidence of sufficient countervailing buyer power was found.

4. **Conclusion**

This case is one of the latest examples of the Commission seeking to obtain a more accurate description of geographical elements of competition, of geographic markets and of the relative strength of the parties involved. This case shows that under suitable circumstances, an accurate market reconstruction with spatial analysis can provide for a more fact-based approach to market definition.