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Working Party No. 3 on Co-operation and Enforcement

ROUNDTABLE ON THE STANDARD FOR MERGER REVIEW, WITH A PARTICULAR EMPHASIS ON COUNTRY EXPERIENCE WITH THE CHANGE OF MERGER REVIEW STANDARD FROM THE DOMINANCE TEST TO THE SLC/SIEC TEST

-- European Commission --

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The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 9 June 2009.

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1. Introduction

1. This submission, firstly, describes the standard merger review test applied under the EC Merger Regulation by the European Commission and the background to the reform (section 1) and, secondly, provides an overview on the Commission's merger review practice before and after the introduction of this standard test (section 2). It then provides some general conclusions (Section 3).

2. The change of the test: from dominance to SIEC test

2. In December 2002, the Commission decided to reform the EU merger control system. It followed a year of consultation and debate on the basis of a Green Paper[1] which, among other issues, launched a reflection on the merits of the substantive test enshrined in Article 2 of Council Regulation (EEC) No 4064/89 ("the old Merger Regulation").[2] In particular, Article 2(3) of the old Merger Regulation provided that the European Commission ("the Commission") must appraise mergers with a view to establishing whether or not they would "*create or strengthen a dominant position as a result of which competition would be significantly impeded in the common market or a substantial part of it*". The test used at the time was therefore the so-called dominance test.

3. The Green Paper launched a debate on the effectiveness of the dominance test compared with the substantial lessening of competition ("SLC") test used in several other jurisdictions (in particular, in the USA). Respondents to the consultation argued both for and against change. Those who pleaded for a change to a SLC-type test mainly argued that the test would be more appropriate for dealing with the full range of competition problems that mergers can give rise to, and in particular that there may be a gap in the scope of the test in Article 2. In their view, it was clear that the dominance test applied to mergers creating or strengthening the leading market player (single firm dominance). It was also clear that the Commission could intervene under the notion of collective dominance against mergers in oligopolistic markets. However, they considered that the scope of application of the dominance test could not extend to concentrations giving raise to non-coordinated effects in the absence of single firm and/or collective dominance.

4. Following this debate, the solution retained by the EU legislator was to adopt the so-called substantial impediment to effective competition ("SIEC") test whilst retaining the creation or strengthening of a dominant position as a principal example of the application of the test. Article 2(3) of Council Regulation (EC) No 139/2004 ("the Merger Regulation")[3] therefore provides that the Commission must assess whether a concentration "*would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position*".

5. The new wording has the objective of providing *legal certainty,* making it clear that the test also applies where a merger results in "unilateral effects" in situations of oligopoly so as to eliminate any

1 COM(2001) 745 final, of 11.12.2001. Green Papers are documents published by the European Commission to stimulate discussion on given topics at European level. They invite the relevant parties (bodies or individuals) to participate in a consultation process and debate on the basis of the proposals they put forward.

2 Council Regulation (EC) No 4064/89 on the control of concentrations between undertakings, OJ L 395, 30.12.1989, p. 1; corrected version OJ L 257, 21.9.1990, p. 13, amended by Council Regulation (EC) No 1310/1997, OJ l80, 9.7.1997, p.1, corrigendum in OJ L 40, 13.2.1998, p. 17.

3 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.01.2004, p. 1

possible enforcement "gap".[4] Another important objective of the change of the test was to shift from a more structural approach to a more *effects-base approach* where the impact of the concentration in prices, output and other important features of the market (e.g. innovation) would be at the core of the assessment.

6. In order to provide further transparency and predictability regarding the Commission's merger analysis under the new test, the Commission published, shortly after the adoption of the Merger Regulation, a set of Guidelines on the assessment of horizontal mergers ("the Horizontal Merger Guidelines").[5] The Horizontal Merger Guidelines provide a sound economic framework for the assessment of concentrations where the undertakings concerned are active sellers on the same relevant market or potential competitors on that market. These Guidelines were complemented by the adoption in 2008 of the Guidelines on the assessment of non-horizontal mergers ("the Non-horizontal Merger Guidelines").[6] Non-horizontal mergers include vertical mergers, such as the acquisition of a supplier by a customer, and conglomerate mergers, which concern companies whose activities are complementary or otherwise related.

2.1 Horizontal mergers: anti-competitive effects covered by the SIEC test

7. The Horizontal Merger Guidelines identify two ways in which horizontal mergers may give rise to SIEC, in particular by creating or strengthening a dominant position:

- By eliminating important competitive constraints on one or more firms, which consequently would have increased market power, without resorting to coordinated behaviour (non-coordinated effects).

- By changing the nature of competition in such a way that firms that previously were not coordinating their behaviour, are now significantly more likely to coordinate and raise prices or otherwise harm effective competition. A merger may also make coordination easier, more stable or more effective for firms which were coordinating prior to the merger (coordinated effects).

8. The Horizontal Merger Guidelines establish a number of indicative *safe harbours*. Market shares which do not exceed 25% are indicative of lack of SIEC. In terms of concentration levels, the Commission is unlikely to identify horizontal competition concerns in a market with a post-merger Herfindahl-Hirschman-Index ("HHI") below 1000. Except in case of special circumstances, the Commission is also unlikely to identify horizontal competition concerns in a merger with a post-merger HHI between 1000 and 2000 and delta below 250 or in a merger with a post-merger HHI above 2000 and a delta below 150.[7]

9. As regards *non-coordinated effects*, the Horizontal Merger Guidelines set out that a SIEC may occur not only in cases where a merger removes important competitive constraints on one company liable

4 It is worth noting the explanations in this respect contained in Recital 25 of the Merger Regulation which clarifies the scope of the revised test: "(…) in the interests of legal certainty, it should be made clear that this Regulation permits effective control of all such concentrations by providing that any concentration which would significantly impede effective competition, in the common market or in a substantial part of it, should be declared incompatible with the common market. The notion of "significant impediment to effective competition" in Article 2(2) and (3) should be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned."

5 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004 at p. 5.

6 Guidelines are complemented by the Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 265, 18.10.2008, p. 6.

7 Paragraphs 18 to 20 of the Horizontal Merger Guidelines.

of creating or strengthening its dominant position but also in case of a merger in oligopolistic markets involving the elimination of important competitive constraints that the merging parties previously exerted upon each other together with a reduction of competitive pressure on the remaining competitors.[8] The Guidelines provide guidance on the factors which the Commission will consider when assessing whether significant non-coordinate effects are likely to result from a merger.[9]

10. With respect to *coordinated effects*, the Horizontal Merger Guidelines set out that a merger in a concentrated market may significantly impede effective competition through the creation or the strengthening of a collective dominant position, because it increases the likelihood that firms are able to coordinate their behaviour and raise prices without entering into an agreement.[10] The Guidelines further elaborate on the most important conditions for the coordination to be sustainable (possibility of monitoring of deviations, presence of deterrent mechanisms, reactions from outsiders not jeopardising the expected results).[11]

11. Finally, the Horizontal Merger Guidelines also deal with particular factors that could mitigate an initial finding of likely harm to competition such as countervailing buyer power, ease of market entry, failing firm defence and efficiencies.[12]

2.2 Non-horizontal mergers: anti-competitive effects covered by the SIEC test

12. In the last few years, the assessment of non-horizontal mergers under EC merger control has significantly evolved. The introduction of the SIEC test, which clarifies that it is not necessary that a merger will lead to dominance before allowing intervention to prevent consumer harm, is particularly relevant for non-horizontal mergers as they do not lead to the elimination of direct rivals.

13. The Non-Horizontal Merger Guidelines provide guidance, based on the European Courts case-law and the Commission's own experience, on the Commission's approach to vertical mergers and conglomerate mergers. As explained in the Guidelines, vertical mergers involve companies operating at different levels of the supply chain; conglomerate mergers are mergers between firms that are in a relationship which is neither horizontal (as competitors in the same relevant market) nor vertical (as suppliers or customers)[13]. The general principle recognised by the Commission is that such mergers are

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8 Paragraph 25 of the Horizontal Merger Guidelines.

9 Paragraphs 27 to 38 of the Horizontal Merger Guidelines. The Commission will consider notably whether (i) the merging firms have large market shares or are close competitors; (ii) customer have limited possibilities of switching suppliers; (iii) competitors are unlikely to increase supply if prices increase; (iv) the merged entity is able to hinder expansion by competitors; (v) the merger eliminates an important competitive force.

10 Paragraph 39 of the Horizontal Merger Guidelines.

11 Paragraph 41 of the Horizontal Merger Guidelines which codifies the guidance provided by the Court of First Instance in the *Airtours* judgment (Case T-342/99 *Airtours v Commission*, judgment of 6.06.2002).

12 Following the review of the standard test and the adoption of the Horizontal and Non-Horizontal Merger Guidelines, the Commission integrates the assessment of efficiencies when analysing an operation under Article 2 of the Merger Regulation. The Commission considered that there was not a need to change the wording of the substantive test in the Merger Regulation in order to take into account of efficiencies when assessing a concentration. Indeed, Article 2(1)(b) of the Merger Regulation (unchanged after the 2004 reform) states that the Commission shall take account in its competition assessment, inter alia, of "the development of technical and economic progress provided it is to consumers' advantage and does not form an obstacle to competition".

13 Paragraphs 4 and 5 of the Non-Horizontal Merger Guidelines.

generally less likely to raise competition concerns than horizontal mergers. First, they do not entail the loss of direct competition between the merging parties and second, they provide substantial scope for efficiencies.[14] It should be recalled that the ultimate goal pursued by the Commission when assessing mergers is consumer welfare. This means, in the context of non-horizontal mergers, that the exclusion or marginalisation of competitors in a certain market is not of itself sufficient to establish a finding of incompatibility. However, in some circumstances also such mergers may give rise to competition concern.

14. The Non-Horizontal Merger Guidelines set out two main ways in which non-horizontal mergers may lead to SIEC:

- Non-coordinated effects may principally arise when non-horizontal mergers give rise to foreclosure, i.e. any instance where actual or potential rivals' access to supplies or markets is hampered or eliminated as a result of the merger, thereby reducing these companies' ability and/or incentive to compete. As a result of such foreclosure, the merging companies (and, possibly, its competitors) may be able to profitably increase the price charged to consumers. These instances give rise to a SIEC.[15]

- Coordinated effects arise where the merger changes the nature of competition in such a way that firms that previously were not coordinating their behaviour, are now significantly more likely to coordinate to raise prices or otherwise harm effective competition. A merger may also make coordination easier, more stable or more effective for firms which were coordinating prior to the merger.[16]

15. The Guidelines also establish certain indicative *safe-harbours*: to give rise to a risk of SIEC the merged entity must have a significant degree of market power (which does not necessarily amount to dominance) in at least one of the markets concerned. Moreover, the Commission is unlikely to find concern in non-horizontal mergers where the market share post-merger of the new entity in each of the markets concerned is below 30% and the post-merger HHI is below 2000.[17]

16. As regards the assessment of *non-coordinated effects* of vertical mergers, the Commission follows a three-step analysis: first, the Commission will assess whether the merged entity would have, post-merger, the ability to substantially foreclose access to inputs, second, whether it would have the incentive to do so, and third, whether a foreclosure strategy would have a significant detrimental effect on competition downstream or upstream. In practice, these aspects are often examined together since they are closely intertwined.[18] Other non-coordinated effects refer to access to sensitive information regarding rivals' upstream or downstream activities.[19] In case of conglomerate mergers, the Commission's main concern is the foreclosure or rivals, through e.g. bundling and tying.

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[14] Paragraphs11 to 13 of the Non-Horizontal Merger Guidelines.

[15] Paragraph 18 of the Non-Horizontal Merger Guidelines. The Guidelines distinguish two forms of foreclosure. The first is where the merger is likely to raise the costs of downstream rivals by restricting their access to an important input (*input foreclosure*). The second is where the merger is likely to foreclose upstream rivals by restricting their access to a sufficient customer base (*customer foreclosure*), see paragraph 30 of the Non-Horizontal Merger Guidelines.

[16] Paragraph 19 of the Non-Horizontal Merger Guidelines.

[17] Paragraphs 23 and 25 of the Non-Horizontal Merger Guidelines.

[18] Paragraph 32 of the Non-Horizontal Merger Guidelines.

[19] Paragraph 78 of the Non-Horizontal Merger Guidelines.

17. For *coordinated effects*, the Non-Horizontal Merger Guidelines follows the analytical framework established by the Horizontal Merger Guidelines (see above paragraph 0).

3. Application of the test to date

18. The present section takes stocks with the Commission's merger review after the introduction of the SIEC test and the application of its Horizontal and Non-Horizontal Merger Guidelines. It is argued that the application of the new test is a matter of continuity rather than discontinuity (2.1), that the Commission has continued to emphasise an effects-based approach rather than a structural one (2.2), that the Commission's instruments for reviewing mergers are clear, comprehensive and appropriate as illustrated by recent decisional practice (2.3), and that its intervention rate remains relatively stable after the introduction of the SIEC test (2.4). Finally, the Commission's remedies policy after the introduction of the SIEC test is briefly discussed (2.5).

3.1 Continuity with the Commission practice under the previous test

19. A review of the Commission's decisional practice shows that there has been a high degree of continuity and a smooth transition between the application of the old dominance test and the new SIEC test. The Commission already applied, prior to the entry into force of the new test and under the old Merger Regulation, an effects-based approach. This approach is firmly rooted in a dynamic concept of market power rather than on a simple analysis of market structures. This can be illustrated by cases such as *Volvo/Renault* (2000), *Philips/Agilent Health Care Solutions* (2001), *GE/Instrumentarium* (2003), *EDP/ENI/GDP* (2004) and *Oracle/PeopleSoft* (2004).

20. In *Volvo/Renault*[20] and in *Philips/Agilent Health Care Solutions*[21] the merged entity's relevant market shares would have been significant. The Commission however did not raise serious doubts as to the compatibility of the concentration with the Common market in light of the evidence put forward by the parties and confirmed by the market investigation that the parties were not each other's closest substitutes.[22]

21. The Commission did however raise competition concerns in *GE/Instrumentarium*[23] where the parties' combined position in a number of Member States would have been particularly strong in the market for perioperative monitors (although the overlaps were limited).[24] The Commission assessed whether the merger, by reducing the number of players from four to three, would bring about a significant change to the market. In view of the specific characteristics of this market (e.g. purchases through tenders and limited overlaps) the Commission supplemented its qualitative assessment with statistical and econometric analyses of past tenders. These analyses showed that the new entity would not only hold high market shares post-transaction but would also remove the significant competitive constraint that the two merging firms exerted on each other prior to the operation. Fringe players played a minor role and customers did not appear to be in a position to exercise a significant countervailing buyer power. The Commission thus concluded that the merged entity would have had the ability to act to an appreciable

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20 Case No COMP/M.1980 Volvo/Renault, decision of 1.09.2000.

21 Case No COMP/M.2256 Philips/Agilent Health Care Solutions, decision of 2.03.2001.

22 In Philip/Agilent Health Care Solutions it was notably found that market shares fluctuated due to innovation, the market was not capacity constrained, customers did not face disproportionate switching costs and market entry by second tier suppliers could be expected in case of price increase.

23 Case No COMP/M.3083 GE/Instrumentarium, decision of 2.09.2003.

24 Market shares of above 80% and incremental market share increase ranging from 5% to 15% depending on the country.

extent independently from competitors and ultimately consumers, and therefore to significantly raise prices charged to consumers.

22. In *Oracle/PeopleSoft*[25] the Commission cleared the concentration in Second Phase. The merger reduced the number of main suppliers of certain categories of high-function software purchased by large enterprises from three to two (Oracle/PeopleSoft and SAP who would have remained the largest player). However, the Commission found, on the basis of bidding data put forward by Oracle, that it could not be excluded that other suppliers were active in the market. Evidence showed that other vendors such as Lawson, IFS, Intentia and QAD had won bids to supply systems to large and complex enterprises in competition with the parties and SAP. Also, there was evidence of Microsoft entering the market. The Commission also carried out various econometric tests with this data which revealed that Oracle's bidding behaviour was not particularly affected by the specific identity of the rival bidders in the final rounds of a given bidding contest, i.e. the presence of PeopleSoft or SAP as rival did not necessarily give rise to more aggressive discounting compared to Oracle's behaviour vis-à-vis other bidders. On the basis of this bidding data and other evidence on file, the Commission concluded that the merger would not give rise to competition concern also under a broader SIEC analysis. In view of the fact that the conclusion of the analysis in this case eliminated any competition concern it was not necessary to take a position on whether the old test would have allowed it to intervene against a concentration where the merging entity was not the market leader. Thus the, issue as to whether the old test may have prevented the Commission from conducting an unilateral effects analysis in such circumstances did not need to be addressed.

23. *EDP/ENI/GDP*[26] is a good example of a case analysed under the old Merger Regulation but which applies the current analytical framework for treating non-horizontal mergers. The merger involved the proposed acquisition of Gás de Portugal (GDP), the incumbent gas company, by both Energias de Portugal (EDP), the incumbent electricity company, and ENI, an Italian energy company. The case was a vertical one to the extent that gas-fired power plants are a source of production of electricity. Gas is also an important input because it represents one of the main production costs of these plants. Both EDP and GDP, as incumbents, held dominant positions pre-merger in the electricity and gas sectors, respectively. In the electricity market, the Commission considered that the merger would have resulted in input foreclosure because EDP would have had both the ability and incentives to raise its rival's costs, either by increasing its prices and/or by managing the constraints in gas supply to the detriment of the latter. Moreover, the case merger would have given rise to significant horizontal anti-competitive effects by removing GDP as the best-place potential competitor on the various electricity markets concerned. On the upstream gas markets, the Commission found that the merger would have foreclosed all gas demand (customer foreclosure) on the distinct markets for gas supply to gas-fired power plants and to local distribution companies, which could otherwise have been challenged by potential competitors of GDP. This was due to the fact that EDP would have been a significant customer of gas for its gas-fired power plants. Post-merger, EDP would have had an incentive to procure gas from its subsidiary GDP rather than from potential new entrants.

24. The above examples provide a good indication that the Commission was receptive to examining effects of transactions well beyond post-merger market structures also prior to the introduction of the SIEC test. Furthermore, as illustrated by the *Oracle/Peoplesoft* case, it was not necessary for the Commission to take a final position as to any potential "legal gap" in the standard test under the Merger Regulation.

3.2 Continued focus on effects with the SIEC test

25. As noted above, one of the objectives of the introduction of the SIEC test was to emphasise the Commission's commitment to shift from a somewhat structural approach to a more effects-base approach.

[25] Case No COMP/M.3216 Oracle/PeopleSoft, decision of 26.10.2004.

[26] Case No COMP/M.3440 EDP/ENI/GDP, decision of 9.12.2004.

The Commission relies less on structural factors (such as market shares, concentration levels) and more on the assessment of whether competitive constraints are eliminated by the merger taking into account market characteristics (i.e. product substitutability, capacity constraints, elimination of an important competitive force, hindrance to competitors' expansion etc.).

26. In applying this effects-based approach, the Commission has increasingly engaged in a fine-tuned competition analysis. On the one hand, it has dismissed competition concerns despite the high combined market shares of the parties in certain cases, considering the competitive constraints to the mergers which showed that these mergers were unlikely to have a significant negative impact on consumers. For instance, in some cases, the Commission found that the concentration involved the combination of *distant substitutes* and therefore would not give rise to concern, e.g. *Bayer Healthcare/Roche*[27] (2004), *Amer/Salomon*[28] (2005) *IBM/Telelogic*[29] (2008). In other cases, it was demonstrated that the *absence of capacity constraints* among competitors would act as a sufficient competitive constraint on the parties to the concentration, e.g. *Johnson&Johnson/Guidant*[30] (2005), *Bertelsmann/Springer/JV*[31] (2005), *Norddeutsche Affineri/Cumerio*[32] (2008), *Arsenal/DSP*[33] (2009) and *Hexion/Huntsman*[34] (2008).

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27 Case No COMP/M.3544 Bayer Healthcare/Roche, decision of 19.11.2004. In the market for plain antacids and H2 antagonists, the parties combined market share in Austria would have been about 55%-60%. However, the Commission dismissed competition concerns based on the fact that Bayer/Roche's products were relatively distant substitutes, two close substitutes to Bayer's product will remain after the merger an three potential entrants exist.

28 Case No COMP/M.3765 Amer/Salomon, decision of 12.10.2005. In the Austrian market for alpine skis, the combined market share of the parties reaches 40%-50%, giving them a lead over their strongest competitors. However, the Commission dismissed a SIEC by unilateral price increases considering that compared to the remaining brands the parties were not close competitors. Since Austrian consumers have strong preferences for "Austrian" brands as well as for ski brands with a "racing" image, mainly other "Austrian" ski brands like Fischer and Head which also provide a stronger "racing" image than the "French" ski brand of Salomon are seen to be the closest competitors of Atomic. Taking further into account that the retailers' brand portfolio in average comprises 5 to 7 ski brands, the Commission considered the major competitive constraints on the merging parties as not being significantly affected by the transaction. In particular, the merged entity would not have a leeway to increase prices unilaterally because customers would be able and willing to switch to competing brands.

29 Case No COMP/M.4747 IBM/Telelogic, decision of 05.03.2008. The activities of IBM and Telelogic mainly overlaped in the markets for modelling and requirements management tools. The Commission's in-depth investigation, which included a detailed analysis of win/loss data, revealed that IBM's and Telelogic's modelling and requirements management products are not close substitutes, as they generally address different types of customers and different needs. Therefore, the removal of the competitive constraints between IBM and Telelogic as a result of the proposed transaction would not allow the merged entity to increase prices post merger.

30 Case No COMP/M.3687 Johnson&Johnson/Guidant, decision of 25.08.2005. In the coronary drug eluting stents (DES), there were only two major suppliers world-wide, J&J and Boston Scientific, plus a number of imminent entrants, including Guidant. In its investigation the Commission had to assess whether by eliminating Guidant as a potential competitor, the merger would remove the major competitive constraint in the DES market. The investigation has revealed that, while Guidant would likely have been one of the key players in the market for DES, other new entrants, primarily Medtronic and Abbott, will also be likely to exert a significant competitive constraint, compensating for the loss of competition resulting from J&J's acquisition of Guidant.

31 Case No COMP/M.3178 Bertelsmann/Springer/JV, decision of 3.05.2005. The market investigation revealed that despite high market shares the joint venture will not be able to increase prices as its competitors could readily expand their capacity allocated to magazine printing and thereby exert effective competitive constraints. In addition, the joint venture will face potential competitors on the German market

27. Conversely, in some cases the Commission identified non-coordinated effects although the merged company's market share was similar or even lower than its competitors. This was the case in concentrations involving *close substitutes* (e.g. *Novartis/Hexal*[35] (2005), *Luvata/Eco*[36] (2007) and *Fortis/ABN Assets* (2007)[37]) or where the concentration would have *eliminated an aggressive competitor (e.g. Linde/BOC*[38] (2006), *EDF/British Energy*[39] (2008)) or the *most likely new entrant* (e.g. *RCA/MAV Cargo*[40] (2008)).

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for rotogravure printing of magazines in particular from printers based in The Netherlands, France and Italy.

32 Case No COMP/M.4781 Norddeutsche Afinnerie/Cumerio, decision of 23.01.2008. In the market for copper shapes, the merged entity's market share would be of 50%-60%, becoming the largest supplier. The Commission however did not raise competition concerns considering the competitive constraints on the market for copper shares coming from the remaining capacity of competitors and the competitive pressure exerted by downstream markets of semi-finished copper products.

33 Case No COMP/M.5153 Arsenal/DSP, decision of 9.01.2009. In this case, the Commission dismissed competition concerns in sodium benzoate were the merged entity would become the sole producer in the European Economic Area ("EEA") with a market share of about 60%-70% because it considered that market shares were not correlated with market power in view of (i) the presence of Chinese produces which constituted a constraint that would discipline the merged entity post-transaction should it intend to increase or increased prices above a competitive level and (ii) important spare capacities of the production of sodium benzoate.

34 Case No COMP/M.4835 Hexion/Huntsman, decision of 30.06.2008. In this case, the Commission did not find the concentration to raise significant anti-competitive effects in the Bis-F LER market despite the parties combined market share at EEA level above 80% (and between 40%-60% at world-wide level). The Commission took into account the fact that (i) competition from blends was likely to mitigate any market power of the parties; (ii) significant spare capacity was currently available inside and outside the EEA and further competitive pressure emanated from increasing imports of blends into the EEA and (iii) customers had technical alternatives in order to substitute the use of Bis-F LER by Bis-A LER.

35 Case No COMP/M.3751 Novartis/Hexal, decision of 27.05.2005. In OTC topical anti-rheumatics in Germany, the merger would have combined the leading branded product - “Voltaren” of Novartis - with the leading generic “Diclac” of Hexal. The Commission’s market investigation revealed that both medicines are seen as close substitutes by consumers.

36 Case No COMP/M.4750 Luvata/Eco, decision of 03.08.2007. In this case, the Commission examined the horizontal overlaps in the coil markets, where both companies where active as suppliers. The Commission's market investigation revealed that Eco and Luvata were the number one and number two suppliers at the European level and the next competitor has a very different market positioning.

37 Case No COMP/M.4844 Fortis/ABN Assets, decision of 03.10.2007. In Commercial Banking, the proposed merger would combine the first and the fourth largest banks in the Dutch market, which was already concentrated. The Commission had concerns in the banking markets for commercial customers in the Netherlands. The market investigation confirmed Fortis' role as an aggressive competitor who had an incentive to be an active competitor in order to expand its market share, despite substantial barriers to entry and expansion. Post-merger, Fortis would have become a market leader instead of a challenger.

38 Case No COMP/M.4141 Linde/BOC, decision of 06.06.2006. In this case, the proposed merger would have crated a dominant player in various Polish gas markets and would strengthen BOC’s dominant position in the UK markets. Moreover, Linde was a recent entrant in the wholesale market for helium, after having acquired significant direct access to helium sources, and had competed aggressively to expand its position on this market. The Commission’s market investigation showed that after the acquisition of BOC, one of the three largest global wholesalers, Linde would no longer have had the same incentives to compete. Finally, by making Linde a partner in a number of Asian Joint Ventures currently controlled by Air Liquide and BOC, the transaction would have brought about important structural links between the two leading European players.

3.3 Recent Commission decisional practice under the SIEC test

28. Below is an overview of some examples of the Commission's recent practice in applying the SIEC test and the Horizontal and Non-horizontal Merger Guidelines. As regards cases raising *horizontal effects* below is a brief description of recent cases where the Commission applied the *unilateral effects theory* (*Ryanair/Aer Lingus*, *StatoilHydro/ConocoPhillips, EDF/British Energy, T-Mobile Austria/tele.ring and BASF/CIBA*) and found *co-ordinated effects* (*ABF/GBI Business*).

29. The *Ryanair/Aer Lingus*[41] case involved a hostile takeover by Ryanair over Aer Lingus. The Commission found that the acquisition would have led to very high market shares on more than 30 routes from/to Ireland, reducing choice for consumers and exposing them to a high risk of price increases. The merger would have combined two airlines with a similar operation model ("low-frills") and with a significant presence in particular at the Dublin Airport, where they would together account for approximately 80% of European short-haul traffic. During the investigation, the Commission complemented the qualitative evidence with substantive quantitative evidence (e.g. customer survey at Dublin Airport and detailed econometric analyses) in order to demonstrate that in the present case high market shares actually translated into a SIEC. The decision addressed *inter alia* whether Ryanair and Aer Lingus were indeed constraining the pricing policy of each other and whether the efficiencies claimed by Ryanair were acceptable. Based on these findings, the Commission ultimately prohibited the transaction in June 2007. It was the first prohibition decision under the new Merger Regulation and the first time an airline merger was prohibited.

30. The *StatoilHydro/ConocoPhillips*[42] case involved the acquisition by StatoilHydro ("SH") of the Scandinavian petroleum business of ConocoPhillips ("JET"). Both parties are active in the markets for retail sales of motor fuel, operating under the Statoil and JET brands respectively. The Commission's in-depth investigation concluded that the operation would have amounted to a SIEC in the markets for retail sales of motor fuels in Sweden and Norway. In both markets, the proposed merger would have removed the competitive constraint that JET (perceived as a low-cost operator) exerted on SH's pricing in markets with high barriers to entry. The merged entity would thus be in a position to exercise unilateral market power. The Commission ultimately approved the operation subject to conditions.

31. In *EDF/British Energy*[43] the activities of EDF and British Energy overlapped at the levels of generation and wholesale as well as the supply of electricity to industrial and commercial customers in the UK. The Commission found during its investigation that the transaction would have been likely to raise serious competition concerns in the wholesale electricity markets. In these markets, the combined entity would not have extremely high market shares (below 30%). However, the Commission raised two

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39 Case No COMP/M.5224 EDF/British Energy, decision of 22.12.2008. See a description of the case at paragraph 0.

40 Case No COMP/M5096 RCA/MAV Cargo, decision of 25.11.2008. This case concerned the acquisition of MÁV Cargo by RCA in a consortium together with GySEV, an integrated rail and infrastructure company with its own rail network located both in Austria and in Hungary. GySEV is active in rail passenger and freight transport in Austria and Hungary with a focus on rail freight cross-border transport. The Commission identified serious competition concerns because the proposed merger would have resulted in removing the closest potential competitor for RCA on the Hungarian rail freight transport market and for MÁV Cargo on the Austrian one. In all these three cases, the Commission ultimately approved the operations in view of the commitments submitted by the parties.

41 Case No COMP/M.4439 Ryanair/Aer Lingus, decision of 27.06.2007.

42 Case No COMP/M.4919 StatoilHydro/ConocoPhillips, decision of 21.10.2008.

43 See above footnote 39.

concerns. First, due to the combination of the flexible generation portfolio of EDF and the base-load generation portfolio of British Energy's nuclear power plants, the proposed transaction could have made it easier for the merged entity to withdraw electricity supplies from the market (out of its flexible production) in order to increase prices. Second, the combination of the short generation position of EDF and the long generation position of British Energy could translate in an internalisation of the power generation output that absent the merger would have been sold to the market, leading to a decrease of liquidity which could have had negative effects in both the wholesale and the retail supply markets. The Commission approved the operation after a First Phase investigation, subject to conditions.

32. It is worth noting the Commission decision in the *T-Mobile Austria/tele.ring*[44] case as a representative example of applying the SIEC test to an undertaking which would not become the market leader after the merger. The Commission carefully analysed the effects of the merger, in particular the role that tele.ring played pre-merger as a maverick. The case involved the acquisition by T-Mobile a subsidiary of Deutsche Telekom, of the Austrian mobile phone operator tele.ring. The operation raised competition concerns in the Austria retail market for the provision of mobile telephony services to end customers. Pre-merger, four main suppliers operated in this market in Austria. The merged entity would have become the second largest operator with a market share of 30%-40% slightly below Mobilkom (35%-45%).

33. The Commission focused on the non-coordinated effects of the proposed operation where it concluded that the concentration would significantly impede effective competition due to the elimination of tele.ring as an independent operator[45]. The Commission first analysed tele.ring's past competitive behaviour on the basis of the market shares (tele.ring's shares had doubled in less than three years), the switching rates (60% of those customers switching from Mobilkom and T-Mobile went to tele.ring) and the pricing behaviour (prices had gone down and tele.ring had offered its services at significantly lower prices per minutes than the other operators). The Commission therefore concluded that tele.ring was the most active player in the market, exerted considerable competitive pressure in particular on the two largest operators and had a crucial role in restricting their pricing behaviour.

34. The Commission also analysed the incentives of the operators to price aggressively in order to attract new customers. Small operators like tele.ring had an incentive to price aggressively to gain customer base. Conversely, operators with large base do not offer price cuts because this would reduce the profitability of the existing customer base. The Commission concluded that the merger would increase T-Mobile's number of customers further thereby strengthening its incentive to focus on the profitability of its existing customers instead of aiming at attracting new customers[46]. Finally, the Commission analysed the behaviour of other operators post-merger and the expected behaviour of tele.ring absent the merger. It concluded that no other operator could take over the role of tele.ring and that tele.ring would continue, absent the merger, its aggressive pricing policy to gain customer base.

35. Similarly, in *BASF/CIBA*[47] the Commission raised unilateral effects concerns in an oligopolistic market where the merged companies were not the leading suppliers post-transaction. The production and

44 Case No COMP/M.3916 T-Mobile Austria/Tele.ring, decision of 26.04.2006.

45 The Commission left open the conclusion of coordinated effects in view of the commitments proposed by T-Mobile.

46 The evidence showed that small network operators have an incentive to use the network capacity in full and therefore build a customer base in order to recoup investments. This incentive reduces once the customer base is larger because an aggressive pricing policy reduces profitability of the existing customer, as the favourable conditions will have to be extended to the existing customers at some point. Therefore, tele.ring had in the past incentives to adopt an aggressive pricing policy. T-Mobile and Mobilkom did not have however reduced its market prices aggressively.

47 Case No COMP/M.5355 BASF/CIBA, decision of 12.3.2009.

sale of dimethylaminoethyl acrylate (DMA3) has five suppliers at the EEA-level, BASF is the number two supplier (20%-30%) and Ciba the number three with a market share below 5%. The leading supplier is Arkema with (60%-70%). Other two producers have market shares below 5%. The Commission considered it unlikely that in the post-merger market situation, where only Arkema and the merged entity would remain as suppliers, the latter would be prevented from raising prices unilaterally, even if Arkema would have spare capacity. The Commission considered that the merged entity, and even more so Arkema, would both benefit from higher prices. The commission did not have indications that there could be constraints from other producers of DMA3. The Commission cleared the operation in First Phase in view of the commitments offered by BASF.

36. A theory of harm based on *coordinated effects* was raised in *ABF/GBI Business*[48]. The Commission approved the operation in Second Phase, subject to conditions. Both ABF and GBI are active in the production and sale of different types of yeast. In the markets for compressed baker's yeast in Spain, Portugal and France, the proposed transaction would have reduced the number of major competitors from three to two, with Lesaffre being the only remaining major competitor besides the merged entity. On the basis of the evidence gathered during the Second Phase market investigation, the Commission concluded that there were strong indications that the elimination of GBI as an independent operator and the emergence of a quasi-duopolistic market structure with two large compressed yeast producers would very likely give rise to coordinated effects in Spain and Portugal. In reaching this conclusion, the Commission carried out a three step analysis on the basis of the European Courts case law on coordinated effects and the Horizontal Merger Guidelines: (i) it assessed the presence of market conditions conducive to tacit coordination; (ii) it identified the likely mechanism for tacit coordination and the resulting degree of tacit coordination that can be expected in the absence of the merger; and (iii) it assessed the extent to which the merger significantly impeded effective competition by making the existing degree of tacit coordination easier, more stable or more effective.

37. As regards *non-horizontal effects*, two recent cases bear mention as good examples of how the Commission has applied the SIEC test and its Non-horizontal Merger Guidelines to concentrations involving parties that are not each others direct rivals: *TomTom/Tele Atlas*[49] and *Nokia/NAVTEQ*.[50]

38. Both cases involved the vertical integration of one of the two suppliers of navigable digital maps (Tele Atlas and NAVTEQ) to the downstream competitors of the purchasers (TomTom and Nokia) who embed digital maps in the devices they manufacture (i.e. Portable Navigation Devices (PND) and mobile handsets) in order to provide their customers with navigation solutions. Tele Atlas has a market share of more than 50% in the upstream market, NAVTEQ being the only other provider of navigable digital map databases with a similar coverage and quality level. None of the upstream suppliers was therefore "dominant" in the navigable digital maps market but had a significant degree of market power.[51]

39. Both transactions nevertheless raised potential concerns of input foreclosure. The theory of harm relied on *the increase in market power* of the remaining supplier of navigable digital maps, which was not party to the transaction, and its capacity to increase its prices. The Commission analysed the ability and in particular the incentive of the merged entities to foreclose their downstream competitors, as well as the overall effect in downstream markets. As regards ability to foreclose, in *TomTom/Tele Atlas* the Commission concluded that the merged entity would have the ability to increase prices or degrade quality/delay access for some PND manufacturers and navigation software providers competing with

48 Case No COMP/M.4980 ABF/GBI Business, decision of 23.09.2008.

49 Case No COMP/M.4854 TomTom/Tele Atlas, decision of 14.05.2008.

50 Case No COMP/M.4942 Nokia/NAVTEQ, decision of 2.07.2008.

51 Paragraph 23 of the Non-Horizontal Merger Guidelines.

TomTom. In *Nokia/NAVTEQ*, the Commission left open the question with regard to the ability of the merged entity to foreclose its downstream competitors.

40. In both cases, the Commission concluded that the merged entity would not have the incentive to foreclose their downstream competitors. In reaching this conclusion, the Commission closely followed the Non-Horizontal Merger Guidelines. In *Nokia/NAVTEQ* the economic analysis conducted by the Commission concluded that, under a foreclosure strategy, the merged entity would only capture relatively limited sales downstream by increasing map database pricing to Nokia's competitors and the loss of revenue due to decreasing sales of map databases would not be replaced by additional sales of mobile handsets. A similar conclusion was reached in *TomTom/Tele Atlas* as regards limited additional sales of PND.[52]

41. Finally, the Commission analysed the effects of the merger in the downstream markets. In both cases, it concluded that the effects would be relatively limited. Several factors tended to limit the price increase that could be imposed by either Tele Atlas or NAVTEQ on their downstream competitors and eventually on consumers, in particular the low percentage of the price of a map database in the PND or mobile handset prices, the evidence regarding limited pass-through, the limited switching costs for customers and the availability of other navigable digital map suppliers.

42. As illustrated by the above cases, the Commission decisional practice under the SIEC test and its Horizontal and Non-horizontal Merger Guidelines has involved the review of concentrations raising horizontal or non-horizontal effects across a great variety of scenarios. These instruments have provided a comprehensive, appropriate and clear analytical framework for this purpose. In applying this framework, the Commission has pursued, on a case-by-case basis, clearly defined theories of harm on the basis of sound economic theory.

43. Finally, the merits of the SIEC test in making clear that the Commission can intervene against any unilateral effects scenario is apparent not only from cases raising horizontal issues such as *T-Mobil/Tele.ring* and *BASF/CIBA* but also from non-horizontal mergers such as *TomTom/Tele Atlas* and *Nokia/NAVTEQ*, where the Commission has assessed the competitive impact of vertical integration in oligopolistic markets.

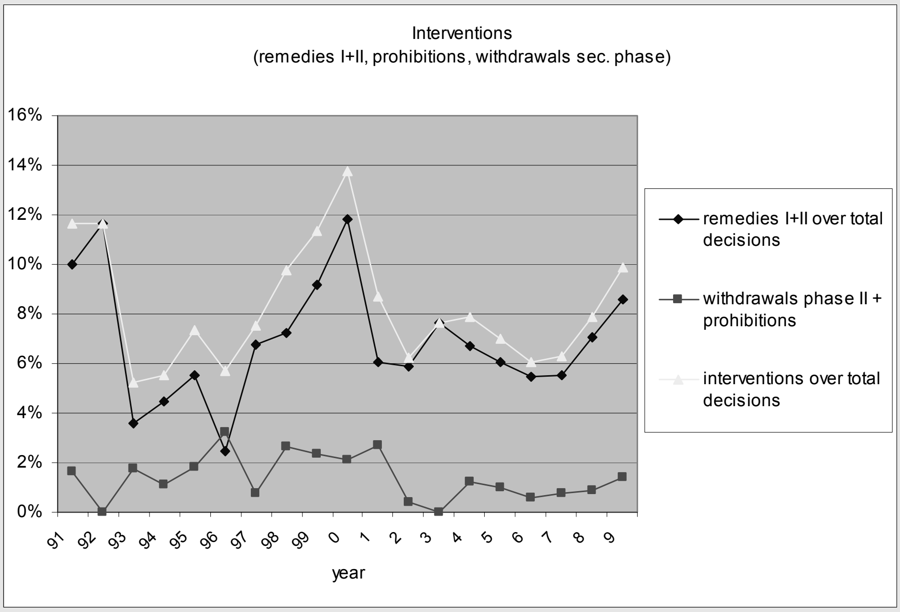
3.4 Stable intervention rate under the SIEC test

44. It should be emphasised that the Commission reviews each case on its own merits and that its goal is not that of achieving a certain intervention rate. Fluctuations in the intervention rate will depend on numerous factors such as the number of cases notified each year and the issues raised by these cases. Nevertheless, statistics on the intervention rate can give one indication on whether the introduction of the SIEC test has had a material effect on the Commission's enforcement record. In this regard, in order to estimate the intervention rate, it is appropriate to take into account the number of prohibitions, conditional

52 When considering the profitability of an input foreclosure strategy, the merged entities face a trade-off between the profit lost in the upstream market due to a reduction of input sales and the profit gained on their respective downstream markets by raising their rivals' costs. The Commission conducted an in-depth qualitative and quantitative analysis to assess the incentive of TomTom and Tele Atlas, and of Nokia and NAVTEQ, to foreclose their competitors in their respective downstream markets. The analysis led to the conclusion that, although the profits obtained by selling a PND in the case of TomTom or a mobile handset in the case of Nokia are much higher than the profits from the sale of a map database, the merged entity would not have the incentive to foreclose its downstream competitors. In fact, the Commission concluded that in both cases, the merged entity would only be able to capture relatively limited sales downstream by increasing map database pricing and the loss of revenue due to decreasing sales of map databases would not be replaced by the relatively limited additional sales of the downstream products.

clearances with commitments (both in First and Second Phases) and cases withdrawn in Second Phase as illustrated by the below Chart 1.[53]

Chart 1. Interventions 1991 until March 2009[54]



45. These statistics indicate that the Commission's intervention rate reached a peak in 2000 (with roughly 14% rate in interventions over total decisions). Thereafter it has been relatively constant with a rate of around 6% (increasing to 8% in 2008). Most of the Commission's intervention relates to decisions cleared in *First Phase* with commitments. The scope and effectiveness of the proposed remedies allowed the Commission to clear the cases in First Phase (e.g. *EDF/British Energy*[55], *Pernod Ricard/V&S*[56], *Rewe/ADEG*[57], *Lesaffre/GBI UK*[58]). With respect to *Second Phase* decisions, there is a stable number of decisions with commitments in 2008 (six in 2006, four in 2007 and five in 2008). There is however an increase in the number of clearance decisions without commitments to an unprecedented level (nine out of the 14 Second Phase decisions in 2008). The main reason for this relates to the notification of very sensitive and complex transactions which posed horizontal as well as vertical and conglomerate competition issues in markets which had not been assessed by the Commission before (e.g. *TomTom/Tele Atlas*[59], *Nokia/Navteq*[60], *Google/DoubleClick*[61], *IBM/Telelogic*[62]).

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53 Cases withdrawn in Second Phase are taking into account because they are often a reaction of the parties to an imminent prohibition decision.

54 Statistics on merger decisions are available at http://ec.europa.eu/competition/mergers/statistics.pdf

55 See above footnote 39.

56 Case No COMP/M.5114 Pernod Ricard/V&S, decision of 17.072008.

57 Case No COMP/M.5047 Rewe/ADEG, decision of 23.06.2008.

58 Case No COMP/M.5020 Lesaffre/GBI UK, decision of 11.07.2008.

59 See above footnote 49.

46. These statistics provide a good indication that the Commission has not intervened in more cases as a result of the adoption of the SIEC test. On the contrary, there is a relatively stable intervention rate which suggests a continuity of trend in the Commission merger control enforcement under the SIEC test.

3.5 Effects based approach as regards remedies

47. The effects-based approach followed by the Commission in applying the SIEC test also extends to its analysis of remedies. The Commission is therefore in a good position to assess whether any remedies proposed by the parties solve the competition concerns identified. In order words, the Commission is not satisfied with a formal removal of the overlap created by the merger in each relevant market (i.e. a structural approach). Instead, it undertakes a qualitative examination of any remedy proposal and examines whether the divestiture is viable, who is the proposed buyer and whether the proposed buyer will be a credible competitor to the merged entity.[63]

48. It should be mentioned in this context that the Commission's Merger Remedy Study (2005)[64] revealed that some problems were encountered with regard to the viability of the divestiture business. In light of the Merger Remedy Study, the Commission decided to review its guidelines on remedies. The new Remedies Notice was adopted in 2008 and brings some refinements in important areas.[65] The Notice notably highlights the importance of defining the appropriate scope of a business to be divested, of ensuring its interim preservation until divestiture, of finding adequate purchasers and of ensuring effective monitoring of the implementation of the remedies.

4. Conclusion

49. The application of the SIEC test in the Merger Regulation and the analytical framework provided by the Horizontal and Non-Horizontal Merger Guidelines has proven to properly cover the great variety of merger scenarios encountered with and to assess the resulting competitive effects.

50. The introduction of the SIEC test in the Merger Regulation confirmed the Commission's already undertaken shift from a somewhat *structural* approach based on market shares and concentration levels towards an *effects-based approach*. This approach is the result of a *gradual development* which commenced well before the introduction of the SIEC test into the Merger Regulation. This can be seen from an examination of *cases before and after* the introduction of the SIEC test and not the least from available statistics which indicate a *similar degree of intervention* before and after its introduction.

51. The analytical framework provided by the SIEC test and the Commission's guidance documents also meets the objective of providing legal certainty, clarity and predictability. By eliminating uncertainties as to the scope of the previous test and possible "gaps" in it, the new SIEC test is comprehensive and

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60 See above footnote 50.

61 Case No COMP/M.4731 Google/DoubleClick, decision of 11.03.2008.

62 See above footnote 29.

63 See for instance the qualitative examination of remedies in the media sector in Case No COMP/M. 4726 Thomson Corporation/Reuters Group, decision of 19.02.2008; in the pharmaceutical sector in Cases No COMP/M.5295 Teva/Barr, decision of 19.12.2008 and COMP/M.5233 Sanofi-Aventis/Zentiva, decision of 04.02.2009 and in the airline transport sector in Case No COMP/M. 5364 Iberia/Vueling/Clickair, decision of 09.01.2009.

64 Available at http://ec.europa.eu/competition/mergers/studies_reports/remedies_study.pdf

65 Commission Notice on remedies acceptable under the Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, 22.10.2008, p. 1-27.

allows for an effects-based analysis of mergers which is well founded on sound economic theory, both in horizontal and non-horizontal scenarios.