EUROPEAN COMMISSION

Hearing Officer

Final Report of the Hearing Officer[1]

Johnson & Johnson/Synthes

(COMP/M.6266)

(1) On 27 September 2011 the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation[2] by which Johnson & Johnson ("Notifying Party") would acquire control, within the meaning of Article 3(1)(b) of the Merger Regulation, of the whole of Synthes Inc. ("Synthes"), by way of purchase of shares. (The Notifying Party and Synthes are referred to as "the parties").

I. WRITTEN PROCEDURE

(2) On 3 November 2011 the Commission initiated proceedings pursuant to Article 6(1)(c) of the Merger Regulation. A Statement of Objections ("SO") was subsequently sent to the Notifying Party on 25 January 2012 for which the deadline to reply was 8 February 2012.

(3) In the SO, the Commission's preliminary findings indicated that the notified concentration would significantly impede effective competition in various national markets for eight spine devices and various national markets for eight trauma devices.

(4) Noticeable in this case is the fact that there did not seem to exist any reliable market share data for the markets affected by the transaction. Hence, the Commission carried out an extensive market reconstruction exercise, which resulted in the creation of a model, producing market share data for a considerable number of competitors, per product and geographic market. The Commission then used the market share of the parties and their competitors as a criteria to identify problematic markets from a competition viewpoint, notably by categorizing markets by reference to the market share of the strongest party to the transaction and the increment in market share resulting from it.

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1 Pursuant to Articles 16 and 17 of Decision 2011/695/EU of the President of the European Commission of 13 October 2011 on the function and terms of reference of the hearing officer in certain competition proceedings, OJ L 275, 20.10.2011, p. 29, (the "Terms of Reference").

2 Council Regulation (EC) No 139/2004 of 20 January 2004, OJ L 24, 29.1.2004, p.1.

(5) The Notifying Party submitted its reply to the SO (the "Reply") on 8 February 2012. The Reply focused on the spine devices markets, since the Notifying Party had already decided to divest J&J's trauma business.

Access to file

(6) The Notifying Party was granted access to the file on 26 January, subsequently to which the Notifying Party submitted several request for further access.

(7) First, the Notifying Party requested to be given access to market shares for all affected markets. In response, DG Competition granted access to market shares for certain markets in non-confidential form, i.e. market shares were provided in ranges and competitors' names were not disclosed. The Notifying Party submitted a reasoned submission explaining why such access was insufficient in light of the potential usefulness of the requested information to respond to the objections. As a result, DG Competition agreed to organize a data room in which market shares (in ranges) of the parties and their competitors for all affected markets would be disclosed to the Notifying Party's legal and economic advisers under strict confidentiality obligations.

(8) Second, the Notifying Party requested access to 22 specific documents. DG Competition granted access, where possible, to non-confidential versions of those documents and provided explanations for the confidential nature of those documents that could not be disclosed.

(9) Third, the Notifying Party requested to have access to the model referred to in paragraph 4 above. Already before the SO was sent and access to file granted, the Notifying Party had lodged formal requests to DG Competition to have access to the model and the data underlying the model, as well as all relevant correspondence with third parties that provided the data. DG Competition rejected these requests but indicated that the Notifying Party would have access to a non-confidential version of the model consisting of all consolidated Excel spreadsheets, including the formulae as well as the allocation of the brands/devices to the product markets, as provided by the competitors. The competitors' sales data was, however, for reasons of confidentiality, deleted in this non-confidential version of the model. In addition, DG Competition indicated that the parties would be granted access to all other information or documents that were necessary to verify the accuracy of the model, notably communications with the data providers. For all these documents the standard access to file procedure was to apply. Finally, the Notifying Party was informed that it would be granted access to its own market share ranges, as well as those of its competitors, for all markets in the SO.

(10) As soon as access to file was granted, the Notifying Party brought the matter formally to my attention by means of a reasoned request. Specifically, the Notifying Party requested that its legal and economic advisors be granted full access, for markets in the SO, to the actual raw sales data provided by third parties and the cumulative total market sizes, as well as access to documents which have been identified as being relevant to the market reconstruction exercise (notably

correspondence between third parties and DG Competition). I responded by decision of 3 February, as follows:

- First, I found that the Notifying Party had not demonstrated that access to confidential sales data submitted by its competitors was indispensable for the exercise of its rights of defence. To justify its request, the Notifying Party had mostly put forward the risk that DG Competition may have made errors as regards the methodology underpinning the market reconstruction or as regards the handling, manipulation and analysis of the raw data itself (i.e. that errors may have been made in the process of transferring the raw data to the model).

  In respect of the methodology used in the market reconstruction, I noted that the Notifying Party had been granted access to the market reconstruction model itself, by way of a copy of the Excel file stripped from any business secrets but including all underlying formulae. I concluded that this placed the Notifying Party in a position to check and comment on the methodology of the analysis that had been conducted.

  In respect of the handling, manipulation and analysis of the data, I noted that the mere theoretical possibility of clerical errors could not, in and by itself, justify the disclosure of confidential information at the risk of undermining completely the special protection it is afforded under EU law. I nevertheless informed the Notifying Party that I could consider disclosure of the actual raw sales data in a restricted manner as provided in Article 8(4) of the Terms of Reference if there were concrete and credible indicia that DG Competition has made mistakes in the reconstruction exercise. No such indicia had been provided thus far.[3]

- Second, I found that certain documents requested by the Notifying Party, namely communications between the Commission and third parties in the context of the market reconstruction exercise, had not been made accessible at all. I did not see any reason for such full confidential treatment, and asked DG Competition to grant access to non-confidential versions of these documents, which was done on 1 February 2012.

(11) On 5 February 2012 the Notifying Party reiterated its request for full access to the model on the basis of certain alleged anomalies in the model and inconsistencies between their market intelligence and the findings of the market reconstruction exercise. I responded to the request on 7 February 2012, as set out below.

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[3] The Notifying Party however provided arguments that findings in the SO concerning two companies, based on the market reconstruction exercise, seemed contradicted by market intelligence. In order for the Notifying Party to be able to comment in full in such findings, I asked DG Competition to obtain from these two companies the permission to disclose further confidential information to the Notifying Party's legal advisers. The companies agreed, and further information was disclosed for one company on 6 February 2012, and for the other company on 10 February 2012. At this occasion, the second company acknowledged some mistakes in its data, and submitted revised sales data, which had an impact on the market shares found by the Commission in the SO for two spine devices markets.

- First, the Notifying Party had pointed out three specific errors in connection with, on the one hand, some formulae in the model and, on the other hand, the handling of the parties' sales data for some spine products (i.e. errors in the transfer process of the raw data to the model). DG Competition acknowledged the errors, which had no impact on the markets shares set out in the SO, and indicated to me that it was willing to provide the Notifying Party with updated market share tables, containing corrected information as regards the specific points raised, which I communicated to the Notifying Party.

- Second, the Notifying Party made comments on two points in the SO in relation to VCF product markets. The comments were not, however, of a procedural nature and had no connection with the question of access to the model. I nevertheless provided the Notifying Party with some explanations after having asked DG Competition to comment on the issues.

- Third, the Notifying Party expressed doubts as to the result of the market reconstruction exercise in relation to a number of important VCF suppliers which allegedly should have been present in certain markets. Having reviewed the Notifying Party's individual claims, I decided that the Notifying Party should be given access to redacted versions of certain third party submissions to demonstrate that their respective data had been reported accurately in the SO. In respect of one supplier, which had submitted after the SO revised figures having an impact on market shares in one market, the Notifying Party was given access to revised market shares for such market via the data room procedure organised on 6-7 February.

(12) On 8 February, the Notifying Party submitted its Reply together with a memorandum on the access to the data room[4]. Both documents contained further arguments casting doubts on the validity of the Commission's market reconstruction exercise. The memorandum highlighted in total around 100 items allegedly wrongly reported from the model to the SO (mostly market shares inaccuracies[5] or omitted competitors). In its Reply, the Notifying Party also referred to other elements, such as market intelligence, which appeared to cast doubts over the validity of the market reconstruction. As regards the alleged errors, DG Competition informed me that some competitors had indeed been omitted since they have only a *de minimis* market share and that some of the errors spotted by the Notifying Party were in fact due to errors in the material made available in the data room. However DG Competition also recognized that some errors had been made in manually transferring data from the model into the SO.

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4 About this data room procedure, see paragraph 7 above.

5 For example, the market share of one party was overstated in one market ([40-50%] in the SO instead of [30-40%] in the model) and, in the same market, the share of one competitor understated ([10-20%] in the SO instead of [20-30%] in the model).

(13) In light of these elements, I considered that it was necessary to review my decision of 3 February and give the Notifying Party access to the requested information. Indeed, the number and scope of the mistakes[6] made it difficult to exclude that other mistakes had not been made, in particular when inserting raw sales data into the model. In addition, given the importance of the market share analysis in this case, and the adverse nature of such evidence for the Notifying Party[7], mistakes of that kind, if made, could have had an impact on the outcome of the case. Finally, it had to be taken into account that the Notifying Party could only to a limited extent put forward further concrete and credible indicia that mistakes had been made.

(14) Consequently, I decided to grant further access to the Notifying Party to: (i) documents containing data and information which the Commission used to compute market shares for the markets for spine devices for which concerns were identified in the SO (i.e. to address concerns relating to the process of transferring the raw data to the model); and (ii) the market reconstruction model with respect to those same markets in order to allow the Notifying Party to verify the validity of the data used for the SO (i.e. to address concerns relating to the process of transferring the data from the model to the SO).

(15) My decision was notified to the Notifying Party on 10 February, i.e. one (working) day before the hearing. However, after the oral hearing, DG Competition informed the Notifying Party of its intention not to maintain the objections in relation to spine devices markets, following which the Notifying Party withdrew its request for access to the model and underlying data. As a result, my decision of 10 February was not implemented, i.e. the confidential information was not disclosed to the Notifying Party's advisers.

Interested third person

(16) On 15 February 2012, I accepted a request from Spinal Kinetics Inc. to be heard as interested third person pursuant to Article 16(1) of Regulation (EC) No 802/2004.[8] I received no additional request from Spinal Kinetics Inc.

II. ORAL PROCEDURE

(17) The Oral Hearing was held on 13 February 2012 and was attended by the Notifying Party, and its advisors, the Commission services and representatives from ten NCAs, i.e. the Belgian, German, Spanish, French, Irish, Italian, Polish, Finnish, Swedish, and British competition authorities.

(18) No incident occurred during the oral hearing.

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6 In particular errors in transferring data from the model to the SO.

7 See, in this regard, Case T-210/01 General Electric v Commission [2005] ECR II-5596, paragraph 660.

8 Commission Regulation (EC) No 802/2004 of 21 April 2004, OJ L 133, 30.4.2004, p.1.

III. THE DRAFT DECISION

(19) Pursuant to Article 16 of the Terms of Reference, I have examined whether the draft decision deals only with objections in respect of which the parties have been afforded the opportunity of making known their views, and I have come to a positive conclusion.

(20) In the draft decision, the objections contained in the SO in relation to the spine devices markets have been dropped.

CONCLUDING REMARKS

(21) Overall, I conclude that all participants in the proceedings have been able to effectively exercise their procedural rights in this case.

Brussels, 3 April 2012

Signed
Michael ALBERS