

***Case No IV/M.1223 -
TYCO
INTERNATIONAL /
US SURGICAL CORP.***

Only the English text is available and authentic.

**REGULATION (EEC) No 4064/89
MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 07/08/1998

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels 07.08.1998

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sirs,

Subject: Case No IV/M. 1223: TYCO INTERNATIONAL LTD/US SURGICAL CORP
Notification of 14 July 1998 pursuant to Article 4 of Council Regulation No 4064/89

1. On 14 July 1998, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89¹ by which Tyco International Ltd ('Tyco') will acquire within the meaning of Article 3(1)(b) of the Council Regulation control of the whole of United States Surgical Corporation ('USSC') by way of acquisition of assets.
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation (EEC) No 4064/89 and does not raise serious doubts as to its compatibility with the common market and with the EEA Agreement.

I. THE PARTIES' ACTIVITIES AND THE OPERATION

3. Tyco is a manufacturer of fire protection systems, electronic security systems, other electronic products, disposable medical products, and supplies related services. USSC manufactures medical products, in particular wound closure products. Both enterprises are based principally in the United States (Tyco's headquarters is in Bermuda).

¹ OJ L 395, 30.12.1989 p. 1; corrected version OJ L 257 of 21.9.1990, p. 13, as last amended by Regulation (EC) No 1310/97, OJ L 180, 9.7.1997, p. 1, corrigendum in OJ L 40, 13.2.1998, p. 17.

II. COMMUNITY DIMENSION

4. The combined aggregate world-wide turnover of the undertakings concerned exceeds ECU 5,000 million (Tyco ECU 10,760 million; and USSC ECU 1,207 million). The aggregate Community wide turnover of each party exceeds ECU 250 million (Tyco ECU [...]², USSC [...]³). The undertakings concerned do not achieve more than two-thirds of their turnover in one and the same Member State. The notified operation therefore has a Community dimension.

III. COMPETITIVE ASSESSMENT

A. **Relevant product market(s)**

5. The parties' activities overlap mainly in the manufacture of certain wound closure products – sutures and needles, staplers and staples, clips and clip applicators. They are described further below. According to the Commission's analysis, although wound closure products have the same function, there appears to be limited practical and economic substitutability between them, suggesting that narrower market definitions may be more appropriate. However the product market definition can be left open since by any of the alternative definitions considered, the concentration does not lead to the creation or strengthening of a dominant position in the common market or a substantial part of it.
6. **Sutures and Needles** are the traditional method for closing internal and external wounds. Needles are made of stainless steel and in many sizes and shapes. They are generally supplied pre-threaded with either natural (silk, gut) or, more commonly, synthetic suturing threads, and may be removable or reabsorbable. They are generally cheaper to buy than the more modern alternatives (eg, about [...]⁴ the price of a skin stapler), are clinically preferable in certain situations, and constitute the largest wound closure market segment (total EEA sales 1997 \$US c. 550m). Both parties supply a range of sutures and needles.
7. **Staplers** use metal staples and operate on the same principle as the office variety. They are of two main types – for skin and internal wounds. Internal staplers are more expensive, more sophisticated items than skin staplers with, e.g., longer handles to enable the staple to be placed correctly within the body, and the two types are not substitutable in use. Skin staplers are pre-loaded, disposable products; internal staplers may be disposable or reusable (but staples are not interchangeable between different staplers). The main advantage of staplers over sutures is their speed and ease of use, and (especially for skin wounds) better cosmetic results, and accordingly, they are preferred in many situations. However since the staples are metal, the patient has to return to have them removed, reducing the total cost advantage over (reabsorbable) sutures. Both parties make skin staplers; USSC only internal staplers. The skin stapler segment is small (total EEA sales 1997 \$US c. [...]⁵) and expected to decline in the next few years, as the use of **glues** becomes more widespread. Glues are the latest development in skin wound closure and currently more expensive to buy than staplers. However, besides being easy to use, they are reabsorbed and so do not

2 Deleted; business secret.

3 Deleted; business secret.

4 Deleted; business secret.

5 Deleted; business secret.

require a return visit, thus offering a considerable potential saving in the overall cost of the procedure (and in patient discomfort). Neither party manufactures glues, although Tyco distributes one on behalf of a third party.

8. **Clips** may be either of metal or synthetic material, and may be removed, reabsorbed (synthetic), or left in place permanently. They are used mainly to ligate (tie) veins and arteries etc within the body, as a faster and more effective alternative to manual suturing. Clips and their applicators - the applicator is specific to the clip - are of two main types; for ordinary 'open' surgery, and for laparoscopic ('keyhole') surgery – for which ordinary suturing is impractical. The two types are not functionally substitutable. Open surgery clips and applicators are too large for keyhole surgery and not designed to allow the insertion of the optical equipment that enables laparoscopy to take place; laparoscopic clips and applicators are significantly more expensive and clinically unsuitable for open surgery. USSC makes clips and applicators of both types; however its laparoscopic clips are metal and thus not reabsorbable, making them less suitable for certain applications where they would remain inside the body. Tyco makes only one specialised type of synthetic, reabsorbable laparoscopic clip (used almost exclusively in gall-bladder operations); it does not make clips for ordinary surgery, and does not possess the expertise or technology to make metal clips and applicators for either purpose. Sales of clips and applicators of all types in the EEA (1997) amounted to \$US c[...]⁶m.

B. Relevant geographic market(s)

9. The notifying parties regard the relevant geographic markets as at least Europe-wide. They point out that much wound closure equipment is manufactured outside the EEA (often in low-labour-cost countries) and frequently acquired by public tender (for public bodies, under EEA public purchasing rules) by hospitals etc who often join together in buying consortia. There are common approval standards (the Medical Devices Directive – 93/42/EEC) which further encourage international sourcing. Transport costs are low ([...]%)⁷ relative to total cost. Distribution is undertaken by independent wholesalers and dealers who carry the products of several different suppliers (and can thus source across national borders), as well as exclusive distributors. Packaging is typically multi-lingual. An EEA-wide definition was adopted, for broadly similar reasons, in a recent ECMR case in the medical equipment sector (the goods concerned were surgical drapes, gowns and swabs)⁸ On the other hand, for the products in question here, price differences appear to remain, for the present at least, between Member States, though the absence of adequate data makes detailed and reliable comparisons impossible. Some purchasers contacted by the Commission have indicated a preference for locally-established suppliers, on grounds of continuity and reliability of supply. The use of exclusive national distributors or subsidiaries by some manufacturers (including the parties) may reduce the scope for effective cross-border competition. However, it is unnecessary to further delineate the relevant geographic markets because, on all alternative definitions considered, effective competition would not be significantly impeded in the EEA or any substantial part of that area.

⁶ Deleted; business secret.

⁷ Deleted; business secret.

⁸ Case IV/M 1075 – Nordic Capital/Mölnycke Clinical/Kolmi – January 1998.

C. Assessment

10. In wound closure products of all types, the parties estimate that after the merger Johnson & Johnson (Ethicon) would remain the leader in Europe (and indeed the world) with the merged company second (Tyco is currently [...] ⁹ and USSC [...] ¹⁰) followed by B Braun and 3M. These four account for the majority of sales in the EEA, worth in total c. \$US [...] ¹¹m in 1997. (Detailed shares on this basis are not available, but based on total turnover the parties' combined share does not appear likely to exceed 25%.) The parties' product lines are largely complementary, with USSC's business mainly in staplers and clips, and Tyco's mainly in sutures and needles. On narrower product definitions, the situation appears as follows.
11. In **sutures**, the parties would have (1997 by value) a combined share of c. [...] ¹² in the EEA (increment [...] ¹³) and similar or smaller shares in most individual Member States. Shares in excess of 40% would however be produced in some Member States - in Finland ([...] ¹⁴, increment [...] ¹⁵) and Sweden ([...] ¹⁶, increment [...] ¹⁷). The increment in Finland is small, and is unlikely to lead to the creation or strengthening of a dominant position, given also the strength of the main competitor, Johnson & Johnson ([...] ¹⁸), the widespread use of competitive tenders by customers and groups of customers, and the relative ease of entry. In addition to the factors mentioned already under geographic market definition, raw materials (synthetic thread and stainless steel) are inexpensive and readily available, and manufacture is straightforward; needles can be sourced ready-made from third parties such as B G Suzle inc. and Mani Inc. There are no significant patents. USSC's own entry dates only from 1991, and there are several other suppliers active in the EEA (eg Peters, Arago, Resorba, Cargin, Pirazzi, Goro, Serag-Wiesner), in some cases with significant national shares, who would appear to face few barriers to serving the Member States in question. There is also a major Japanese supplier, NESCO, which could apparently expand into the EEA without great difficulty. The parties estimate, for example, that regulatory approval could be obtained within a year, and there are no quotas or tariff barriers for sutures. In Sweden, similar factors apply as regards entry barriers and buying practices; moreover the merged company will be in second place - Johnson & Johnson (Ethicon) remaining the leader with [...] ¹⁹. The creation of joint dominance in either Member State as a result of this merger also appears unlikely, even if the relevant markets are not wider than national. Ethicon's share differs materially from that of the parties, and its range is wider (and it also

⁹ Deleted; business secret.

¹⁰ Deleted; business secret.

¹¹ Deleted; business secret.

¹² Business secret: between 20 and 30%.

¹³ Business secret: between 5 and 10%.

¹⁴ Business secret: between 45 and 55%.

¹⁵ Business secret: less than 3%.

¹⁶ Business secret: between 45 and 55%.

¹⁷ Business secret: less than 15%.

¹⁸ Business secret: between 40 and 50%.

¹⁹ Business secret: between 50 and 60%.

sells a wider range of other medical products than the parties); there are accordingly asymmetry of shares and a differentiation of product ranges, reducing the scope for co-ordination. Moreover, the widespread use of public tendering for medical supplies means that prices and shares are not transparent, which is a further, significant, constraint.

12. There is no overlap in **internal staplers**. In **skin staplers** the parties would have a combined share of some [...] ²⁰ in the EEA (increment [...] ²¹) with similar, or larger, shares and/or increments in several Member States. The next largest supplier, both in the EEA as a whole and nationally, is Ethicon ([...] ²²); the remaining players (Beiersdorf, 3M, Richard Allen and others) have [...] ²³ or less each. The parties suggest, however, that the combination of buying practices, as already described, the increasing use of glues – prices of which are expected to fall as sales increase – and the effective absence of barriers to entry or expansion, especially for firms already in the medical products sector, will ensure that these shares and increments do not lead to significant adverse effects on competition. The Commission’s analysis broadly endorses this view. As the parties point out, skin staplers are a ‘low-tech’ product requiring little in the way of resources or special expertise. There are no significant patents on the core technology. Raw materials (principally, plastics and stainless steel) are readily available, and key production stages – component manufacture, and sterilisation of the completed product – are easily subcontracted (as the parties themselves do) leaving only an unskilled, labour-intensive assembly function, which can be carried out well away from the point of sale as transport costs are very low and distribution – especially for suppliers of other medical products – straightforward. Tyco, for example, has moved its skin stapler production between several countries in recent years; it currently manufactures in Mexico. USSC’s stapler production line is in a factory in Puerto Rico.
13. New, ‘grass roots’ entry may be deterred by the low margins (prices have been falling quite rapidly in recent years) and the absence of growth in demand. However opportunistic expansion of production by existing players – especially those such as Ethicon and 3M which are multinational, multi-product companies – would appear to be very easy (largely a question of, e.g., starting a second shift on the production line) and a realistic prospect if the parties were to attempt to raise prices above the competitive level post-merger.
14. In **Clips and Appliers**, if the product market were to include all types, the parties would have a combined share of [...] ²⁴ (increment [...] ²⁵) in the EEA as a whole. National shares and increments are more variable, though where they exceed 40%, the increments, if any, are insignificant. On narrower definitions, there is no overlap in clips and appliers for ordinary surgery; in laparoscopic clips, the combined share would be [...] ²⁶ (increment [...] ²⁷). Data on national shares is unavailable. However other suppliers to the EEA

²⁰ Business secret: between 45 and 55%.

²¹ Business secret: less than 30%.

²² Business secret: between 20 and 30%.

²³ Business secret: less than 7%.

²⁴ Business secret: between 35 and 45%.

²⁵ Business secret: less than 4%.

²⁶ Business secret: between 35 and 45%.

²⁷ Business secret: less than 10%.

include Ethicon ([...]²⁸), Richard Allen, Braun, Origin and Pilling-Weck, and as in the other product categories mentioned, expansion by existing suppliers across national borders does not appear to be difficult. The differences between the parties' activities in this product area - as mentioned above, Tyco does not supply metal clips, and does not possess the technology to do so; USSC is in the same position regarding reabsorbable ones – together with the highly specialised nature of Tyco's clip, also indicate that the merger is unlikely to significantly reduce competition in laparoscopic clips, even if there are not separate markets for reabsorbable and non-reabsorbable types. If there are, there would be no overlap.

15. In view of the foregoing, it appears that the notified operation does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the EEA or any substantial part of that area.

V. CONCLUSION

16. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EEC) No 4064/89 and Article 57 of the EEA agreement.

For the Commission,

²⁸ Business secret: between 30 and 40%.