



EUROPEAN COMMISSION
DG Competition

***Case M.8146 - CARLYLE
/ SCHÖN FAMILY /
SCHÖN KLINIK***

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 15/11/2016

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EUROPEAN COMMISSION

Brussels, 15.11.2016
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In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE

To the notifying parties

Dear Sir/Madam,

**Subject: Case M. 8146 - CARLYLE / SCHÖN FAMILY / SCHÖN KLINIK
Commission decision pursuant to Article 6(1)(b) of Council Regulation
No 139/2004¹ and Article 57 of the Agreement on the European Economic
Area²**

- (1) On 7 October 2016, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which the undertaking CGP Peggy S.à r.l ('CGP Peggy', Luxembourg) a special purpose vehicle belonging to the Carlyle Group ('Carlyle Group'), together with the Schön Family acquire within the meaning of Article 3(1)(b) of the Merger Regulation joint control of Schön Klink SE ('SKS', Germany) and its direct and indirect subsidiaries and participations ('Schön Klinik Group') by way of purchase of shares³ (the 'Transaction'). Carlyle Group, the Schön Family and the SKS are collectively referred to as the 'Parties'.

¹ OJ L 24, 29.1.2004, p. 1 (the 'Merger Regulation'). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ('TFEU') has introduced certain changes, such as the replacement of 'Community' by 'Union' and 'common market' by 'internal market'. The terminology of the TFEU will be used throughout this decision.

² OJ L 1, 3.1.1994, p. 3 (the 'EEA Agreement').

³ Publication in the Official Journal of the European Union No C 378, 14.10.2016, p. 24.

1. THE PARTIES

- (2) **Carlyle** is a global alternative asset manager, which indirectly jointly controls AMEOS Holding AG and AMEOS AG (collectively the “AMEOS Group”), a private operator of general hospitals, with a specific focus on psychiatrics, as well as long-term elderly care and long-term mental care facilities in Germany and Austria.
- (3) **Schön Family** comprises Mr Dieter Schön, his spouse Dr Susanne Nolte-Schön and their sons Mr Christopher Schön and Mr Constantin Schön, who jointly control SKS, the ultimate parent company of the Schön hospitals.⁴
- (4) **Schön Klinik Group** operates 18 hospitals in Germany with a focus on three acute medical segments, namely: i) mental illnesses (with a specific focus on psychosomatics), ii) orthopaedics and iii) neurology, but also offering complementary general surgery and internal medicine.

2. THE OPERATION AND THE CONCENTRATION

- (5) On 24 June 2016, CGP Peggy entered into an investment agreement with Dieter Schön to acquire [a minority shareholding] in SKS and certain veto rights conferring Carlyle decisive influence over certain strategic matters of SKS, [veto rights],⁵ thereby enabling Carlyle to exercise joint control together with the Schön Family over SKS.
- (6) Therefore, the Transaction constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

3. EU DIMENSION

- (7) The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million⁶ [*Carlyle: EUR [...] million; SKS: EUR [...] million*]. At least two of them have an EU-wide turnover in excess of EUR 250 million [*Carlyle: EUR [...] million; SKS: EUR [...] million*], but they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The notified operation therefore has an EU dimension pursuant to Article 1(2) of the Merger Regulation.

4. RELEVANT MARKETS

- (8) The Transaction concerns the markets for acute hospital services and rehabilitation services in Germany.

⁴ The Schön Family also controls Silony Medical International AG, developing and supplying a broad range of orthopaedic products.

⁵ Sections 4, 7 and 8 of the Term Sheet signed by the Parties on 24 June 2016.

⁶ Turnover calculated in accordance with Article 5 of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C 95, 16.4.2008, p. 1).

4.1. Market Definition

4.1.1. Relevant product markets

4.1.1.1. Market for acute hospital services

- (9) The Commission has in the past assessed the provision of hospital services in Germany and considered a market for acute hospital services⁷. The Commission found the market for acute hospital services to exclude medical care units, i.e., facilities in which salaried doctors exclusively provide ambulatory healthcare services and rehabilitation services.⁸ Ultimately, however, the Commission left the exact delineation of the market for acute hospital services open.
- (10) The Commission has examined in previous decisions but ultimately left open, whether the market for acute hospital services in Germany should be further subdivided along inpatient and outpatient/ambulatory services provided in hospitals.⁹ However, as the Parties' activities only overlap in the area of acute inpatient treatment, the Parties submitted data and market share estimates calculated on the basis of the narrower potential market for acute inpatient hospital services only.¹⁰ It may therefore be left open, for the purpose of assessing the Transaction, whether acute inpatient and acute ambulatory treatment form part of the same product market.
- (11) The Commission has consistently held that the market for acute hospital services in Germany comprises both public and private hospitals remunerated pursuant to the Fifth Book of the German Social Security Code ("SGB V").¹¹ Respondents to the market investigation confirmed this finding.¹² Consequently, for the purpose of this assessment, the market will comprise both public and private hospitals remunerated pursuant to SGB V.

⁷ See Cases M.4010 – FRESENIUS / HELIOS of 8 December 2005, para. 8 et seq; M.6428 – HELIOS / DAMP of 23 February 2012, para. 11; M.5548 – BARCLAYS / RBS / HILLARY of 6 July 2009, para. 9.

⁸ Cases M.4010 Fresenius/Helios of 8 December 2005, para. 9; M.6428 – HELIOS / DAMP of 23 February 2012, para. 11.

⁹ Cases M.4010 Fresenius/Helios of 8 December 2005, para. 8, M.6428 – HELIOS / DAMP of 23 February 2012, para. 11. The Bundeskartellamt has in its previous decisional practice distinguished within the market for acute hospital services between the market for acute inpatient hospital services (*Markt für akutstationäre Krankenhausdienstleistungen*) and the market for outpatient medical treatment (*Markt für ambulante ärztliche Krankenbehandlung*); see for example Bundeskartellamt, decision B3-109/13 of 19 February 2014, para. 202 et seq.

¹⁰ Form CO, para.183.

¹¹ Only purely private clinics in the meaning of §108 SGB V, were found as belonging to a separate relevant product market; M.4010 – FRESENIUS / HELIOS, paras. 8 et seq. Similarly, the Bundeskartellamt in its decisional practice also exempts from the market for acute hospital services purely private clinics that do not have a contract with the health insurances according to § 108 SGB V; see for example decision B3-135/13 – Klinikum Esslingen/Kreiskliniken Esslingen of 14 May 2014, para. 62. As the Parties do not operate purely private clinics, these will not be further referenced in this Decision.

¹² See the Minutes of the call with a funding agency of 14 September 2016, para. 5; Minutes of the call with a competitor of 30 August 2016, para. 6.

- (12) The Commission has examined in previous decisions but ultimately left open, whether the market for acute hospital services in Germany encompasses all types of medical services or should be further sub-divided along different specialist medical departments or "groups of specialties", e.g. medicine, surgery, obstetrics, gynaecology etc.¹³ Specifically regarding the treatment of mental, as opposed to somatic, illnesses, the Commission has indicated that it might constitute a distinct product market, ultimately leaving the exact delineation open.¹⁴ The Commission has not dealt with a market for acute neurology services in its previous practice.¹⁵
- (13) The Parties do not challenge the above outlined Commission's approach to distinguish between acute hospital and rehabilitation services and further specify that if the market for acute general hospital services were to be sub-segmented, the potential sub-segment for acute inpatient hospital services for mental illnesses would have to be distinguished from the potential market for mental rehabilitation services.¹⁶
- (14) A majority of respondents taking a position indicated that within the market for acute hospital services, a distinct market could be considered for the acute treatment of mental illnesses, as a result of the type of services offered, the staff specialisation, etc.¹⁷ A majority of respondents taking a position also pointed towards a separate market for acute neurology services.¹⁸
- (15) Ultimately, the exact scope of the product market may be left open, as serious doubts as to the compatibility of the Transaction with the internal market would not arise under any of the above-mentioned plausible product market definitions. The impact of the Transaction will be assessed in further detail on a market for acute inpatient hospital services, as well as on the plausible narrower markets for the acute inpatient treatment of mental illnesses and for acute inpatient neurology services.

¹³ See cases M.7309 – BRIDGEPOINT / EdRCP of 4 August 2014, para. 24; M.5805 – 3i / VEDICI GROUPE of 21 May 2010, para. 11. The Bundeskartellamt has also considered sub-segmentations of the market for acute hospital services by department specialisation, but ultimately left the market definition open; Bundeskartellamt, decision B3-135/13 – Klinikum Esslingen / Kreiskliniken Esslingen of 14 May 2014, para 64.

¹⁴ See case M.4788 – ROZIER / BHS of 21 August 2007, para. 10, where the European Commission considered psychiatric care services covering a wide spectrum of mental health and psychiatric disorders, as a separate product market distinct from the market for acute hospital services. The Bundeskartellamt also considered a distinct market for the inpatient treatment of all forms of non-somatic illnesses, comprising psychiatry and psychosomatics, ultimately leaving the exact delineation of the product market open; see for example Bundeskartellamt, decision B3-135/13 - Klinikum Esslingen / Kreiskliniken Esslingen of 14 May 2014, para. 62.

¹⁵ The Bundeskartellamt has also not analysed markets for the provision of acute neurology services in its practice.

¹⁶ Form CO, para. 110.

¹⁷ See Minutes of the call with a funding agency of 24 August 2016, para. 5, Minutes of the call with a competitor of 11 August 16, para. 15.

¹⁸ See Minutes of the call with a funding agency of 24 August 2016, para. 10, Minutes of the call with a competitor of 11 August 2016, para. 15, written reply of a competitor of 21 September 2016, in particular answer to question 2 but also the rest of the reply and Minutes of call with a funding agency of 18 October 2016, para. 3.

4.1.1.2. Market for mental rehabilitation services

- (16) The Commission has in the past considered distinct markets for the provision of rehabilitation services, ultimately, however, leaving their exact delineation open.¹⁹
- (17) The Parties do not challenge the Commission's approach to market definition and furthermore acknowledge a possible distinct market for the provision of mental rehabilitation services. Within such market, however, the Parties submit that no further distinction should be considered.²⁰
- (18) All respondents to the market investigation consider that rehabilitation services constitute a distinct product market.²¹ Moreover, certain respondents submitted that the market for mental rehabilitation services can be viewed as distinct from other types of rehabilitation services, in light of the differences in the type of treatment provided, its duration and expertise of the personnel required.²² The majority of respondents did not however consider any further sub-segmentation of the mental rehabilitation market to be appropriate, as all facilities offer a broad range of mental rehabilitation services and any specialisation is mostly done in particular for marketing purposes.²³
- (19) Ultimately, the exact scope of the market for rehabilitation services may be left open, as serious doubts as to the compatibility of the Transaction with the internal market would not arise under any of the above-mentioned plausible market definition. The impact of the Transaction will be assessed in more detail on a market for all rehabilitation services, as well as on the plausible narrower market for mental rehabilitation services.

¹⁹ See among others, Cases M.4010 Fresenius/Helios of 8 December 2005, para. 9; M.6428 – HELIOS / DAMP of 23 February 2012, para. 11. The Bundeskartellamt has considered a separate market for rehabilitation facilities, left, however, open whether within that market, further segmentation according to different indications or groups of indications, such as mental rehabilitation, would be warranted. Similarly, the Bundeskartellamt appears to have considered a distinction between inpatient and ambulatory rehabilitation services; see for example Bundeskartellamt decision B3-109/13 – Fresenius/Rhön of 19 February 2014, para 249.

²⁰ Form CO, para. 122.

²¹ See for example Minutes of the call with a funding agency of 14 September 2016; written reply of a competitor of 4 October 2016, answer to Q2: "*Der Bereich der Krankenhausbehandlung dient der Symptomreduktion, der Bereich der Rehabilitation der Wiederherstellung von Funktionen. Beide Bereiche werden von verschiedenen Kostenträgern finanziert. [...]*" Courtesy translation: Whilst the area of hospital treatment serves symptom reduction, the area of rehabilitation serves the restoration of functions. Both areas are financed by different funding agencies [...]."

²² See the Minutes of the call with a funding agency of 14 September 2016, para. 9; Minutes of the call with a funding agency of 18 August 2016, para. 6.

²³ See for example Minutes of the call with a competitor of 30 August 2016, para. 7: "whilst it is true that some clinics have greater specialisation and built a reputation for certain specific treatments, such as the Schön Klinik for the treatment of eating disorders and [a competitor] for trauma and depression, and they also market themselves on the basis of their specialisation, most of the clinics can provide treatments for all of the indications".

4.1.2. Relevant geographic markets

4.1.2.1. Market for acute hospital services

- (20) In prior decisions, the Commission has left open whether the market for acute hospitals is national, regional or local in scope. The Commission has not specifically assessed the geographic scope of narrower markets for the acute treatment of mental illnesses or for acute neurology services.²⁴
- (21) The Parties are of the opinion that the markets for the provision of acute hospital services, as well as the narrower markets for the acute treatment of mental illnesses and for acute neurology services in Germany are national, mainly due to the strongly overlapping catchment areas.²⁵
- (22) Some respondents to the market investigation consider the market for acute hospital services to consist of a catchment area of 100-150 km from the patient's residence,²⁶ whilst smaller catchment areas could not be excluded in case certain medical conditions, requiring urgent treatment.²⁷ Specifically for acute neurology services, some respondents identify a catchment area of 20 to 40 minutes driving time in Schleswig-Holstein, whereas others refer to a catchment area of around 100 km and up to 400 km.²⁸
- (23) Ultimately, since the Transaction does not raise serious doubts as to the compatibility of the Transaction with the internal market under any of the above-mentioned plausible geographic market, its exact delineation may be left open. The assessment of acute hospital services markets and of the narrower markets for the acute treatment of mental illnesses will be carried out in more detail at national and regional (State) level, as well as on the basis of conservative catchment areas of 200km, 100 km and 50 km, which are based on the actual patient flow data submitted by the Parties. For acute neurology services, following the Parties' patient data analysis,²⁹ a narrower catchment area of 30km will also be assessed.

²⁴ Ibid. COMP/M.4010 Fresenius/Helios, para. 20-21 of 8 December 2005, COMP.M.7055 Fresenius/Rhön, para. 14. The Bundeskartellamt has in its decision practice examined whether different hospitals in a limited geographic area are – from the patient's point of view – interchangeable, whereby it was essential, whether the patients residing in that area regard other hospitals as real alternatives to the merging parties' hospitals; see for example Bundeskartellamt, decision B3-135/13 of Klinikum Esslingen / Kreiskliniken Esslingen of 14 May 2014, para 65 et seq. The Bundeskartellamt has not specifically assessed the geographic scope of markets for the acute treatment of mental illnesses or for acute neurology treatment.

²⁵ Form CO, para. 146.

²⁶ See Minutes of the call with a competitor of 30 August 2016, para. 11.

²⁷ See Minutes of the call with a funding agency of 13 October 2016, para. 5 & 12.

²⁸ See Minutes of the call with a funding agency of 24 August 2016, para. 10, Minutes of call with a funding agency of 12 October 2016, para.12 and Minutes of the call with a funding agency of 17 October 2016, para. 8.

²⁹ To determine the relevant catchment areas, the Parties and their consultant aktiva undertook an actual patient flow analysis based on their hospitals' patient data for 2015. The Parties listed all postal code areas around the location of the respective hospital in increasing distance to the hospital until at least 80% of all the patients were covered.

4.1.2.2. *Market for mental rehabilitation services*

- (24) In prior decisions, the Commission has left open whether the market for rehabilitation clinics is regional or national in scope.³⁰ The Commission has not considered the geographic delineation of a market for mental rehabilitation services specifically.
- (25) The Parties are of the opinion that the catchment area for mental rehabilitation services is national, or, if narrower, State-wide, due to the fact that insurance companies and other funding agencies that have a decisive influence on which rehabilitation facility the patients attend, conclude supply contracts on a national and/or State wide level.³¹
- (26) The majority of the respondents to the market investigation consider the market to cover an area of at least 100-150km, whereas some indicate that the market would likely exceed the region or State depending also on the required treatment.³²
- (27) Nevertheless, since the Transaction does not raise serious doubts under any of the above-mentioned plausible geographic market definitions, the exact geographic market definition can be left open. The assessment of the Transaction on rehabilitation markets will be carried out in more detail at national and regional (Land) level, as well as at the narrowest plausible catchment area of 100km.

5. **COMPETITIVE ASSESSMENT**

- (28) The Transaction does not lead to a horizontally affected overall market for acute hospital services under any plausible geographic market definition, irrespective of whether rehabilitation services are included or excluded in such market.³³
- (29) However, the Transaction leads to horizontally affected markets, if narrower markets for the acute treatment of mental illnesses, for acute neurology services and for mental rehabilitation are considered, under the narrowest plausible geographic scopes. More concretely, the following markets would be affected by the Transaction:³⁴
- the market for acute inpatient treatment of mental illnesses in Schleswig-Holstein;

³⁰ Ibid. COMP/M.4010 Fresenius/Helios, COMP.M.7055 Fresenius/Rhön.

³¹ Form CO, para. 160 et seq.

³² See Minutes of the call with a funding agency of 24 August 2016, para. 9 et seq., Minutes of the call with a funding agency of 14 September 2016, para. 12, Minutes of the call with a competitor of 11 August 2016, para. 19, Minutes of the call with a competitor of 30 August 2016, para. 9 et seq.

³³ The Transaction does not give rise to any vertically affected market, potential competition considerations or conglomerate/portfolio effects. Form CO, paras. 186-187 and 283-284.

³⁴ The market shares are based on the number of actual cases, as the Commission is of the opinion that this is the more reliable proxy of the Parties' actual market position. The Bundeskartellamt also estimates hospital service providers' market shares based on the actual number of cases. Should the number of beds be used as a metric, reflecting market participants' capacity, the conclusions reached in the present decision would not be materially different.

- market for inpatient neurology services on catchment areas of i) 50km and ii) 30 km in Schleswig-Holstein;
- market for mental rehabilitation services in Bavaria based on a catchment area of 100 km.

5.1. *Funding of hospital services in Germany*

- (30) The market investigation showed that statutory health insurances have a strong negotiating and bargaining position vis-à-vis the individual hospitals across the different markets and market segments.
- (31) The cost of hospital services in Germany is mostly undertaken by the statutory health insurances. Health insurances negotiate collectively each year with each individual hospital the budgets for the year to come.³⁵ In case of disagreement, an arbitration procedure is initiated.³⁶
- (32) Concerning somatic illnesses, acute hospital services are in Germany generally reimbursed by the health insurances subject to a system of per case payments to the hospitals, i.e., flat-rate payments for so-called Diagnosis Related Groups (“DRG”) (*DRG-Fallpauschalen-System*), determined on national level.³⁷ Individual hospitals cannot deviate from the DRGs. Additionally, State governments prepare the hospital plan for that State (*Krankenhausplan*), in which it determines the medical departments included in each hospital captured by the hospital plan.³⁸ In the budget negotiations, health insurances and hospitals negotiate the number of anticipated cases for the following year. In this regard, hospitals have to show and validate the number of cases, which are realistically to be expected by the respective hospitals, based on their activity in the previous year.³⁹
- (33) In case hospitals treat more patients than the number of cases negotiated in certain year, health insurances only reimburse the hospitals their fix costs and not the full DRG-reimbursement for the additional cases. In case the negotiated number of

³⁵ See Minutes of Call with a funding agency of 18 October 2016, para. 6.

³⁶ See Parties' reply to RFI 1 from 21 October 2016, see also Minutes of the call with a funding agency of 17. October 2016, para. 4.

³⁷ Within the DRG-System, each illness is categorised and attributed a factor, according to the severity of the respective illness. That factor is then multiplied with the state base rate (*Landesbasisfallwert*) to determine the reimbursement. The state base rate is centrally negotiated between the regional hospital associations and the health insurances on a yearly basis. See Parties' reply to RFI 1 from 21 October 2016.

³⁸ Acute general hospitals in Germany are subject to the Hospital Finance Act (*Krankenhausfinanzierungsgesetz*) and the respective hospital plans of the German federal states (*Krankenhauspläne der Länder*). This regulatory framework aims to safeguard a high-quality and need-based provision of acute general hospital services (*qualitativ hochwertige, patienten- und bedarfsgerechte Versorgung*), see Article 1 and 6 of the Hospital Finance Act; see also Minutes of the call with a funding agency of 13 October, para. 4-5.

³⁹ See Parties' reply to RFI 1 from 21 October 2016; Minutes of the call with a funding agency of 17. October 2016, para. 4 et seq. and Minutes of the call with a funding agency of 18 October 2016, para. 6 et seq.

cases is in the end not treated in a hospital, the hospital receives anyway significant part of the reimbursement.⁴⁰

- (34) However, with regard to acute hospital services for mental illnesses and mental rehabilitation services, the DRG system described above is not applicable. These services are currently funded by way of a cost-based reimbursement system based on fixed daily rates, so-called daily nursing charges (*tagesgleiche Pflegesätze*). Both these rates and the number of projected cases are negotiated with health insurances to determine the reimbursement paid to the hospital.

5.2. *Market for acute inpatient treatment of mental illnesses in Schleswig-Holstein*

- (35) The Transaction would lead to an affected market for acute the treatment of mental illnesses in the State of Schleswig-Holstein, where the Parties would have a combined market share of [20-30]%. The increment brought about by the Transaction on that market would only be [5-10]%.
- (36) In Schleswig-Holstein, several strong competitors would remain post-Transaction, such as the Landesverein für Innere Mission in Schleswig-Holstein with [10-20]%, the Evangelische Stiftung Alsterdorf with [5-10]%, Johanniter with [5-10]% and others.⁴¹
- (37) Moreover, these competitors offer either the same or highly similar services, and even treat the same principal conditions (*Hauptdiagnosen*) within the respective mental illnesses' departments. Concretely, for each single principal type of mental illness treated by the Parties' hospitals in Schleswig-Holstein, there are always a number of competitors in close proximity, which provide the same or similar services or which even have the same focus as the Parties' hospitals. Consequently, the competitors' services can be considered as competing with those of the Parties' and interchangeable from the patients' point of view.⁴²
- (38) During the market investigation however, a competitor mentioned that post-Transaction, the merged entity would have significant capacity in Schleswig-Holstein, combining the beds of both Parties. This could result in the merged entity having a stronger negotiating position vis-a-vis the health insurances.⁴³ Only one health insurance company in Schleswig-Holstein shared this concern,⁴⁴ whereas the majority of health insurances active in Schleswig-Holstein responding to the market investigation considered that they had a sufficiently strong negotiating position to prevent any potential cost increases by the merged entity and that the Transaction would not impact their ability to effectively negotiate with hospitals treating mental illnesses in Schleswig-Holstein.
- (39) Overall, on the basis of all evidence available to it, the Commission concludes that given the limited market shares of the Parties and the small increment brought

⁴⁰ See Minutes of the call with a funding agency of 17 October 2016, para. 6.

⁴¹ Form CO, para. 261.

⁴² See Parties' reply to RFI 2 of 20 October 2016.

⁴³ See the written Reply of a competitor of 21 September 2016.

⁴⁴ See Minutes of the call with a funding agency of 17 October 2016, para. 11 et seq.

about by the Transaction, the presence of significant and close competitors and the negotiating power of the health insurances, the Transaction does not raise serious doubts as concerns acute treatment of mental illnesses, under any plausible delineation of the geographic market discussed above.

5.3. *Markets for inpatient neurology services in Schleswig-Holstein*

- (40) The Transaction would lead to affected markets solely under the narrowest plausible geographic market delineations, namely based on catchment areas of 50km and 30km in Schleswig-Holstein, where the Parties' combined market shares would be at [20-30]% and [30-40]%, respectively. The increment brought about by the Transaction on a market consisting in a 50km catchment area would be [10-20]% and on a market consisting in a catchment area of 30km, [10-20]%.
- (41) Several strong competitors would remain in a 50km or 30km area post-Transaction. Even within the narrowest 30km geographic market, several competitors will remain active, such as the Universitätsklinikum Schleswig-Holstein with [30-40]%, Sana with [10-20]%, Stiftung August-Bier-Klinik with [10-20]% and others.⁴⁵ Within a 50km catchment area, Sana would have a market share of [20-30]%, Universitätsklinikum Schleswig-Holstein of [20-30]%, Segeberger Kliniken of [10-20]% and other clinics would also continue to compete.⁴⁶
- (42) Moreover, these competitors offer either the same or highly similar acute hospital services, and even treat the same principal diagnoses within the respective medical departments for neurology. Consequently, the competitors' services can be considered as closely competing with those of the Parties' and as interchangeable from the patients' point of view.⁴⁷
- (43) During the market investigation, a competitor and a funding agency mentioned that the Transaction would create in East-Schleswig-Holstein a cluster of clinics in neurology belonging to the merged entity, which would increase the Parties' bargaining position vis-à-vis funding agencies.⁴⁸ The increased bargaining position of the Parties' could in turn lead to the Parties' ability to negotiate higher numbers of cases with the funding agencies.
- (44) However, all other funding agencies from Schleswig-Holstein participating to the market investigation did not consider that the Transaction would have a negative impact on the market for neurology in any area of Schleswig-Holstein.⁴⁹ In particular, the Parties' hospitals are not considered as particularly strong competitors in the market for neurology services⁵⁰ and the funding agencies would

⁴⁵ Form CO, para. 261.

⁴⁶ Form CO, para. 259.

⁴⁷ See Parties' reply to RFI 2 from 20 October 2016.

⁴⁸ See the written Reply of a competitor of 21 September 2016; Minutes of the call with a funding agency of 17 October 2016, para. 11-13.

⁴⁹ See Minutes of the call with a funding agency of 13 October 2016, para.13-16 and Minutes of the call with a funding agency of 18 October 2016, para. 10-11.

⁵⁰ See Minutes of the call with a funding agency of 13 October 2016, para. 14.

continue to have a strong bargaining position vis a vis the Parties.⁵¹ Last, all respondents to the market investigation taking a position on this issue, state that there has never been any scarcity of acute neurological services in Schleswig-Holstein and that, instead, there is overcapacity that could be further reduced.⁵²

- (45) Therefore, overall, on the basis of all evidence available to it, the Commission concludes that given the moderate market shares of the Parties, the presence of significant and close competitors and the negotiating power of the funding agencies, the Transaction does not raise serious doubts on markets for acute neurology services at any plausible geographic market.

5.4. *Market for mental rehabilitation services in Bavaria*

- (46) The Transaction would only lead to an affected market on a catchment area of 100 km in Bavaria, where the Parties' combined market share would be [40-50]%. The increment brought about by the Transaction on that market would be [10-20]%.

- (47) However, the Commission considers in particular the following important elements in its assessment.

- (48) First, post-Transaction, the Parties would still be facing significant competition as several strong competitors would remain, such as Medical Park Chiemseeblick Fachklinik für Psychosomatik with [10-20]%, Klinik Alpenland Fachklinik with [10-20]%, Johannesbad Reha-Klinik with [10-20]% and others.⁵³

- (49) Second, funding agencies, such as the German Pension Insurance Association (Deutscher Rentenversicherung Bund) and the statutory health and accident insurance companies would retain post-Transaction very significant negotiating power.⁵⁴ Indeed, participants to the market investigation explain that funding agencies to a large extent determine the rehabilitation facility that each patient will go to⁵⁵ and that when it comes to rehabilitation services, proximity is much less crucial than in the case of acute hospital services. Indeed, in many instances, patients are prepared to or even select to receive their rehabilitation treatment in German States other than the one of their residence.⁵⁶

⁵¹ See Minutes of the call with a funding agency of 13 October 2016, para. 15 and Minutes of the call with a funding agency of 18 October 2016, para. 11.

⁵² See Minutes of the call with a funding agency of 13 October 2016, para. 13.

⁵³ Form CO, para. 271.

⁵⁴ The German Pension Insurance Association is typically responsible for the reimbursement of rehabilitation services if there is a risk of early retirement, i.e. mainly for the employed population in the whole of Germany. Statutory health insurances are responsible for the reimbursement of rehabilitation services when there is a risk of long-time nursing care and statutory accident insurances, responsible for the reimbursement of rehabilitation services, when there is a disability risk, as a result of an occupational accident; Form CO, para. 81.

⁵⁵ Form CO, para. 161; Minutes of the call with a competitor of 11 August 2016, para. 22; Minutes of the call with a funding agency of 14 September 2016, para. 4-5.

⁵⁶ See also Minutes of the call with a funding agency of 14 September 2016 at para. 11-12; See also Minutes of the call with a competitor of 30 August 2016 at para. 9-11.

- (50) Finally, none of the market respondents (neither competitors nor the funding agencies) raised any issues with respect to the market for mental rehabilitation.⁵⁷ Indeed the respondents (including funding agencies which are responsible for the adequate availability of rehabilitation facilities) mainly explained that there will be sufficient beds in the mental rehabilitation clinics in Germany, as well as Bavaria,⁵⁸ Also in terms of scale, the Parties would not give rise to a major player in the market.⁵⁹
- (51) Therefore, overall and on the basis of all evidence available to it, the Commission concludes that given the presence of significant competitors, the negotiating power of the funding agencies, the sufficient capacity of rehabilitation clinics in Bavaria and the fact that no respondent to the market investigation considers that the Transaction will negatively impact the market, the Transaction does not raise serious doubts as to its compatibility with the internal market on markets for mental rehabilitation under any plausible geographic market definition.

6. CONCLUSION

- (52) For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation and Article 57 of the EEA Agreement.

For the Commission

(signed)
Margrethe VESTAGER
Member of the Commission

⁵⁷ See Minutes of the call with a funding agency of 24. August 2016, para. 11-12; Minutes of the call with a funding agency of 18 August 2016, para. 9; Minutes of the call with a funding agency of 11 August 2016, para. 23; Minutes of the call with a competitor of 30 August 2016, para. 15; Minutes of the call with a funding agency of 14 September 2016, para. 13.

⁵⁸ See Minutes of the call with a funding agency of 24 August 2016, para. 11-12; Minutes of the call with a funding agency of 18 August 2016, para. 9.

⁵⁹ See Minutes of the call with a competitor of 11 August 2016, para. 23.