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THE STANDARD FOR MERGER REVIEW

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FOREWORD

This document comprises proceedings in the original languages of a 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 held by the Competition Committee (Working Party No. 3 on Co-operation and Enforcement) in June 2009.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

PRÉFACE

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur la Norme des Fusions avec une Réflexion plus particulière sur l'Expérience des Pays concernant le Passage du Critère de Position Dominante au Critère de SLC/SIEC qui s'est tenue en juin 2009 dans le cadre du Comité de la concurrence (Groupe de Travail No. 3 sur la Coopération et l'Application de la Loi).

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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OTHER TITLES
SERIES ROUNDTABLES ON COMPETITION POLICY

1.	Competition Policy and Environment	OCDE/GD(96)22
2.	Failing Firm Defence	OCDE/GD(96)23
3.	Competition Policy and Film Distribution	OCDE/GD(96)60
4.	Competition Policy and Efficiency Claims in Horizontal Agreements	OCDE/GD(96)65
5.	The Essential Facilities Concept	OCDE/GD(96)113
6.	Competition in Telecommunications	OCDE/GD(96)114
7.	The Reform of International Satellite Organisations	OCDE/GD(96)123
8.	Abuse of Dominance and Monopolisation	OCDE/GD(96)131
9.	Application of Competition Policy to High Tech Markets	OCDE/GD(97)44
10.	General Cartel Bans: Criteria for Exemption for Small and Medium-sized Enterprises	OCDE/GD(97)53
11.	Competition Issues related to Sports	OCDE/GD(97)128
12.	Application of Competition Policy to the Electricity Sector	OCDE/GD(97)132
13.	Judicial Enforcement of Competition Law	OCDE/GD(97)200
14.	Resale Price Maintenance	OCDE/GD(97)229
15.	Railways: Structure, Regulation and Competition Policy	DAFFE/CLP(98)1
16.	Competition Policy and International Airport Services	DAFFE/CLP(98)3
17.	Enhancing the Role of Competition in the Regulation of Banks	DAFFE/CLP(98)16
18.	Competition Policy and Intellectual Property Rights	DAFFE/CLP(98)18
19.	Competition and Related Regulation Issues in the Insurance Industry	DAFFE/CLP(98)20
20.	Competition Policy and Procurement Markets	DAFFE/CLP(99)3
21.	Regulation and Competition Issues in Broadcasting in the light of Convergence	DAFFE/CLP(99)1
22.	Relationship between Regulators and Competition Authorities	DAFFE/CLP(99)8
23.	Buying Power of Multiproduct Retailers	DAFFE/CLP(99)21
24.	Promoting Competition in Postal Services	DAFFE/CLP(99)22
25.	Oligopoly	DAFFE/CLP(99)25
26.	Airline Mergers and Alliances	DAFFE/CLP(2000)1
27.	Competition in Professional Services	DAFFE/CLP(2000)2
28.	Competition in Local Services	DAFFE/CLP(2000)13
29.	Mergers in Financial Services	DAFFE/CLP(2000)17
30.	Promoting Competition in the Natural Gas Industry	DAFFE/CLP(2000)18
31.	Competition Issues in Electronic Commerce	DAFFE/CLP(2000)32
32.	Competition and Regulation Issues in the Pharmaceutical Industry	DAFFE/CLP(2000)29
33.	Competition Issues in Joint Ventures	DAFFE/CLP(2000)33
34.	Competition Issues in Road Transport	DAFFE/CLP(2001)10

35.	Price Transparency	DAFFE/CLP(2001)22
36.	Competition Policy in Subsidies and State Aid	DAFFE/CLP(2001)24
37.	Portfolio Effects in Conglomerate Mergers	DAFFE/COMP(2002)5
38.	Competition and Regulation Issues in Telecommunications	DAFFE/COMP(2002)6
39.	Merger Review in Emerging High Innovation Markets	DAFFE/COMP(2002)20
40.	Loyalty and Fidelity Discounts and Rebates	DAFFE/COMP(2002)21
41.	Communication by Competition Authorities	DAFFE/COMP(2003)4
42.	Substantive Criteria used for the Assessment of Mergers	DAFFE/COMP(2003)5
43.	Competition Issues in the Electricity Sector	DAFFE/COMP(2003)14
44.	Media Mergers	DAFFE/COMP(2003)16
45.	Universal Services Obligations	DAF/COMP(2010)13
46.	Competition and Regulation in the Water Sector	DAFFE/COMP(2004)20
47.	Regulating Market Activities by Public Sector	DAF/COMP(2004)36
48.	Merger Remedies	DAF/COMP(2004)21
49.	Cartels: Sanctions against Individuals	DAF/COMP(2004)39
50.	Intellectual Property Rights	DAF/COMP(2004)24
51.	Predatory Foreclosure	DAF/COMP(2005)14
52.	Competition and Regulation in Agriculture: Monopsony Buying and Joint Selling	DAF/COMP(2005)44
53.	Enhancing Beneficial Competition in the Health Professions	DAF/COMP(2005)45
54.	Evaluation of the Actions and Resources of Competition Authorities	DAF/COMP(2005)30
55.	Structural Reform in the Rail Industry	DAF/COMP(2005)46
56.	Competition on the Merits	DAF/COMP(2005)27
57.	Resale Below Cost Laws and Regulations	DAF/COMP(2005)43
58.	Barriers to Entry	DAF/COMP(2005)42
59.	Prosecuting Cartels without Direct Evidence of Agreement	DAF/COMP/GF(2006)7
60.	The Impact of Substitute Services on Regulation	DAF/COMP(2006)18
61.	Competition in the Provision of Hospital Services	DAF/COMP(2006)20
62.	Access to key Transport Facilities	DAF/COMP(2006)29
63.	Environmental Regulation and Competition	DAF/COMP(2006)30
64.	Concessions	DAF/COMP/GF(2006)6
65.	Remedies and Sanctions	DAF/COMP(2006)19
66.	Competition in Bidding Markets	DAF/COMP(2006)31
67.	Competition and Efficient Usage of Payment cards	DAF/COMP(2006)32
68.	Vertical mergers	DAF/COMP(2007)21
69.	Competition and Regulation in Retail Banking	DAF/COMP(2006)33
70.	Improving Competition in Real Estate Transactions	DAF/COMP(2007)36
71.	Public Procurement – The Role of Competition Authorities in Promoting Competition	DAF/COMP(2007)34
72.	Competition, Patents and Innovation	DAF/COMP(2007)40
73.	Private Remedies	DAF/COMP(2006)34

TABLE OF CONTENTS

EXECUTIVE SUMMARY

By the Secretariat

From the country submissions, the Secretariat Issues Paper, and the discussion at the roundtable in June 2009, the following points emerge:

(1) *Most competition authorities rely on one of two main tests applied to assess whether a merger has anti-competitive effects: (i) the dominance test and (ii) the significant lessening of competition (SLC) test. Some, such as the EU, have a hybrid test, which combines the dominance and the SLC standards.*

Under the dominance test a merger is anticompetitive and can be prohibited if it strengthens or creates a dominant position in the market. The notion of dominance is not clearly defined in economics but it certainly reaches situations in which a market leader with a degree of independence from competitive pressures is created. Dominance can be interpreted either narrowly whereby it covers only situations where the merged firm becomes dominant or more broadly as covering also collective dominance, i.e. situations where the merger affects the competitive structure of the market in a manner that is conducive to creating a coordinated equilibrium among competitors.

Under the significant lessening of competition test, a merger has anti-competitive effects if it is likely to substantially lessen competition in the market. In comparison with the dominance test, the SLC test focuses on the effects of the merger on the market and on the loss of competition among firms rather than on threshold structural issues such as market shares. Under the SLC test, the investigation and assessment of a merger are more concerned with whether prices are likely to rise after the merger is consummated.

Under the hybrid test, a merger is anticompetitive if it significantly impedes effective competition in the market in particular through the creation or strengthening of a dominant position. This is the test currently in force in the European Union. By listing the creation or strengthening of dominant position as one of the ways in which effective competition may be impeded, the hybrid test combines the standards of both SLC and dominance. Doing so may allow countries that change from dominance to the SLC test to maintain clear continuity with past decisional practice and case law. Generally, the hybrid test is viewed as being nearly identical to the SLC test and hence is treated as part of SLC family.

(2) *There may be a difference in the scope of the dominance and SLC standards, whereby the assessment of certain situations could lead to different outcomes depending on which test is used.*

Whether there is a difference between the scope of the dominance and SLC tests, and how large that difference is, depend on how the concept of dominance is interpreted.

Horizontal mergers can have two types of effects, unilateral and coordinated effects. Unilateral effects are those that result from the strengthening of a market position of the merged entity, which as a consequence can act to some extent independently of its competitors. Coordinated effects on the other hand arise when, as a result of the merger, the structure of the market is changed in a way that favors tacit or express collusion among the remaining competitors.

There is no doubt that the SLC test can cover both unilateral and coordinated effects. However, whether the dominance test is capable of doing the same depends on how the notion of dominance is interpreted. If interpreted narrowly, i.e. to a certain extent literally because the wording is usually in singular (creation or strengthening of a dominant position), the dominance test does not reach coordinated effects and as such does not allow for proper assessment of many potentially anticompetitive mergers. If on the other hand, dominance is interpreted broadly as extending also to situations of collective dominance, such as the case was in the EU, the reach of the dominance test is nearly identical to that of the SLC test.

Nevertheless, even if dominance is given a broad economic interpretation, there may still be mergers leading to potentially anti-competitive unilateral effects that could escape scrutiny under the dominance test. This may occur with respect to mergers that lead to non-collusive oligopolies or vertical and conglomerate mergers. Indeed, several countries have mentioned cases from their practice, which could potentially have led to different outcomes if assessed under the dominance test as opposed to the SLC test.

(3) *Many jurisdictions have changed and others are contemplating changing the legal standard for the review of mergers from a standard based on the creation or strengthening of a dominant position to an SLC standard. No country reported changing over the last twenty years from the SLC standard to the dominance standard. While for most countries the change to an SLC test has made little difference in their practice, it has nevertheless made an impact on various aspects of merger review. Overall, the experience with changing from dominance to an SLC standard has been positive.*

There has been a clear move away from dominance and towards the SLC standard over the past seven years. There have been various reasons for switching from one test to the other.

In Australia, for example, the move from dominance towards an SLC test was necessary because of the narrow interpretation of the notion of dominance adopted by the domestic courts, which lead to a potential enforcement gap with respect to mergers that presented coordinated effects problems. In these countries the change from one standard to the other made a marked difference in the review of mergers.

Other jurisdictions have moved to the SLC test principally to eliminate the uncertainty over the reach of the dominance standard, for example, whether it extended to situations where horizontal mergers would lead to unilateral effects without creating a clear market leader. This was the case of the EU, while other countries (e.g. Czech Republic and Poland) have switched to the SLC test to adapt their standard to that of other countries or jurisdictions.

In the Netherlands, which have always endorsed a broad notion of dominance, the change to an SLC standard has brought very little to the assessment of mergers. Because these countries had already gradually introduced an increasingly economic, effects-based approach to merger review under a dominance test, the adoption of the SLC test has mainly aligned the wording of the test with the practice.

Countries like Denmark have also mentioned that the SLC test has contributed to enhancing the role of economic analysis in their merger review and to a better understanding of the assessment by the parties and the courts. In the experience of some countries, such as Canada, the SLC test has proven to be sufficiently flexible to capture a spectrum of anti-competitive effects.

The EU and other jurisdictions also noted that the SLC test allows them to properly assess mergers that would have been problematic to evaluate under the dominance standard, such as non-horizontal mergers. In such cases, a merger between two companies that are active on different markets, neither of them dominant, may still lead to an increase in prices as a result of vertical integration.

Some countries argued that the SLC standard allows for a more flexible and appropriate assessment of some mergers because it reduces the reliance on a formal market definition. In the UK experience, for example, there are cases in which it is not necessary to formally define the market because at a "quick look" it is clear that the merger is not anti-competitive regardless of how one defines the market. In such cases, the merger review can be much faster under an SLC standard, since formal market definition often takes a significant amount of time.

(4) Countries which have adopted an SLC test have not experienced an increase in their intervention rate or a negative impact on legal certainty.

Some commentators were concerned that the adoption of an SLC test would give competition authorities too much discretion and lead to over-enforcement. In this respect, the experience of countries that have moved to the SLC test indicates that the intervention rate against mergers has not increased following the adoption of the SLC test. This may be attributable to the fact that the change to an SLC test has, for most countries, aligned the wording of the test with the existing practice.

With respect to legal certainty, arguments were made that the SLC test is inherently more complex than the dominance test, and that the latter provides bright line rules and therefore offers firms a higher degree of legal certainty. However, many delegations emphasised that the SLC standard can provide a comparable level of legal certainty, in particular if accompanied by the adoption of guidelines explaining in detail how the test is applied.

(5) Convergence on a common substantive test may benefit international cooperation, however diverging standards are generally not perceived as hampering international cooperation.

There was no clear consensus on the proposition that having the same substantive test leads to better international cooperation. Some countries, such as the US, noted that having a common analytical approach focused on economic evidence and analysis is more important for international cooperation than an identically worded test. Experience shows that diverging tests do not hamper international cooperation as shown by the fact that in the past many mergers were reviewed by agencies under different tests and those agencies reached similar results in almost all cases. However, countries also emphasized that having the same standard may simplify cooperation because it provides competition agencies with the same frame of reference and allows them to focus on similarities rather than differences.

SYNTHÈSE

Par le Secrétariat

Il ressort des contributions des pays, des documents de réflexion du Secrétariat et des débats tenus lors de la table ronde de juin 2009 que :

(1) *La plupart des autorités de la concurrence s'en remettent à l'un des deux principaux critères retenus lorsqu'il s'agit de déterminer si une fusion a des effets anticoncurrentiels : i) le critère de position dominante ; ii) le critère de diminution substantielle de la concurrence. Certaines entités, comme l'Union européenne (UE), utilisent un critère hybride conjuguant les notions de position dominante et de diminution substantielle de la concurrence.*

Selon le critère de position dominante, une fusion est anticoncurrentielle et peut être interdite si elle renforce ou crée une position dominante sur le marché. La notion de position dominante n'est pas clairement définie en économie, mais elle englobe en tout cas les situations dans lesquelles est créé un leader de marché bénéficiant d'une certaine indépendance par rapport aux pressions concurrentielles. Cette notion peut être interprétée au sens restreint, ne couvrant alors que les situations dans lesquelles l'entreprise issue de la fusion vient à dominer le marché, ou dans un sens plus large, auquel cas elle englobe également les situations de position dominante collective, à savoir celles dans lesquelles la fusion influe sur la structure concurrentielle du marché d'une manière propice à l'instauration d'un équilibre concerté entre les concurrents.

Selon le critère de diminution substantielle de la concurrence, une fusion produit des effets anticoncurrentiels si elle risque de réduire sensiblement la concurrence sur le marché. Par rapport au critère de position dominante, le critère de diminution substantielle de la concurrence est centré sur les effets de la fusion sur le marché et sur le déficit de concurrence entre les entreprises plutôt que sur les questions structurelles de seuil telles que les parts de marché. En outre, les travaux d'enquête et d'évaluation concernant une fusion visent davantage à savoir si les prix sont susceptibles d'augmenter une fois la fusion achevée.

Selon le critère hybride, une fusion est anticoncurrentielle si elle représente une entrave significative à une concurrence effective sur le marché, du fait en particulier de la création ou du renforcement d'une position dominante. C'est le critère actuellement en vigueur dans l'Union européenne. Partant du principe que la création ou le renforcement d'une position dominante font partie des formes d'entrave éventuelle à une concurrence effective, le critère hybride combine les notions de diminution substantielle de la concurrence et de position dominante. Il permet peut-être en cela aux pays qui abandonnent le critère de position dominante au profit du critère de diminution substantielle de la concurrence de maintenir une continuité nette avec la pratique décisionnelle antérieure et la jurisprudence. Le critère hybride étant généralement considéré comme quasiment identique au critère de diminution substantielle de la concurrence, il est classé dans la famille construite autour de cette notion.

(2) *En raison d'une éventuelle différence de portée entre les critères de position dominante et de diminution substantielle de la concurrence, l'évaluation de certaines situations pourrait aboutir à des résultats différents selon le critère retenu.*

L'existence ou non d'une différence de portée entre les critères de position dominante et de diminution substantielle de la concurrence, et l'ampleur de cette différence, dépendent de l'interprétation qui est faite de la notion de position dominante.

Les fusions horizontales peuvent avoir deux types d'effets : unilatéraux et coordonnés. Les effets unilatéraux sont ceux qui résultent du renforcement de la position sur le marché de l'entité issue de la fusion, laquelle, en conséquence, peut agir indépendamment de ses concurrents dans une certaine mesure. Les effets coordonnés, en revanche, sont ceux qui se produisent lorsque la fusion modifie la structure du marché dans le sens d'une collusion tacite ou expresse entre les concurrents restants.

Il ne fait aucun doute que le critère de diminution substantielle de la concurrence peut s'appliquer à la fois aux effets unilatéraux et aux effets coordonnés. Cependant, la capacité du critère de position dominante à s'appliquer aux deux types d'effets dépend de la façon dont la notion de position dominante est interprétée. Si elle l'est au sens strict, autrement dit, dans une certaine mesure, de façon littérale, étant donné que la formulation est généralement au singulier (création ou renforcement d'une position dominante), le critère de position dominante ne prend pas en compte les effets coordonnés et, à ce titre, ne permet pas d'évaluer dûment de nombreuses fusions potentiellement anticoncurrentielles. À l'inverse, si la notion de position dominante est interprétée au sens large, de sorte qu'elle englobe aussi les situations de position dominante collective, comme c'était le cas dans l'UE, la portée du critère de position dominante est quasiment identique à celle du critère de diminution substantielle de la concurrence.

Néanmoins, même si la notion de position dominante est interprétée dans un sens économique large, il est encore possible que des fusions ayant des effets unilatéraux potentiellement anticoncurrentiels échappent à un contrôle en vertu du critère de position dominante. Cette situation peut se produire dans le cas des fusions conduisant à des oligopoles non collusoires ou des fusions verticales et conglomérales. D'ailleurs, plusieurs pays ont fait mention de cas concrets, qui auraient pu se traduire par des résultats différents s'ils avaient été évalués selon le critère de position dominante et non de diminution substantielle de la concurrence.

(3) *De nombreuses juridictions ont abandonné le critère fondé sur la création ou le renforcement d'une position dominante au profit du critère de diminution substantielle de la concurrence comme norme juridique de contrôle des fusions, et d'autres envisagent de les imiter. Aucun pays n'a signalé avoir abandonné le second critère au profit du premier au cours des vingt dernières années. Si ce changement a eu peu d'impact concrètement pour la plupart des pays, il a influé néanmoins sur divers aspects du contrôle des fusions. Globalement, le bilan du passage du critère de position dominante à celui de diminution substantielle de la concurrence est positif.*

On a assisté au cours des sept dernières années à un net repli du critère de position dominante au profit du critère de diminution substantielle de la concurrence. Divers motifs expliquent le passage de l'un à l'autre.

En Australie, par exemple, le passage du critère de position dominante au critère de diminution substantielle de la concurrence s'est avéré nécessaire du fait de l'interprétation restreinte de la notion de position dominante adoptée par les tribunaux du pays, interprétation à l'origine d'un vide réglementaire potentiel en ce qui concerne les fusions présentant des problèmes d'effets coordonnés. Dans de tels pays, l'abandon d'un critère au profit de l'autre a eu un fort impact sur le contrôle des fusions.

D'autres juridictions ont opté pour le critère de diminution substantielle de la concurrence avant tout pour mettre fin à l'incertitude concernant la portée du critère de position dominante, constatée par exemple dans le cas de fusions horizontales qui produiraient des effets unilatéraux sans donner naissance à un leader de marché évident. L'UE, notamment, a changé sa norme au profit du critère de diminution substantielle de la concurrence, tandis que d'autres pays (comme la Pologne et la République tchèque) ont fait de même pour aligner leur norme sur celle d'autres pays ou juridictions.

Aux Pays-Bas, qui ont toujours souscrit à une interprétation au sens large de la notion de position dominante, le passage au critère de diminution substantielle de la concurrence a eu très peu d'impact sur l'évaluation des fusions. Les pays dans le même cas de figure ayant déjà progressivement introduit une méthode de contrôle des fusions selon le critère de position dominante axée de plus en plus sur l'économie et les résultats, l'adoption du critère de diminution substantielle de la concurrence a essentiellement permis de rendre l'intitulé de la norme conforme à la pratique.

Des pays tels que le Danemark ont également indiqué que le critère de diminution substantielle de la concurrence avait contribué à renforcer le rôle de l'analyse économique dans les contrôles de fusions auxquels ils procédaient, et à améliorer la connaissance de l'évaluation par les parties et les tribunaux. Dans le cas de certains pays, par exemple le Canada, le critère de diminution substantielle de la concurrence permet en outre une meilleure évaluation des gains d'efficacité éventuels engendrés par une fusion.

L'UE et d'autres juridictions ont aussi fait observer que le critère de diminution substantielle de la concurrence leur permettait d'évaluer dûment des fusions qu'il aurait été difficile de contrôler selon le critère de position dominante, par exemple les fusions non horizontales. Dans ce cas de figure, la fusion entre deux entreprises qui opèrent sur des marchés différents, aucune d'entre elles n'ayant une position dominante, reste susceptible d'entraîner une hausse des prix du fait d'une intégration verticale.

Certains pays ont affirmé que le critère de diminution substantielle de la concurrence permettait une évaluation plus souple et appropriée de certaines fusions car il atténuait la nécessité de recourir à une définition formelle du marché. Au Royaume-Uni, par exemple, il est quelquefois inutile de définir formellement le marché dans la mesure où il apparaît de manière évidente, par un simple « coup d'œil », qu'une fusion n'est pas anticoncurrentielle, quelle que soit la définition qu'on donne du marché. Dans ces cas-là, le contrôle de la fusion peut s'avérer bien plus rapide selon le critère de diminution substantielle de la concurrence, étant donné qu'il est souvent très long de définir formellement le marché.

(4) Les pays qui ont adopté le critère de diminution substantielle de la concurrence n'ont enregistré aucun accroissement de leur taux d'intervention ni effet négatif en termes de sécurité juridique.

Certains commentateurs se sont inquiétés de ce que l'adoption du critère de diminution substantielle de la concurrence offrirait aux autorités de la concurrence une marge de manœuvre trop importante et se traduirait par une intervention excessive. À cet égard, les données d'expérience des pays qui ont changé de norme pour ce critère montrent que le taux d'intervention à l'encontre des fusions n'a pas progressé à la suite de ce changement, ce qui peut s'expliquer par le fait que l'abandon de la norme existante au profit du critère de diminution substantielle de la concurrence a eu pour effet, pour la plupart des pays, d'aligner l'intitulé de la norme sur la pratique en vigueur.

En ce qui concerne la sécurité juridique, on a objecté que le critère de diminution substantielle de la concurrence était intrinsèquement plus complexe que le critère de position dominante, et que celui-ci reposait sur des principes de conformité à l'objectif garantissant aux entreprises un niveau plus élevé de sécurité juridique. Toutefois, de nombreuses délégations ont souligné que le critère de diminution substantielle de la concurrence pouvait offrir un niveau de sécurité juridique comparable, en particulier lorsqu'il allait de pair avec l'adoption de principes directeurs expliquant en détail le mode d'application de la norme.

(5) La convergence vers un critère de fond commun peut avoir des effets positifs sur la coopération internationale, bien que l'existence de normes différentes ne soit généralement pas perçue comme un obstacle à la coopération internationale.

La proposition selon laquelle l'utilisation du même critère de fond conduirait à une meilleure coopération internationale n'a fait l'objet d'aucun consensus net. Certains pays, tels les États-Unis, ont fait remarquer qu'il importait davantage, pour la coopération internationale, de suivre une méthode analytique commune centrée sur l'information économique et son analyse que d'appliquer des normes aux intitulés identiques. L'expérience montre que les différences de critères n'entravent pas la coopération internationale : dans le passé, par exemple, de nombreuses fusions ont été contrôlées par des organismes faisant appel à des critères distincts, et des résultats analogues ont été obtenus dans la quasi-totalité des cas. Néanmoins, des pays ont aussi souligné que l'utilisation du même critère pouvait simplifier la coopération compte tenu que les autorités de la concurrence disposeraient du même cadre de référence et pourraient se concentrer sur les similitudes plutôt que sur les différences.

ISSUES PAPER

1. Introduction

After the February 2009 meeting, the Chair of the Competition Committee requested delegates to express their views on which topics should be included in the agenda of Working Party n. 3 (WP3) for June 2009 (see letter COMP/2009.31). Based on the responses received by the Secretariat, it was decided that in June 2009, WP3 would hold a roundtable discussion 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*". The Chair asked the Secretariat to identify in a short Issues Paper the main questions related to this topic that could be addressed in the country contributions and in the WP3 roundtable discussion of June 9. In his letter of 25 March 2009, the Chair invited Committee members and observers to submit written contributions on this topic by no later than Friday, 16 May 2009.

The substantive criteria used for the assessment of mergers has already been the topic of a Committee roundtable in October 2002[1]. The 2002 discussion revealed that while a number of different tests can be used to assess mergers, there were two main tests in use: (i) the dominance test, where a merger is considered anti-competitive if it creates or strengthens a dominant position and (ii) the significant lessening of competition test (SLC), where mergers are anti-competitive if competition is likely to be significantly impaired after the merger is consummated. Some countries reported to have hybrid standards and others to have substantive tests based also on other public interest considerations. The WP3 discussion will follow-up on that roundtable, focussing on country experiences in changing the standard of review for mergers.

The 2002 discussion indicated that there was no consensus on the overall superiority of one test over the other. However, there was considerable debate over whether or not the two tests cover the same set of anti-competitive effects that can arise from mergers. Generally, the SLC test was perceived as offering a broader coverage than the dominance test and to offer a more flexible enforcement approach to mergers. However, because of the greater flexibility in the SLC test, delegates concluded that a change of legal standard from dominance to SLC may introduce some legal uncertainty on the businesses as to what type of mergers are likely to raise anti-competitive effects. The change in legal standards, can therefore affect firms' willingness to plan even inoffensive mergers. In terms of tools and instruments of analysis, the roundtable showed that market shares and concentration indices generally play a more important role when the dominance test is applied as opposed to the SLC test, which is a less structural and more economic-based tool for investigating mergers.

Over the years, and particularly following the 2002 roundtable, a number of jurisdictions have decided to change their legal standards for the review of mergers and have moved from the dominance test to the SLC or equivalent tests. Since other countries (particularly in Europe) may be considering whether to adopt the SLC or similar tests, this roundtable offers the opportunity to engage in a discussion about the experiences that countries may have had with the change of the legal test. The purpose of this issues paper is to identify the main topics for discussion at the meeting on June 9. After reviewing the meaning of the dominance test and of the SLC test and the implications each test may have in terms of merger assessment, this paper describes some of the merger reforms that have occurred in selected OECD countries. The paper

1 See DAFFE/COMP(2003)5.

then briefly discusses some of the main policy issues which are involved with the choice of the merger test. The last part of the paper is devoted to some 'gap' cases and to describing an hypothetical merger case that delegates are invited to discuss on the basis of the merger test that they apply.

2. Substantive tests for merger review

Most competition authorities rely on one of the two main tests applied to assess whether a merger has anti-competitive effects: (i) the dominance test and (ii) the significant lessening of competition test. Some countries have a hybrid test, as was the case for example of the EU before the change of the merger test in 2004,[2] or have a test which is based on other public interest considerations[3]. The dominance test and the SLC test, whilst differently worded, are considered to pursue the same objective of preventing the anti-competitive effects of mergers. As will be briefly discussed below, however, the two tests are also considered to have a different reach in terms of which type of anti-competitive effects of mergers can be investigated under each test.

2.1 Definitions

Under the *dominance test*, a merger has anti-competitive effects only if the merged firm can be viewed as having a dominant position. In other words, a merger can be prohibited if it is likely to create or strengthen a dominant position in the market. While the notion of dominance is not well defined in economics, it is certainly associated with a transaction creating a leader in the market, i.e. a company with substantial market power enabling it to behave independently of competitors, customers and ultimately consumers. In many countries, the notion of dominance has been interpreted extensively to also include collective dominance, i.e. situations where the merger modifies the structure of the market and favours a collusive equilibrium among the remaining firms (collusive oligopolies).

Under the *significant lessening of competition test*, a merger has anti-competitive effects if the merger is likely to substantially lessen competition on the market. As opposed to the dominance test, the SLC test is less focussed on structural issues. In particular, while under the dominance test, market definition and market shares play crucial roles in finding a prima facie indication of anti-competitive effects, the focus of the SLC test lies predominantly on the impact of the merger on existing competitive constraints and on measuring market power post merger. In other words, under the SLC test the investigation is more concerned with whether prices are likely to raise post merger.

2.2 Unilateral and co-ordinated effects

Antitrust economics identifies two main anti-competitive effects of horizontal mergers: unilateral effects and co-ordinated effects. The first extensive characterization of these two concepts can be found in the U.S. Horizontal Merger Guidelines[4].

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2 Under the old EU rules, a merger was prohibited only if it created or strengthened a dominant position and the dominant position reduced competition substantially. The EU Commission's practice, however, put more emphasis on the creation of a dominant firm in the market that on the second part of the test, which was considered as met if a dominant position was created or strengthened.

3 This was for instance the case of the United Kingdom before the adoption of the Enterprise Act in 2002.

4 US Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, 1997.

Co-ordinated effects are defined as follows:[5]

A merger may diminish competition by enabling the firms selling in the relevant market more likely, more successfully, or more completely to engage in co-ordinated interaction that harms consumers. Co-ordinated interaction is comprised of actions by a group of firms that are profitable for each of them only as a result of the accommodating reactions of the others. This behaviour includes tacit or express collusion, and may or may not be lawful in and of itself.

Unilateral effects are defined as follows[6]:

A merger may diminish competition even if it does not lead to increased likelihood of successful coordinate interaction, because merging firms may find it profitable to alter their behaviour unilaterally following the acquisition by elevating price and suppressing output. Unilateral competitive effects can arise in a variety of different settings. In each setting, particular other factors describing the relevant market affect the likelihood of unilateral competitive effects. The settings differ by the primary characteristics that distinguish firms and shape the nature of their competition.

The European Commission, following the reform of the European merger control system issued a set of Guidelines on the Assessment of Horizontal Mergers[7] which recognise that there are two main ways in which horizontal mergers may significantly impede effective competition:

- by eliminating important competitive constraints on one or more firms, which consequently would have increased market power, without resorting to co-ordinated behaviour (non-coordinated or unilateral effects);

- by changing the nature of competition in such a way that firms who 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 already coordinating prior to the merger (co-ordinated effects).

2.3 Is there a gap in the dominance test?

It is undisputed that the SLC test can be used to review both unilateral and co-ordinated effects. More controversial is to what extent the dominance test is sufficiently flexible to cover all anti-competitive mergers. The question is whether there are mergers which could harm competition and whose anti-competitive effects cannot be addressed using the existing concepts of single firm and/or collective dominance. This would be the case where post-merger, the market features are not such that co-ordination can take place and the merged firm's market share is below the level required for establishing single dominance, but the merger nonetheless leads to unilateral effects (i.e. to a price increase).

Consider for example the situation of a so-called 'non-collusive oligopoly' where post-merger there would be only a few firms, none of which have enough market power to be considered individually dominant, and where collusion is also unlikely (i.e. the firms are not jointly dominant). In such a situation,

5 See Section 2.1 (Lessening of Competition Through Co-ordinated Interaction).

6 See Section 2.2 (Lessening of Competition Through Unilateral Effects).

7 European Commission, Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings, [2004] OJ C31/5.

economic theory suggests that the elimination of the competitive constraints that the merging firms exerted on each other prior to the merger may lead to a general price increase in the market. The merging firms will have an incentive to unilaterally increase their prices (although the merging firms will not become dominant and there will be no co-ordinated behaviour after the merger). Also, the other market players will benefit from the reduction of competitive pressure that results from the merger, since the merging firms' price increase may induce the switching of some demand to the rival firms, which, in turn, may find it optimal to increase prices. This might happen in particular in differentiated product markets. This is the so-called "gap" in the dominance test: mergers which allow firms to unilaterally raise prices but do not create or reinforce a single or collective dominant position cannot be prohibited.

The dominance test does not inherently extend to co-ordinated effects[8]. In most jurisdictions which have (or have had) a dominance test, collective or joint dominance is not expressly referred to in the statutory language. For example, the European Union, New Zealand and Australia all had statutory dominance tests which made no explicit reference to collective dominance. Similarly, in many European countries whose substantive merger test is dominance, collective dominance is not expressly mentioned in the text of the law. Some courts, as in the European Union, have developed a consistent case law interpreting the merger rules as applicable to collective as well as single-firm dominance but that has not been the case in all jurisdictions. In Australia and New Zealand, for example, the dominance test applied only to single firm dominance. The result was that mergers could not be blocked simply because they created a strong likelihood of co-ordinated effects. This was one of the reasons why the competition authorities in both countries argued in favour of replacing their dominance tests with an SLC test.

Box 1. Questions and Issues for Discussion

1. Please describe the substantive test which is applied to mergers in your jurisdiction and what factors are featured in determining whether competition is likely to be harmed by a merger.

2. Please discuss what type of possible anti-competitive effects are covered by the substantive test applied in your country.

3. If you feel that the merger test which is currently applicable in your jurisdiction is inadequate to address some potentially anti-competitive effects of mergers, please explain why that is.

3. Addressing the 'gap' in the dominance test

In the debate on which test is better suited for assessing mergers, a number of suggestions short of new legislation have been put forward to address the problem of the 'gap' in the dominance test. For the sake of legal certainty, however, some countries have decided to amend their merger statutes and change the legal standard.

8 OECD (2003), section 2.5.

3.1 Filling the gap in the dominance test without changing the legal test

A number of solutions have been put forward to address the gap in the dominance test without the need to change the test itself. These proposals aim at finding more flexibility in the dominance test so that it can be used to catch all harmful mergers that could be stopped under the SLC test. Some of these proposals, which are discussed in the Background Note to the 2002 OECD roundtable[9], include:

- weakening the definitional link between market power and dominance;
- varying the approach to market definition depending on the type of merger being reviewed, i.e. adopt particularly narrow markets in the case of mergers likely to produce unilateral effects in markets featuring differentiated products;
- consistently adopting particularly narrow market definitions;
- adopting different dominance thresholds for single and collective dominance;
- lowering the market power threshold required to find dominance; and/or
- ensuring collective dominance covers anti-competitive oligopolistic inter-dependence falling short of co-ordinated effects.

These suggestions however may have some important policy implications. On the one hand, they could ensure more flexibility and a broader scope of intervention against anti-competitive mergers in those jurisdictions which apply the dominance test. On the other hand, however, there is a risk that some uncertainty will be introduced into the merger system. For example, the first option could reduce certainty on how merger rules are enforced by diminishing the utility of the jurisprudence developed in enforcing the other parts of a competition statute. Similarly, the second option may introduce some uncertainty by requiring a prediction as to what approach to market definition will be used in any particular merger. It could also create suspicions that merger review in particular cases may be driven more by a desire for a particular result than exclusive attention to proven facts. Adopting consistently narrow market definitions could also mean that many mergers involving substitute products are analysed as conglomerate mergers making it necessary to treat horizontal effects as various kinds of portfolio effects[10].

More generally, courts may resist endorsing some of these proposals. For example, courts could prove very reluctant to extend collective dominance to block mergers where "non-cooperative" oligopolistic inter-dependence (i.e. behaviour neither explicitly nor tacitly involving collusion) will tend to result in higher prices post-merger. In addition, courts may resist de-linking the definitions for single-firm and collective dominance and, partly because of that, resist as well lowering market power thresholds associated with either collective or single-firm dominance. Courts will presumably be reluctant to open the door to finding that more than one different sized firm enjoys single-firm dominance in a properly defined antitrust market. More importantly, courts may be unwilling to de-link the definitions of dominance applied in merger review and in abuse of dominance cases, as doing so could upset the balance incorporated in abuse of dominance prohibitions.

9 See DAFFE/COMP(2003)5.

10 OECD (2002).

3.2 Legislative changes in the standard of review of mergers

In light of the existence of a possible gap in the dominance test and the difficulties to fill the gap without clearly changing the test, many have argued in favour of changing the merger statutes and adopting a more flexible test, such as the SLC test, which would catch without doubt all possible anti-competitive effects of mergers. Over the years, a number of jurisdictions have changed the legal test for the review of mergers and moved from the dominance test to the SLC test or to equivalent tests. This was the case for example in Australia (1992), New Zealand (2001), the UK (2002) and the European Union (2004). Other European countries have more recently followed the EU and also moved to a SLC-type of test. This was the case in Belgium, France, Spain, and Poland. Other countries may be considering similar reforms for the future.

3.2.1 Australia

In Australia, the merger standard included in Section 50 of the Trade Practices Act 1974 (TPA) has been amended twice[11]. Originally, the TPA prohibited any merger or acquisition which was likely to result in a substantial lessening of competition in a market for goods and services in Australia. In 1977, the legal standard for assessing mergers was amended and only mergers or acquisitions which would be likely to result in a corporation being able to dominate or control a substantial market for goods and services in Australia were considered anti-competitive. The reason for the policy change was that the government believed it was necessary to allow more mergers to take place so that Australian firms could achieve economies of scale and improve their international competitiveness. The dominance test was perceived to allow more mergers because of the higher threshold of intervention.

However, over the decades that followed, the appropriateness of the dominance test was put in question, particularly after a number of significant mergers led to high levels of concentration in major industries. Criticisms were raised that the dominance test had failed to deliver the gains in efficiency and international competitiveness that would supposedly be achieved by allowing more mergers. In 1992 the Australian government decided to revert to the substantial lessening of competition test, as a way to broaden the range of transactions which could be examined under Section 50 of the TPA. Today, the test for reviewing mergers in Australia states that "a corporation must not directly or indirectly: acquire shares in the capital of a body corporate or acquire any assets of a person, if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market".

3.2.2 New Zealand

The original version of the 1986 Commerce Act applied a dominance test to all mergers and acquisitions[12]. In May 2001, however, the government amended the Commerce Act and the merger review test was changed from dominance to substantial lessening of competition. A number of reasons were brought to support this decision, including:

- The need to achieve greater alignment of the merger test with the Australian merger law and that of other overseas jurisdictions, such as the US and Canada.

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11 See Australian contribution to the OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers in OECD, 2003.

12 See New Zealand contribution to the OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers in OECD, 2003.

- The perception that the threshold for intervention under the dominance test was set too high and left significant and potentially anti-competitive mergers outside the reach of the merger control law.

- The need for the Commerce Commission to have a merger test that would allow it to assess concerns of co-ordinated effects, as well as single-firm dominance.

Today, New Zealand applies a significant lessening of competition test to proposed mergers. Section 47 (Certain Acquisitions Prohibited) of the Commerce Act provides that "a person must not acquire assets of a business or shares if the acquisition would have, or would be likely to have, the effect of substantially lessening competition in a market".

3.2.3 United Kingdom

In 2002, the United Kingdom decided to change its test for reviewing mergers and moved to a significant lessening of competition standard. Unlike the previous examples, the UK did not have a dominance test before 2002, but a broad 'public interest' test. In particular, Section 69 of the 1973 Fair Trade Act (FTA) required the Competition Commission to consider whether the merger "operates, or may be expected to operate, against the public interest".

Section 84 of the FTA provided that, in making this assessment: "the Commission shall take into account all matters which appear to them in the particular circumstances to be relevant and, among other things, shall have regards to the desirability (a) of maintaining and promoting effective competition between persons supplying goods and services in the UK; (b) of promoting the interests of consumers, purchasers and other users of goods and services in the UK in respect of the prices charged for them and in respect of their quality and the variety of goods and services supplied; (c) of promoting, through competition, the reduction of costs and the development and use of new techniques and new products, and of facilitating the entry of new competitors into existing markets; (d) of maintaining and promoting the balanced distribution of industry and employment in the UK; (e) of maintaining and promoting effective competitive activity in markets outside the UK on the part of producers of goods, and suppliers of goods and services, in the UK".

According to the UK submission to the 2002 OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers,[13], despite the fact that non-competition considerations such as public security, regulatory concerns or environmental considerations, could be part of the assessment of mergers, in practice the UK competition agencies were almost entirely concerned in their investigations, with the effects of the merger on competition. The competition element therefore still carried substantial weight in practice. Under the Enterprise Act of 2002, the new merger system focused expressly on competition concerns and consumer welfare, by introducing a substantial lessening of competition test. However, if the merger is a public interest case or a special merger situation, the Secretary of State may still take other factors into account (national security and other public security concerns) in deciding whether to deviate from the decision of competition agencies.

3.2.4 European Union

The European Union adopted its first merger statute (the Merger Regulation[14]) in 1989 and the substantive test for all merger cases was the dominance test. Article 2(3) of the Merger Regulation

13 In OECD (2003).

14 See Council Regulation Nr. 4064/89 of 21 December 1989 on the Control of Concentrations between Undertakings.

stipulated that a concentration "which creates or strengthens a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it shall be declared incompatible with the common market."

In 2004, the Merger Regulation was amended[15] and a new substantive test for mergers was adopted. According to the merger regulation itself,[16] the reform of the merger test was necessary to fill the perceived gap in the dominance test. According to recital 25 of the new Merger Regulation, "in view of the consequences that concentrations in oligopolistic market structures may have, it is all the more necessary to maintain effective competition in such markets. Many oligopolistic markets exhibit a healthy degree of competition. However, under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition. The Community courts have, however, not to date expressly interpreted Regulation (EEC) No 4064/89 as requiring concentrations giving rise to such non-coordinated effects to be declared incompatible with the common market. Therefore, 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 [...]".

Today, the European Commission applies a SLC-type test for all mergers and acquisitions. According to Article 2.2 of the Merger Regulation, "a concentration which would not 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, shall be declared compatible with the common market"[17]. The 'significant impediment to effective competition' (SIEC) is considered to be equivalent to a 'significant lessening of competition' and is interpreted as extending, beyond the concept of dominance, 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.

Box 2. Questions and Issues for Discussion

1. Please explain if the substantive test for the review of mergers has been changed in your country.

2. If yes, please describe the changes and provide some background as to the policy rationale that led to these changes.

3. If you have recently changed your substantive test, please describe whether the change appears to have achieved the desired effect. Please discuss any issue that has arisen with the change in the substantive test.

4. If your jurisdiction is currently considering changing the test for the review of mergers in the foreseeable future, please summarise the current policy debate and explain why such legislative changes are being considered.

15 See Council Regulation Nr. 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings.

16 See Recital 25.

17 In practice, the new merger test reverses the two limbs of the old dominance test and the creation or strengthening of a dominant position becomes now only one possible theory of harm under which a merger can be considered incompatible with the common market.

4. Broader policy issues connected to the dominance test and the SLC test

The debate over the advantages and disadvantages of the dominance test versus the SLC test identified a number of broader policy issues which are closely related to the type of test that is chosen for assessing mergers.

4.1 Structural versus economic analysis

Some of the supporters of the SLC test have argued that reviewing mergers under a significant lessening of competition standard is more suited to an economics-based approach used to assess the effects of mergers on competition. The SLC allows emphasis to be place on rivalry between firms, on empirical evidence and on economic analysis[18]. This is particularly the case for the analysis of mergers in oligopoly markets, where the SLC test appears to be more suitable to review the impact of the merger on competition in a way that the dominance test cannot. The analysis under the dominance test follows more of a structural approach that places more emphasis on market definition and on market shares and is therefore less suited to measure inter-firm competitive dynamics which may or may not lead to a loss of competition as a result of the merger in oligopoly markets and in markets with differentiated products.

4.2 Legal certainty and predictability

Some authors, however, have warned that the SLC test may require the use of increasingly more sophisticated quantitative and econometric analysis to measure unilateral effects[19]. The concern is not simply related to the ability of the reviewing agency or of the parties to handle complex economic evidence and lengthy quantitative analysis[20], when the data is available. There is also the concern that the switch to the SLC test may introduce a degree of uncertainty and unpredictability as to how mergers will be assessed, which may ultimately discourage firms from planning pro-competitive mergers in the first place.

According to Heimler[21], the adoption of the SLC test for mergers would add too much flexibility to the merger standard with the risk that the test for assessing mergers will become too broad, leaving the competition agency with too much discretion. He argues that this may be contrary to the basic objective of legal provisions, which is to provide an effective guide to enterprises and individuals. Heimler is less concerned with the application of the SLC test by "capable and rigorous" enforcers than by the risks that a more flexible test can pose when applied by less sophisticated jurisdictions.

4.3 Over-enforcement and under-enforcement

The choice between a more rigid or a more flexible test also has policy implications on the type of merger regime that a jurisdiction wishes to put in place. The trade off is between more rigid rules, which may provide more certainty to firms but runs the risk of letting some anti-competitive mergers go through,

18 Se Kokkoris (2005).

19 See Voelcker (2004).

20 Voelcker, however, points out that complex econometric analysis requires agencies to hire the necessary expertise and resources to handle such complex matters. This may be a challenge for some agencies. Voelcker is particularly sceptical that courts reviewing merger decisions have the ability to use the complex econometric and qualitative evidence that the SLC test may require in its application. In addition, referring to the EU proposed change to the SLC test, he adds: "As long as there is a perception that the benefits (as well as the limitations) of using econometric evidence are not well understood at both staff level and within the DG COMP hierarchy, many companies may be hesitant to introduce such evidence".

21 Heimler (2008).

and more flexible rules, which can potentially catch all anti-competitive mergers but bears the risk of prohibiting some pro-competitive mergers. Indeed both arguments can be used. For example, those who have argued against the dominance test have emphasised its rigidity and the fact that it can lead to too many prohibitions. Others have argued that the dominance test does not catch all types of anti-competitive mergers.

4.4 Links between the merger test and unilateral conduct rules

Another policy issue that has been flagged in the debate on the dominance and the SLC tests is whether it is necessary to link the merger test with the legal standard for unilateral conduct. To the extent that mergers are found in other sections of competition statutes, it has been argued that there can be overlaps in jurisprudence with potentially important effects on merger review and on how other parts of the competition statute are applied[22].

The concepts of single and collective dominance developed in the review of mergers can affect how abuse of dominance provisions are applied and vice versa. This could be quite unhelpful, particularly if dominance test jurisdictions wish to lower the threshold of what constitutes dominance in order to block certain anti-competitive mergers, especially those having unilateral effects. Before doing so, however, one has to consider how this will tend to widen the scope of their abuse of dominance prohibitions. Moreover, the finding that a merger either leverages or strengthens a previously unidentified dominant position could have important ramifications for subsequent application of the abuse of dominance prohibition to the merging parties. Such a finding of dominance could presumably trigger increased scrutiny of the firms' conduct under abuse of dominance prohibitions. This point applies as well to mergers where the dominance is of a collective nature. In that case the ramifications affect not just the merging parties, but the whole group of firms sharing the collectively dominant position.

Those in favour of moving from a dominance test to an SLC test for mergers have also argued that: "Not only is there no logical or necessary link between the substantive test for mergers and the control of abusive behaviour, there is much to be said for detaching the two tests from one another. Such a detachment could serve the useful purpose of making clearer that merger control is about maintaining effective competition in markets, and not about predicting future abusive conduct"[23].

4.5 International co-operation

One other policy concern that has been flagged as relevant in the debate on the change of the substantive test for mergers is the fact that a greater homogeneity in the standard of review of mergers among jurisdictions would facilitate international cooperation. This point could support the adoption of either the dominance or the SLC test depending on the group of countries for which co-operation and convergence is deemed particularly important. As noted above, one reason that New Zealand adopted the SLC test was to align its merger regime with the one in Australia, its most important economic partner.

While the similarity of tests may be important to facilitate cooperation between agencies, it has also been emphasised that to facilitate international convergence there are other factors that could be just as or even more important than the substantive test that is applied to mergers[24]. Differences in objectives, the threshold applied for judging how much market power is too much, the analytical approach used to analyse

22 OECD (2003).

23 Whish (2002).

24 OECD (2003).

market power, and the way in which efficiencies are factored into merger review are equally important areas to explore in order to secure greater convergence in results.

Box 3. Questions and Issues for Discussion

1. Please discuss if the type of substantive test applied in your jurisdiction poses risks of over- or under-enforcement.

2. Please discuss if you think that the substantive standards applied to mergers have a broader policy impact on the interpretation and enforcement of unilateral conduct rules or on the prohibition of anti-competitive agreements.

3. Please discuss to what extent legal certainty (i.e. ability of parties to predict the result of merger review in a specific transaction) can be affected depending on which competition test is applied to mergers.

4. In a world where merger enforcement is increasingly multi-jurisdictional, please discuss if competition authorities should consider converging on one of the generic merger tests (i.e. SLC, dominance or public benefit).

5. Please discuss any instance where differences or similarities in substantive tests for mergers have had any relevance in the context of international cooperation in a merger case.

5. Examples of 'gap' cases

The literature has identified a number of cases that could potentially illustrate the so called 'gap'. These are merger cases where unilateral effects could arise below the threshold of dominance.

5.1 Heinz/Beech-Nut

The so-called "Baby Food" merger case[25] in the US is often cited as an example of this situation. The case involved the merger between Heinz and Beech-Nut, which after the merger would face competition only from Gerber, which remained the market leader. The case was investigated by the US Federal Trade Commission which applied the SLC test to assess the effects of the merger. The merger was prohibited as it substantially impaired competition. This case is often referred to as a case where the dominance test would have failed to properly capture the unilateral anti-competitive effects of the merger. Although the number of players in the market would be reduced from three to two players, the merger only involved the second and third players in the market with the remaining player retaining the leading position even after the merger. The facts of the case would have made it difficult for an agency applying the dominance test to argue that the merger would have created or strengthen a dominant position on the market.

5.2 Oracle/PeopleSoft

Another case that has been identified as a possible illustration of the gap is the merger between Oracle and PeopleSoft[26]. The transaction was investigated both in Europe (under the dominance test) and in the US (under the SLC test). Oracle and PeopleSoft are vendors of enterprise application software and compete with SAP (the market leader) and a number of smaller players. From the Commission decision it appears that the European Commission investigated whether unilateral effects would arise from a three-to-

[25] FTC v H.J. Heinz, 116 F.Supp. 2d 190 (2000 U.S. Dist.), revised 246 F.3d 708 (2001 U.S. App.).

[26] See Commission Decision of 26 October 2004, case COMP/M.3216.

two transaction, but it concluded that such effects were not likely to arise because evidence that was obtained after the Oral Hearing indicated that markets were broader and included a larger number of software vendors[27]. Commentators of this decision argued that the Commission relied upon unilateral effects and the analysis was devoid of any single-firm dominance considerations[28]. The Commission actually tried to close the enforcement gap in the application of the dominance test in this case by stretching the concept of collective dominance to non-coordinated effects on oligopolistic markets. The market structure, however, was not conducive to collective dominance and the fact that SAP and Oracle/PeopleSoft had similar market shares in an innovative market with differentiated products would render a credible allegation of single-firm dominance difficult. The merger was ultimately approved by the European Commission, but many argued that because of the dominance test the Commission was not able to properly address the unilateral effects that the merger raised[29].

5.3 T-Mobil/Tele.ring

After the EU changed its merger test from the dominance test to the SIEC test, the first case which was investigated by the Commission showed the greater flexibility of the new test. The merger involved the merger between T-Mobil and Tele.ring, two Austrian mobile network providers[30]. The transaction offered the opportunity to the Commission to apply the new SIEC test to a merger which would not create a market leader. After the merger, the merged entity would have had a market share slightly smaller than that of the leading mobile provider in Austria (Mobilkom). The merger lead neither to a single dominant position nor to collective dominance, but significantly reduced competition resulting in higher prices by eliminating a competitive constraint on the incumbents. Under the new merger test, the Commission concluded that “especially with the elimination of the maverick in the market and the simultaneous creation of a market structure with two leading, symmetrical network operators, it is likely that the planned transaction will produce non-co-ordinated effects and significantly impede effective competition in a substantial part of the common market”[31]. The Commission focussed its attention on the likely effects that the merger would have on prices in the Austrian end-customer market and concluded that even if prices would not rise in the short term, the elimination of Tele.ring as a pricing constraint would make it unlikely for prices to continue falling significantly as previously. The merger was however ultimately approved by the Commission, subject to the commitments offered by T-Mobil.

6. An hypothetical ‘gap’ case for discussion – A bank merger

This last section of the paper presents a short hypothetical exercise. The purpose of this exercise is to discuss whether the application of different standards of review for mergers may lead to different assessments of the same transaction. This could offer the opportunity to those delegations which have not had experience with both tests to contribute their perspective.

27 See para 187 of the Decision.

28 Baxter and Dethmers (2005).

29 Kokkoris (2009) and Werden (2005). Both authors identify potentially significant unilateral effects (such as adverse effects on prices, product variety, product quality and innovation) that could occur despite the presence of several rivals even if the merging products are not particularly close substitutes. They both argue that the existence of a number of firms in the post-merger market offering competing products, which arguably are not as efficient as the those of the three major players does not preclude the existence of unilateral adverse effects on competition from the merger in the form of non-co-ordinated effects in the post-merger oligopolistic market.

30 See Commission Decision of 26 April 2006, case COMP/M.3916.

31 See para 125.

6.1 Factual background

This hypothetical case concerns the proposed acquisition of the Bank of Investment (BoI) by the Bank of Commerce (BoC), both active in retail banking services to personal consumers and small and medium enterprises (SMEs) within the country of Oceanica.

BoC is currently the second largest bank in Oceanica and it offers a wide range of retail banking services with a particular emphasis on services to SMEs. The BoI is the fifth largest retail bank in that country and is widely seen as a relative newcomer in the market, having started its operation 15 years ago. It has grown rapidly through acquisitions as well as organically and has developed a reputation of something of a “maverick” that charges lower prices to consumers than its competitors. According to consumer surveys, BoC and BoI are the closest competitors for the supply of several bank services.

Both banks offer the whole range of retail banking services to private consumers, SMEs, large firms and institutions. They also possess a country-wide network of branches that gives them a presence all over the national territory of Oceanica. Due to their size, the range of services offered and the breadth of their branch network, they are considered to be “national banks”. As such, they belong to the group of the Big Five, all national banks that dominate the bank system in Oceanica.

Within the Big Five we have also Bank One, the historical market leader in Oceanica, just ahead of the second largest bank (the BoC). Together, the Big Five banks account for over 85% of the banking business in Oceanica. The remaining 15% are controlled by a multitude of smaller banks that specialize in different areas and have no national presence. The largest of these is much smaller than the BoI.

The sector has evolved substantially in the last 20 years. After a period of general broad expansion, where several banks entered the Oceanica market – and some of them achieved a significant presence in the market like the BoI - the sector has been consolidating over the recent years. Several acquisitions have occurred leading to a growing concentration of market shares in the hands of the Big Five banks.

Notably, BoC has expanded its presence in the market through a series of high-profile acquisitions during the past years – it was not the only one, other banks in the Big Five group have also achieved this position through acquisitions. Throughout the whole period, Bank One has remained the leader of the market, with only BoC starting to challenge its position recently.

For the purpose of this exercise, we will assume that the HHI analysis identifies a selected number of markets where the merger could raise concerns for competition. As shown in the Table below, Bank One is the leader of all the relevant markets. With the proposed merger, however, the new entity would become the market leader for credit for SMEs. For the remaining markets of concern, Bank One would still remain the leader - although by a narrow margin.

Table 1. Market Shares

	BoC	BoI	BoC+BoI	Bank One
Five markets for personal retail consumers (all markets have similar market shares)	20%	10%	30%	33%
Short term credit for SME	25%	10%	35%	30%

Box 4. Questions and Issues for Discussion

1. Based on the legal test that is applied in your country, please discuss if the hypothetical merger between BoC and BoI is likely to raise anti-competitive effects.

2. Please describe what type of potential anti-competitive effects you are likely to investigate.

3. Please discuss to what extent market definition and market shares are important factors in your analysis.

4. Please describe what other factors you would consider to complement the analysis of market shares.

5. Please discuss if the so-called “maverick” reputation of the BoI may have an impact on your analysis, particularly regarding competition concerns about consumer choice.

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NOTE POUR DISCUSSION

1. Introduction

Après la réunion de février 2009, la présidence du Comité de la concurrence a demandé aux délégués d'exprimer leur point de vue sur les thèmes qui devaient figurer à l'ordre du jour du Groupe de travail n°3 (GT3) pour juin 2009 (voir lettre COMP/2009.31). À partir des réponses reçues par le Secrétariat, il a été décidé qu'en juin 2009, le GT3 tiendrait une table ronde sur *« La norme d'examen des fusions, avec une réflexion plus particulière sur l'expérience des pays concernant le changement de norme d'examen des fusions, consistant à abandonner le critère de position dominante pour celui de la diminution substantielle de la concurrence »*. La présidence a demandé au Secrétariat de mettre en évidence dans un bref Document de réflexion les principales questions relevant de ce thème qui pourraient être traitées dans les contributions des pays pour la table ronde du GT3 du 9 juin. Dans sa lettre du 25 mars 2009, la présidence a invité les membres et observateurs du Comité à soumettre des contributions écrites sur ce thème au plus tard avant le vendredi 16 mai 2009.

Les critères de fond utilisés pour l'évaluation des fusions ont déjà fait l'objet d'une table ronde du Comité en octobre 2002[1]. La discussion de 2002 avait révélé que même si un certain nombre de critères peuvent servir à évaluer les fusions, deux critères principaux sont surtout utilisés : (i) le critère de position dominante selon lequel une fusion est considérée comme anticoncurrentielle si elle créée ou renforce une position dominante et (ii) le critère de diminution substantielle de la concurrence (*substantiel lessening of competition* — SLC), selon lequel les fusions sont anticoncurrentielles si la concurrence est sensiblement dégradée une fois la fusion consommée. Certains pays ont indiqué qu'ils appliquaient des normes hybrides et d'autres qu'ils recouraient à des critères de fond reposant aussi sur d'autres considérations d'intérêt public. Le débat du GT3 suivra cette table ronde en s'attachant aux expériences des pays concernant le changement de norme d'examen des fusions.

La discussion de 2002 a montré qu'il n'y avait pas de consensus sur la supériorité de l'un des critères sur l'autre. Toutefois, il y a eu tout un débat pour savoir si les deux critères couvrent ou non le même ensemble d'effets anticoncurrentiels qui peuvent découler de fusions. De façon générale, le critère de SLC a paru offrir une couverture plus étendue que celui de la position dominante et une démarche plus flexible de l'application du droit aux fusions. Cela étant, en raison de la plus grande souplesse du critère de SLC, les délégués ont conclu qu'un changement de norme juridique de la position dominante à la SLC risquait d'introduire une forme d'incertitude juridique pour les entreprises quant aux types de fusion susceptibles d'avoir des effets anticoncurrentiels. Le changement de normes juridiques peut donc affecter la volonté des entreprises de se lancer dans des opérations de fusion, si inoffensives soient-elles. En ce qui concerne les outils et instruments d'analyse, la table ronde a montré que les parts de marché et les indices de concentration jouent généralement un rôle plus important lors de l'application du critère de position dominante par opposition au critère de SLC qui constitue un outil moins structurel et d'ordre plus économique pour les enquêtes sur les fusions.

Au fil des années et en particulier à la suite de la table ronde de 2002, un certain nombre de juridictions ont décidé de changer de normes juridiques pour l'examen des fusions et ont délaissé le critère

1 Voir DAFFE/COMP(2003)5.

de position dominante au profit de celui de la SLC ou de critères équivalents. Comme d'autres pays (en particulier en Europe) peuvent envisager d'adopter le critère de SLC ou des critères analogues, cette table ronde offre l'occasion d'entamer un débat sur les expériences qu'ont pu avoir différents pays du changement de critère juridique. L'objet de ce document de réflexion est de cerner les différents thèmes de discussion lors de la réunion du 9 juin. Après avoir examiné la signification des critères de position dominante et de la SLC et les implications que chacun d'eux peut avoir pour l'évaluation des fusions, ce document décrit un certain nombre de réformes des fusions intervenues dans différents pays de l'OCDE. Le document examine ensuite quelques-unes des grandes questions stratégiques qu'implique le choix d'un critère d'examen des fusions. La dernière partie du document est consacrée à quelques cas de 'failles' et à la description d'une affaire thoérique de fusion que les délégués sont invités à examiner sur la base du critère qu'ils appliquent.

2. Critères de fond pour l'examen des fusions

La plupart des autorités de la concurrence s'en remettent à l'un des deux principaux critères appliqués pour évaluer si une fusion a des effets anticoncurrentiels : (i) le critère de position dominante et (ii) le critère de diminution substantielle de la concurrence (SLC). Certains pays utilisent un critère hybride, comme c'était par exemple le cas de l'UE avant le changement de critère intervenu en 2004[2] ou appliquent un critère reposant sur d'autres considérations d'intérêt général[3]. Les critères de la position dominante et de la SLC, bien que formulés différemment, passent pour avoir le même objectif de prévention des effets anticoncurrentiels des fusions. Comme on le verra brièvement, on considère que ces deux critères ont une portée différente quant aux types d'effets anticoncurrentiels des fusions pour lesquels ils peuvent être utilisés dans les enquêtes.

2.1 Définitions

Selon le *critère de position dominante*, une fusion n'a des effets anticoncurrentiels que si l'on peut considérer que l'entreprise issue de la fusion occupe une position dominante. En d'autres termes, on peut interdire une fusion si elle risque de créer ou de renforcer une position dominante sur le marché. Même si la notion de position dominante n'est pas bien définie en économie, elle est certainement associée à une transaction qui amène à l'apparition d'un leader sur le marché, à savoir une société disposant d'une puissance commerciale substantielle lui permettant de se comporter indépendamment de ses concurrents, de ses clients et, en dernière analyse, des consommateurs. Dans de nombreux pays, la notion de domination a été interprétée au sens large de façon à couvrir également la domination collective, à savoir les situations dans lesquelles la fusion modifie la structure du marché et favorise un équilibre collusif entre les entreprises restantes (oligopoles collusifs).

Selon le *critère de diminution substantielle de la concurrence*, une fusion produit des effets anticoncurrentiels si elle risque de réduire sensiblement la concurrence sur le marché. Contrairement au critère de position dominante, le critère de SLC est moins centré sur les problèmes structurels. Plus précisément, alors qu'avec le critère de position dominante, la définition du marché et les parts de marché jouent un rôle essentiel dans la mise en évidence de l'existence apparente d'effets anticoncurrentiels, le critère de SLC se préoccupe avant tout de l'impact de la fusion sur les contraintes concurrentielles

2 Aux termes des anciennes règles de l'UE, une fusion n'était interdite que si elle créait ou renforçait une position dominante et si cette position dominante réduisait sensiblement la concurrence. Toutefois, la pratique de la Commission européenne mettait plus l'accent sur la création d'une entreprise dominant le marché que sur le second volet du critère, qui était considéré comme satisfait si une position dominante était créée ou renforcée.

3 C'était par exemple le cas du Royaume-Uni avant l'adoption de l'Enterprise Act en 2002.

existantes et de la mesure de la puissance commerciale après la fusion. En d'autres termes, avec le critère de SLC, l'enquête cherche plus à savoir si les prix sont susceptibles d'augmenter après la fusion.

2.2 Effets unilatéraux et coordonnés

L'économie du droit de la concurrence identifie deux grands effets anticoncurrentiels des fusions horizontales : les effets unilatéraux et les effets coordonnés. La première caractérisation large de ces deux concepts figure dans les Horizontal Merger Guidelines des États-Unis[4].

Les effets coordonnés sont définis de la façon suivante[5] :

> *Une fusion peut affaiblir la concurrence en permettant aux entreprises vendant sur le marché pertinent d'avoir plus de chances de pouvoir se livrer à une interaction coordonnée préjudiciable aux consommateurs et de le faire de façon plus réussie et plus complète. L'interaction coordonnée recouvre les actions d'un groupe d'entreprises dont chacune n'est rentable qu'en raison des réactions accommodantes des autres. Ce comportement peut recouvrir des collusions tacites ou expresses et peut être légale ou non en soi et pour soi.*

Les effets unilatéraux sont définis de la façon suivante[6] :

> *Une fusion peut affaiblir la concurrence même si elle n'aboutit pas à accroître les chances de succès d'une interaction coordonnée parce que les entreprises parties à la fusion peuvent trouver rentable de modifier unilatéralement leur comportement à la suite de l'acquisition en relevant leur prix et en comprimant leur production. Les effets unilatéraux sur la concurrence peuvent se manifester dans diverses conditions. Dans chaque cas, d'autres facteurs spécifiques servant à décrire le marché pertinent peuvent affecter la probabilité d'effets unilatéraux sur la concurrence. Les conditions diffèrent par les caractéristiques premières qui distinguent les entreprises et déterminent la nature de leur concurrence.*

À la suite de la réforme du dispositif européen de contrôle des fusions, la Commission européenne, a publié un ensemble de Lignes directrices sur l'appréciation des concentrations horizontales[7] qui admet l'existence de deux grands modes par lesquels les fusions horizontales peuvent sensiblement entraver une concurrence effective :

- En éliminant d'importantes contraintes concurrentielles s'exerçant sur une ou plusieurs entreprises, ce qui devrait accroître la puissance commerciale, sans recourir à un comportement coordonné (effets non coordonnés ou unilatéraux) ;

- En changeant la nature de la concurrence de telle sorte que les entreprises qui, auparavant, ne coordonnaient pas leur comportement, sont désormais beaucoup plus susceptibles de coordonner et de relever leurs prix ou de porter par ailleurs préjudice à une concurrence effective. Une fusion peut aussi rendre la coordination plus facile, plus stable et plus efficace pour les entreprises qui coordonnaient déjà leur comportement avant la fusion (effets coordonnés).

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4 US Department of Justice et Federal Trade Commission, Horizontal Merger Guidelines, 1997.

5 Voir Section 2.1 (Lessening of Competition Through Co-ordinated Interaction).

6 Voir Section 2.1 (Lessening of Competition Through Unilateral Effects).

7 Commission européenne, Lignes directrices sur l'appréciation des concentrations horizontales au regard du règlement du Conseil relatif au contrôle des concentrations entre entreprises, [2004] JO C31/5.

2.3 Le critère de position dominante présente-il une faille ?

Il est incontestable que le critère de SLC peut servir à vérifier l'existence d'effets tant unilatéraux que coordonnés. La question de savoir dans quelle mesure le critère de position dominante est suffisamment souple pour couvrir toutes les fusions anticoncurrentielle prête plus à controverse. Il s'agit de savoir s'il y a des fusions qui peuvent porter préjudice à la concurrence et dont les effets anticoncurrentiels ne peuvent pas être abordés à l'aide des concepts existants de la position dominante d'une entreprise unique ou la domination collective. Ce serait le cas lorsque, après la fusion, les caractéristiques du marché ne sont pas de nature à permettre une coordination et lorsque la part de marché de l'entreprise issue de la fusion est inférieure au niveau requis pour établir l'existence d'une domination individuelle, alors que la fusion aboutit néanmoins à des effets unilatéraux (à savoir une augmentation de prix).

Envisageons par exemple la situation d'un oligopole « non collusif » dans laquelle, après la fusion, il n'y aurait plus que quelques entreprises dont aucune ne détiendrait une puissance commerciale permettant de la considérer comme individuellement dominante et dans laquelle les collusions seraient aussi improbables (en d'autres termes, les entreprises ne sont pas conjointement dominantes). Dans une telle situation, la théorie économique veut que l'élimination des contraintes concurrentielles que les entreprises ayant fusionné exerçaient l'une sur l'autre avant la fusion, peut aboutir à une augmentation générale des prix sur le marché. Les entreprises ayant fusionné auront intérêt à relever unilatéralement leurs prix (bien qu'elles ne deviennent pas dominantes et qu'il n'y ait pas de coordination des comportements après la fusion). En outre, les autres intervenants sur le marché vont bénéficier de la réduction des pressions concurrentielles sous l'effet de la fusion, puisque l'augmentation des prix décidée par les entreprises qui fusionnent peut entraîner le report d'une partie de la demander sur les entreprises qui peuvent elles-mêmes juger optimal de relever leurs prix. C'est ce qui peut se produire sur des marchés dont les produits sont différenciés. C'est la fameuse « faille » du critère de position dominante : les fusions qui permettent à des entreprises de relever unilatéralement leurs prix sans créer ou renforcer une position dominante individuelle ou une domination collective, ne peuvent pas être interdites.

En soi, le critère de position dominante ne couvre pas les effets coordonnés[8]. Dans la plupart des juridictions qui appliquent (ou ont appliqué) un critère de position dominante, la notion de domination collective ou conjointe n'est pas évoquée dans la rédaction des textes. Par exemple, l'Union européenne, la Nouvelle-Zélande et l'Australie ont toutes appliqué des critères officiels de position dominante qui ne faisaient pas explicitement mention de la notion de domination collective. De même, dans de nombreux pays européens dont le critère de fond d'examen des fusions est la position dominante, la notion de domination collective ne figure pas expressément dans le texte de la loi. Certains tribunaux ont, comme dans l'Union européenne, élaboré une jurisprudence cohérente considérant que les règles relatives aux fusions s'appliquent à la position dominante tant collective qu'individuelle, mais cela n'a pas été le cas dans toutes les juridictions. En Australie et en Nouvelle-Zélande, par exemple, le critère de position dominante ne s'appliquait qu'à la domination d'une seule entreprise. Il s'ensuivait que les fusions ne pouvaient pas être simplement bloquées parce qu'elles induisaient une forte probabilité d'effets coordonnés. Cela a été l'une des raisons pour lesquelles les autorités de la concurrence de ces deux pays ont plaidé pour le remplacement de leurs critères de position dominante par un critère de SLC.

8 OCDE (2003), section 2.5.

Encadré 5. Questions et problèmes à examiner

6. Veuillez décrire le critère de fond qui est appliqué aux fusions dans votre juridiction et les facteurs contribuant à déterminer si la concurrence risque d'être négativement affectée par une fusion.

7. Veuillez expliquer quels sont les types d'effets anticoncurrentiels possibles qui sont couverts par le critère de fond appliqué dans votre pays.

8. Si vous estimez que le critère d'examen des fusions actuellement applicable dans votre juridiction est inadapté au traitement de certains effets potentiellement anticoncurrentiels des fusions, veuillez expliquer pourquoi.

3. Remédier à la 'faille' du critère de position dominante

Dans le débat sur le critère le plus adapté pour évaluer les fusions, un certain nombre de propositions, sans aller jusqu'à l'introduction d'une nouvelle loi, ont été avancées pour remédier au problème de la 'faille' du critère de position dominante. Au nom de la certitude juridique, cependant, des pays ont décidé de modifier leurs textes législatifs et réglementaires relatifs aux fusions et de changer de norme juridique.

3.1 Remédier à la faille du critère de position dominante sans changer de critère juridique

Un certain nombre de solutions ont été proposées pour remédier à la faille du critère de position dominante sans pour autant changer le critère lui-même. Ces propositions visent à introduire plus de souplesse dans l'application de ce critère de façon qu'il puisse servir à couvrir toutes les fusions préjudiciables qui pourraient être bloquées selon le critère de SLC. Parmi ces propositions, qui sont examinées dans la Note de référence de la table ronde de l'OCDE de 2002[9], on retiendra :

- alléger le lien entre pouvoir de marché et position dominante dans la définition de ces deux concepts ;
- modifier l'approche de la définition du marché en fonction du type de fusion contrôlé, en d'autres termes retenir des marchés particulièrement étroits dans le cas de fusions susceptibles de produire des effets unilatéraux sur des marchés présentant des produits différenciés ;
- adopter uniformément des définitions du marché particulièrement étroites ;
- adopter des seuils de position dominante différents selon qu'il s'agit d'une position dominante individuelle ou collective ;
- abaisser le seuil de pouvoir de marché exigé pour conclure à l'existence d'une position dominante ;
- étendre le concept de position dominante collective pour couvrir les situations d'interdépendance oligopolistique anticoncurrentielle en l'absence d' « effets coordonnés ».

Toutefois, ces propositions peuvent avoir des implications stratégiques importantes. D'un côté, elles pourraient apporter plus de souplesse et élargir le champ d'intervention contre les fusions anticoncurrentielles dans les juridictions appliquant le critère de position dominante. Mais d'un autre côté,

9 See DAFFE/COMP(2003)5.

elles présentent le risque d'introduire une forme d'incertitude dans le régime des fusions. Par exemple, la première solution pourrait réduire la certitude quant aux modalités d'application des règles relatives aux fusions en réduisant l'intérêt de la jurisprudence élaborée à l'occasion de la mise en œuvre d'autres volets des autres textes relatifs à la concurrence. De même, la deuxième option peut introduire une incertitude en imposant de dire par avance quelle approche de la définition du marché sera utilisée dans le cas d'une fusion particulière. Cela risque aussi d'amener à soupçonner que l'examen des fusions puisse dans des cas particuliers être plus motivé par le désir de parvenir à un certain résultat que si l'on se concentrait exclusivement sur des faits établis. Adopter uniformément des définitions étroites du marché peut aussi signifier que de nombreuses fusions impliquant des produits de substitution sont analysées comme des fusions conglomérales, ce qui nécessite d'en traiter les effets horizontaux comme différents types d'effets de portefeuille[10].

Plus généralement, les tribunaux pourraient résister à l'adoption de certaines de ces propositions. Par exemple, les tribunaux pourraient être très réticents à adopter une notion élargie de domination collective pour bloquer des fusions lorsqu'une interdépendance oligopolistique « non coopérative » (à savoir un comportement qui n'implique aucune collusion explicitement ou tacitement) tendra à aboutir à une augmentation des prix après la fusion. En outre, les tribunaux risquent de résister à un découplage des définitions des notions de position dominante individuelle et collective et, en partie de ce fait, résister aussi à l'abaissement des seuils de puissance commerciale associés à la notion de position dominante collective ou à celle de position dominante individuelle. Les tribunaux seront sans doute réticents à ouvrir la porte à la conclusion que plusieurs entreprises de tailles différentes bénéficient d'une position dominante individuelle sur un marché convenablement défini aux termes du droit de la concurrence. Mais surtout, les tribunaux seront sans doute peu désireux de découpler les définitions de la position dominante appliquée dans l'examen des fusions et dans les affaires d'abus de position dominante, car cela pourrait mettre à mal l'équilibre intégré dans les interdictions des abus de position dominante.

3.2 Les modifications législatives de la norme d'examen des fusions

À la lumière de l'existence d'une possible faille du critère de position dominante et des difficultés à remédier à cette faille sans modifier clairement le critère, nombre de spécialistes ont plaidé pour une modification des textes législatifs et réglementaires relatifs aux fusions en vue d'adopter un critère plus souple comme le critère de SLC, qui permettrait de couvrir sans aucun doute tous les effets anticoncurrentiels possibles des fusions. Au fil des années, un certain nombre de juridictions ont changé de critère juridique d'examen des fusions et sont passées du critère de position dominante au critère de SLC ou à des critères équivalents. Cela a par exemple été le cas de l'Australie (1992), de la Nouvelle-Zélande (2001), du Royaume-Uni (2002) et de l'Union européenne (2004). D'autres pays européens ont plus récemment imité l'UE pour adopter un critère de type SLC. Cela a été le cas en Belgique, en France, en Espagne et en Pologne. D'autres envisagent sans doute de telles réformes pour l'avenir.

3.2.1 Australie

En Australie, la norme relative aux fusions figurant à l'article 50 de la Trade Practices Act (TPA) de 1974 a été modifiée deux fois[11]. À l'origine, la TPA interdit toute fusion ou acquisition susceptible d'aboutir à une réduction substantielle de la concurrence sur un marché des biens et des services en Australie. En 1977, la norme juridique d'évaluation des fusions a été modifiée et seules les fusions ou acquisitions susceptibles d'aboutir à la possibilité pour une société de dominer ou de contrôler un marché substantiel des biens ou services en Australie étaient considérées comme anticoncurrentielle. Ce

10 OCDE (2002).

11 Voir contribution australienne à la Table ronde de l'OCDE sur Substantive Criteria Used for the Assessment of Mergers (critères de fond utilisés pour l'évaluation des fusions) in : OCDE, 2003.

changement d'orientation a été justifié par le fait que le gouvernement jugeait nécessaire d'autoriser la réalisation de plus de fusions de façon que les entreprises australiennes puissent dégager des économies d'échelle et améliorer leur compétitivité internationale. Le critère de position dominante paraissait permettre plus de fusions en raison du seuil plus élevé d'intervention.

Toutefois, dans les décennies qui ont suivi, la pertinence du critère de position dominante a été remise en question, particulièrement après qu'un certain nombre de fusions importantes ont abouti à une forte concentration dans certains grands secteurs. On a ainsi accusé le critère de position dominante de ne pas avoir permis de parvenir aux gains d'efficience et à la compétitivité internationale que l'on était censé obtenir en autorisant plus de fusions. En 1992, le gouvernement australien a décidé de revenir au critère de réduction substantielle de la concurrence, afin d'élargir l'éventail des transactions qui pourraient être examinées aux termes de l'article 50 de la TPA. Aujourd'hui, le critère d'examen des fusions en Australie prévoit qu'une « société ne doit pas directement ou indirectement : acquérir des parts du capital d'une personne morale ou acquérir de quelconques actifs d'une personne si ladite acquisition aurait pour effet ou risquerait d'avoir pour effet de réduire sensiblement la concurrence sur un marché ».

3.2.2 Nouvelle-Zélande

La version initiale de la Commerce Act de 1986 appliquait un critère de position dominante à toutes les fusions et acquisitions[12]. En mai 2001, cependant, le gouvernement a modifié cette loi et le critère d'examen des fusions est passé de la position dominante à la réduction substantielle de la concurrence. Un certain nombre de raisons ont été invoquées à l'appui de cette décision, notamment :

- La nécessité de faire mieux coïncider le critère d'examen des fusions avec la loi australienne relative aux fusions et avec celles d'autres juridictions étrangères, comme les États-Unis et le Canada.

- Le sentiment que le seuil d'intervention aux termes du critère de position dominante a été fixé à un niveau trop élevé et a permis à des fusions importantes et potentiellement anticoncurrentielles d'échapper à la loi sur le contrôle des fusions.

- La nécessité pour la Commerce Commission de disposer d'un critère qui lui permettrait d'apprécier les préoccupations relatives aux effets coordonnés ainsi qu'a une position dominante d'une seule entreprise.

Aujourd'hui, la Nouvelle-Zélande applique un critère de réduction significative de la concurrence aux projets de fusion. L'article 47 (Certain Acquisitions Prohibited) de la Commerce Act prévoit que « une personne ne doit pas acquérir des actifs d'une entreprise ou des actions si l'acquisition aurait pour effet ou serait susceptible d'avoir pour effet de réduire sensiblement la concurrence sur un marché ».

3.2.3 Royaume-Uni

En 2002, le Royaume-Uni a décidé de changer de critère d'examen des fusions et a adopté une norme de réduction significative de la concurrence. Contrairement aux exemples précédents, le Royaume-Uni n'appliquait pas de critère de position dominante avant 2002, mais un critère large 'd'intérêt général'. Plus précisément, l'article 69 de la Fair Trade Act (FTA) de 1973 disposait que la Commission de la concurrence devait vérifier si la fusion « agit ou porte à penser qu'elle agira contre l'intérêt général ».

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[12] Voir la contribution de la Nouvelle-Zélande à la table ronde de l'OCDE sur le thème Substantive Criteria Used for the Assessment of Mergers (critères de fond utilisés pour l'évaluation des fusions) in : OCDE, 2003.

L'article 84 de la FTA prévoyait qu'à l'occasion de cette évaluation « la Commission tiendra compte de toutes les questions qui, dans les circonstances particulières, lui apparaissent pertinentes et, entre autres, prendra en considération le caractère souhaitable (a) de maintenir et de promouvoir une concurrence effective entre des fournisseurs de biens et de services au Royaume-Uni ; (b) de promouvoir les intérêts des consommateurs, acheteurs et autres utilisateurs de biens et de services au Royaume-Uni en ce qui concerne les prix qui leur sont facturés et en ce qui concerne la qualité et la variété des biens et des services fournis ; (c) de promouvoir, par le biais de la concurrence, la réduction des coûts et le développement et l'utilisation de techniques nouvelles et de nouveaux produits et de faciliter l'entrée de nouveaux concurrents sur les marchés existants ; (d) de maintenir et de promouvoir l'équilibre de la distribution de l'industrie et de l'emploi au Royaume-Uni ; (e) de maintenir et de promouvoir une activité compétitive sur des marchés extérieurs au Royaume-Uni de la part des producteurs de biens et des fournisseurs de biens et de services au Royaume-Uni ».

Selon la contribution du Royaume-Uni à la Table ronde de 2002[13], bien que des considérations comme la sécurité publique, des préoccupations d'ordre réglementaire ou des préoccupations environnementales puissent entrer dans le cadre de l'évaluation de fusions, dans la pratique, les autorités de la concurrence se sont presque exclusivement intéressées dans leurs enquêtes aux effets de la fusion sur la concurrence. L'élément de concurrence continue donc d'avoir un poids substantiel dans la pratique. Aux termes de l'Enterprise Act de 2002, le nouveau régime des fusions met expressément l'accent sur les considérations de concurrence et de bien-être des consommateurs, en introduisant un critère de réduction substantielle de la concurrence. Toutefois, si la fusion est une affaire d'intérêt général ou s'il s'agit d'un cas spécial de fusion, le Secrétaire d'État peut tout de même tenir compte d'autres facteurs (la sécurité nationale et d'autres considérations de sécurité publique) pour décider s'il convient de s'écarter de la décision des autorités de la concurrence.

3.2.4 Union européenne

L'Union européenne a adopté son premier texte sur les fusions (le règlement sur les concentrations[14]) en 1989 et le critère de fond applicable à toutes les affaires de fusion était le critère de position dominante. L'article 2(3) du Règlement sur les concentrations précisait que des opérations de concentration « qui créent ou renforcent une position ayant comme conséquence qu'une concurrence effective dans le marché commun ou une partie substantielle de celui-ci est entravée de manière significative doivent être déclarées incompatibles avec le marché commun ».

En 2004, le Règlement sur les concentrations a été modifié[15] et un nouveau critère de fond a été adopté pour l'examen des fusions. Selon le règlement lui-même[16], la réforme du critère de fusion était nécessaire pour remédier à la faille apparente du critère de position dominante. Selon le considérant 25 du nouveau Règlement sur les concentrations, « eu égard aux conséquences possibles des concentrations réalisées dans le cadre de structures de marché oligopolistiques, il est d'autant plus nécessaire de maintenir une concurrence effective sur ces marchés. Un grand nombre de marchés oligopolistiques montrent un sain degré de concurrence. Toutefois, dans certaines circonstances, les concentrations impliquant l'élimination des fortes contraintes concurrentielles que les parties à la concentration exerçaient l'une sur l'autre, ainsi qu'une réduction des pressions concurrentielles sur les autres concurrents, peuvent, même en l'absence de

13 In : OECD (2003).

14 Voir Règlement (CEE) n° 4064/89 du Conseil, du 21 décembre 1989, relatif au contrôle des opérations de concentration entre entreprises.

15 Voir Règlement (CE) n° 139/2004 du Conseil du 20 janvier 2004 relatif au contrôle des concentrations entre entreprises.

16 Voir Considérant 25.

probabilité de coordination entre les membres de l'oligopole, avoir pour conséquence une entrave significative à une concurrence effective. Toutefois, les juridictions communautaires n'ont pas, à ce jour, expressément interprété le règlement (CEE) n° 4064/89 comme exigeant que soient déclarées incompatibles avec le marché commun les concentrations donnant lieu à des effets non coordonnés de ce type. Il convient donc, par souci de sécurité juridique, de préciser que le présent règlement prévoit un contrôle effectif de toutes ces concentrations en établissant que toute concentration qui entraverait de manière significative une concurrence effective, dans le marché commun ou une partie substantielle de celui-ci, devrait être déclarée incompatible avec le marché commun [...] ».

Actuellement, la Commission européenne applique un critère de type SLC à toutes les fusions et acquisitions. Selon l'article 2.2 du Règlement sur les concentrations, « les concentrations qui n'entraveraient pas de manière significative une concurrence effective dans le marché commun ou une partie substantielle de celui-ci, notamment du fait de la création ou du renforcement d'une position dominante, doivent être déclarées compatibles avec le marché commun »[17]. L'expression 'entrave significative à une concurrence effective' (SIEC) est considérée comme équivalente à une 'réduction significative de la concurrence' et elle est réputée s'appliquer, au-delà du concept de position dominante, aux effets anticoncurrentiels d'une opération de concentration résultant du comportement non coordonné d'entreprises qui n'occuperaient pas de position dominante sur le marché concerné.

Encadré 6. Questions et problèmes à examiner

9. Veuillez expliquer si le critère de fond utilisé pour l'examen des fusions a été modifié dans votre pays.

10. Si c'est le cas, veuillez décrire les modifications et donner quelques éléments de référence sur les raisons stratégiques qui ont abouti à ces changements.

11. Si vous avez récemment changé de critère de fond, veuillez indiquer si ce changement semble avoir obtenu l'effet désiré. Veuillez préciser les éventuels problèmes qui se sont posés sous l'effet du changement de critère de fond.

12. Si votre juridiction envisage actuellement de changer de critère d'examen des fusions dans un avenir proche, veuillez résumer le débat d'orientation en cours et expliquer pourquoi ces changements de la loi sont envisagés.

4. Questions plus générales se rapportant aux critères de position dominante et de SLC

Le débat sur les avantages et inconvénients du critère de position dominante par rapport au critère de SLC a mis en relief un certain nombre de questions plus générales qui sont étroitement liées au type de test retenu pour évaluer les fusions.

4.1 Analyse structurelle ou analyse économique

Pour certains tenants du critère de SCL, l'examen des fusions en fonction de la norme de réduction significative de la concurrence convient mieux à une démarche fondée sur une analyse économique servant à les effets d'une fusion sur la concurrence. Le critère de SLC permet de mettre l'accent sur la rivalité entre

17 Dans la pratique, le nouveau critère d'examen des fusions inverse les deux branches de l'ancien critère de position dominante et la création ou le renforcement d'une position dominante ne devient plus désormais qu'une théorie possible du préjudice aux termes de laquelle une fusion peut être jugée incompatible avec le marché commun.

entreprises, sur les éléments empiriques et sur l'analyse économique[18]. C'est particulièrement vrai de l'analyse des fusions sur des marchés oligopolistiques, pour lesquels le critère de SLC semble mieux convenir à l'examen de l'impact de la transaction sur la concurrence que le critère de position dominante. L'analyse selon le critère de position dominante suit une approche plus structurelle qui met plus l'accent sur la définition du marché et les parts de marché et donc convient moins bien pour mesurer les dynamiques de concurrence interentreprises qui peuvent déboucher ou non à une perte de concurrence par suite de la fusion sur des marchés oligopolistiques ou sur des marchés présentant des produits différenciés.

4.2 Certitude juridique et prévisibilité

Certains auteurs ont cependant averti que le critère de SLC peut nécessiter le recours à des analyses quantitatives et économétriques de plus en plus sophistiquées pour mesurer les effets unilatéraux[19]. Cette préoccupation n'est pas uniquement liée à la capacité de l'autorité examinatrice ou des parties de manier des éléments économiques complexes et de longues analyses quantitatives[20], lorsque les données sont disponibles. Il y a aussi la crainte que le passage au critère de SLC n'introduise une incertitude et une imprévisibilité quant à la façon dont la fusion sera évaluée, ce qui peut en dernier ressort décourager les entreprises de préparer ne serait-ce que des fusions favorables à la concurrence.

Selon Heimler[21], l'adoption du critère de SLC pour les fusions va ajouter trop de flexibilité à la norme de fusion au risque que le critère d'évaluation des fusions devienne trop large et laisse trop de latitude à l'autorité de la concurrence. Il estime que cela peut être contraire à l'objectif élémentaire des dispositions juridiques, à savoir donner des orientations efficaces aux entreprises et aux particuliers. Heimler se préoccupe moins de l'application du critère de SLC par des autorités « capables et rigoureuses » que du risque que peut présenter un critère plus souple lorsqu'il s'applique dans des juridictions moins bien armées pour un tel exercice.

4.3 Sur-application ou sous-application du droit

Le choix entre un critère plus rigide ou plus flexible a aussi des conséquences sur le type de régime des fusions qu'une juridiction souhaite mettre en place. L'arbitrage intervient entre des règles plus rigides qui peuvent apporter plus de certitudes aux entreprises au risque de laisser passer certaines fusions anticoncurrentielles entre les mailles du filet et des règles plus souples qui peuvent théoriquement couvrir toutes les fusions anticoncurrentielles au risque d'interdire certaines fusions favorables à la concurrence. De fait, les deux arguments sont recevables. Par exemple, ceux qui ont plaidé contre le critère de position dominante ont mis l'accent sur sa rigidité et sur le fait qu'il peut aboutir à de trop nombreuses interdictions. D'autres ont affirmé que le critère de position dominante ne détecte pas tous les types de fusions anticoncurrentielles.

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18 Voir Kokkoris (2005).

19 Voir Voelcker (2004).

20 Voelcker souligne cependant qu'une analyse économétrique complexe impose aux autorités de se doter des compétences et des ressources nécessaires pour traiter de sujet aussi délicats. Cela peut poser des problèmes à certaines autorités. Voelcker est particulièrement sceptique quant à la capacité des tribunaux amenés à examiner des décisions de fusion à utiliser les éléments économétriques et qualitatifs complexes que peut induire l'application du critère de SLC. En outre, ce référant à la proposition de l'UE visant à adopter le critère de SLC, il ajoute : « tant qu'on a le sentiment que les avantages (ainsi que les limites) de l'utilisation d'éléments économétriques ne sont pas bien connus aux niveaux tant du personnel que de la hiérarchie de la DG COMP, de nombreuses sociétés risquent d'hésiter à présenter de tels éléments ».

21 Heimler (2008).

4.4 Les liens entre critère de fusion et règles de conduite unilatérale

Un autre problème stratégique soulevé dans le débat sur les critères de la position dominante et de la SLC consiste à savoir s'il faut lier le critère de fusion avec la norme juridique relative aux conduites unilatérales. Dans la mesure où les fusions sont évoquées dans d'autres parties des textes législatifs et réglementaires sur la concurrence, certains ont affirmé qu'il peut y avoir des chevauchements de jurisprudences pouvant avoir des répercussions importantes sur l'examen des fusions et sur les modalités d'application d'autres volets des textes sur la concurrence[22].

Les concepts de position dominante individuelle et collective élaborés lors de l'examen de fusions peuvent affecter les modalités d'application des dispositions relatives à l'abus de position dominante et *vice versa*. Cela pourrait être particulièrement gênant, en particulier si les juridictions appliquant le critère de position dominante veulent abaisser le seuil déterminant l'existence d'une position dominante pour bloquer certaines fusions anticoncurrentielles, spécialement celles qui ont des effets unilatéraux. Avant d'en venir à cet aspect, il convient cependant de réfléchir à l'élargissement de la portée de leurs interdictions des abus de position dominante auquel cela tendra à aboutir. Da plus, la conclusion qu'une fusion met à profit ou renforce une position dominante passée jusqu'ici inaperçue pourrait avoir d'importantes ramifications pour l'application qui en découle de l'interdiction de l'abus de position dominante aux parties prenantes à une fusion. On peut penser qu'une telle conclusion sur l'existence d'une position dominante pourrait inciter les autorités à surveiller de plus près la conduite des entreprises au regard de l'interdiction de l'abus de position dominante. Cela vaut aussi pour les fusions dans lesquelles la position dominante est de nature collective. Dans ce cas, les ramifications affectent non seulement les parties prenantes à la fusion, mais encore tout le groupe d'entreprises occupant collectivement une position dominante.

Ceux qui plaident pour le passage du critère de position dominante au critère de SLC pour les fusions ont aussi affirmé que « non seulement il n'y a pas de lien logique ou nécessaire entre le critère de fond relatif aux fusions et le contrôle des abus, mais encore il y a beaucoup d'arguments en faveur d'une dissociation de ces deux critères. Une telle dissociation pourrait servir utilement à bien faire comprendre que l'objet du contrôle des fusions est de préserver la concurrence sur les marchés et non pas de prévoir des abus futurs »[23].

4.5 Coopération internationale

Autre préoccupation jugée pertinente dans le débat sur le changement de critère de fond pour les fusions, le fait qu'une plus grande homogénéité de la norme d'examen des fusions entre les différentes juridictions faciliterait la coopération internationale. Ce point pourrait favoriser l'adoption du c ritère de la position dominante ou de la SLC selon le groupe de pays pour lesquels la coopération et la convergence passent pour particulièrement importantes. Comme on l'a vu, l'une des raisons pour lesquelles la Nouvelle-Zélande a adopté le critère de SLC était le souci d'aligner son régime des fusions sur celui de l'Australie, son principal partenaire économique.

Même si la similitude des critères peut s'avérer importante pour faciliter la coopération entre autorités, on a aussi souligné qu'il y a d'autres facteurs susceptibles de la faciliter autant sinon plus que le critère de fond appliqué aux fusions[24]. Les différences d'objectifs, le seuil appliqué pour juger si une puissance commerciale est trop forte, l'approche utilisée pour analyser la puissance commerciale et la

[22] OECD (2003).

[23] Whish (2002).

[24] OECD (2003).

façon dont les gains d'efficience sont pris en compte dans l'analyse de la fusion sont aussi des thèmes importants à étudier si l'on veut obtenir une plus grande convergence des résultats.

Encadré 7. Questions et problèmes à examiner

13. Veuillez expliquer si le type de critère de fond appliqué dans votre juridiction présente des risques de sur- ou de sous-application du droit.

14. Veuillez expliquer si vous estimez que les normes de fond appliquées aux fusions ont un impact politique plus large sur l'interprétation et l'application des règles relatives aux conduites unilatérales ou sur l'interdiction des accords anticoncurrentiels.

15. Veuillez expliquer dans quelle mesure la certitude juridique (à savoir la possibilité pour les parties de prédire le résultat de l'examen d'une opération spécifique de fusion) peut être affectée par le choix du critère de concurrence appliqué aux fusions.

16. Dans un monde où l'application du régime des fusions devient de plus en plus multi-juridictionnelle, veuillez expliquer si les autorités de la concurrence doivent envisager une convergence vers l'un des critères génériques d'examen des fusions (à savoir, SLC, position dominante ou intérêt général).

17. Veuillez indiquer les éventuels cas dans lesquels des différences ou similitudes de critères de fond en matière de fusions ont revêtu une importance quelconque dans le contexte de la coopération internationale dans une affaire de fusion.

5. Exemples de 'failles'

Les travaux publiés ont mis en évidence un certain nombre de cas susceptibles d'illustrer le problème des 'failles'. Il s'agit de cas de fusion dans lesquels des effets unilatéraux peuvent se manifester en deçà du seuil de position dominante.

5.1 Heinz/Beech-Nut

L'affaire de la fusion « Baby Food »[25] aux États-Unis est souvent citée comme exemple de cette situation. Cette affaire portait sur la fusion entre Heinz et Beech-Nut, qui, après la fusion, se serait trouvés face à un seul concurrent, Gerber, qui restait le leader du marché. L'affaire a fait l'objet d'une enquête de la Federal Trade Commission des États-Unis qui a appliqué le critère de SLC pour évaluer les effets de cette fusion. La fusion a été interdite dans la mesure où elle aurait porté un préjudice sensible à la concurrence. Cette affaire est souvent évoquée comme un cas dans lequel le critère de position dominante n'aurait pas permis de rendre convenablement compte des effets anticoncurrentiels unilatéraux de la fusion. Certes, le nombre d'intervenants sur le marché aurait été ramené de trois à deux, mais cette fusion ne concernait que le numéro 2 et le numéro 3 du marché, l'autre intervenant conservant sa première place même après la fusion. Dans ces conditions, il aurait été difficile pour une autorité appliquant le critère de position dominante de prétendre que la fusion aurait créé ou renforcé une position dominante sur le marché.

25 FTC v H.J. Heinz, 116 F.Supp. 2d 190 (2000 U.S. Dist.), revised 246 F.3d 708 (2001 U.S. App.).

5.2 Oracle/PeopleSoft

Autre cas susceptible d'illustrer la faille, la fusion entre Oracle et PeopleSoft[26]. L'opération a donné lieu à des enquêtes à la fois en Europe (au regard du critère de position dominante) et aux États-Unis (au regard du critère de SLC). Oracle et PeopleSoft vendent des logiciels d'applications d'entreprise et sont en concurrence avec SAP (le leader du marché) et avec un certain nombre d'intervenants plus petits. Il ressort de la décision de la Commission européenne que cette dernière a cherché à savoir si une opération de réduction du nombre de grands intervenants de trois à deux aurait des effets unilatéraux, mais elle a conclu que de tels effets étaient peu probables car les éléments obtenus à l'issue de l'audition indiquaient que les marchés étaient plus larges et comprenaient un plus grand nombre de vendeurs de logiciels[27]. Selon les commentaires sur cette décision, la Commission a travaillé sur les effets unilatéraux et son analyse était exempte de toute considération sur la position dominante d'une entreprise individuelle[28]. La Commission a en fait essayé de remédier à la faille juridique lors de l'application du critère de position dominante dans ce cas, en étendant le concept de domination collective aux effets non coordonnés sur des marchés oligopolistiques. Or, la structure du marché n'incitait pas à l'instauration d'une position de domination collective et le fait que SAP et Oracle/PeopleSoft détiennent alors des parts de marché du même ordre sur un marché innovant présentant des produits différenciés faisait qu'il était difficile de conclure de façon crédible à l'existence d'une domination individuelle. La fusion a fini par être approuvée par la Commission européenne, mais pour nombre d'observateurs, le recours au critère de position dominante a fait que la Commission n'a pas pu convenablement traiter les effets unilatéraux induits par la fusion[29].

5.3 T-Mobil/Tele.ring

Après l'abandon par l'UE du critère de position dominante au profit de celui de SLC, la première affaire qui a donné lieu à une enquête de la Commission a mis en évidence la plus grande flexibilité de ce nouveau critère. La fusion impliquait T-Mobil et Tele.ring, deux opérateurs de réseau de téléphonie mobile autrichiens[30]. Cette opération a donné à la Commission l'occasion d'appliquer le nouveau critère de SLC à une fusion qui ne donnerait pas naissance à un leader du marché. À l'issue de la fusion, la nouvelle entité aurait dû détenir une part de marché légèrement inférieure à celle de l'opérateur dominant en Autriche (Mobilkom). La fusion n'aboutissait ni à une position dominante individuelle, ni à une domination collective, mais elle réduisait sensiblement la concurrence pour aboutir à des prix plus élevés grâce à l'élimination d'une contrainte concurrentielle pour les sociétés en place. Aux termes du nouveau critère d'examen des fusions, la Commission a conclu que, en particulier avec l'élimination du franc-tireur sur le marché et la création simultanée d'uns structure de marché comportant deux opérateurs de réseaux symétriques dominants, il est probable que l'opération prévue aboutisse à des effets unilatéraux et qu'elle entrave sensiblement la concurrence sur un segment substantiel du marché commun[31]. La Commission a

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26 Voir Décision de la Commission du 26 octobre 2004, affaire COMP/M.3216.

27 Voir para. 187 de la Décision.

28 Baxter et Dethmers (2005).

29 Kokkoris (2009) et Werden (2005). Les deux auteurs identifient des effets unilatéraux potentiellement importants (comme des effets négatifs sur les prix, la variété des produits, la qualité et l'innovation) susceptibles de se concrétiser en dépit de la présence de plusieurs rivaux même si les produits fusionnés ne sont pas particulièrement de proches substituts. Ils affirment tous les deux que l'existence sur le marché après la fusion d'un certain nombre d'entreprises proposant des produits concurrents, dont on peut affirmer qu'ils ne sont pas aussi efficients que ceux des trois grands intervenants, n'empêche pas l'existence d'effets négatifs unilatéraux de la fusion sur la concurrence sous forme d'effets non coordonnés sur le marché oligopolistique après la fusion.

30 Voir Décision de la Commission du 26 avril 2006, affaire COMP/M.3916.

31 Voir para 125.

concentré son attention sur les effets probables qu'aurait une fusion sur les prix du marché autrichien pour le consommateur final et elle a conclu que même si les prix n'augmenteraient pas à court terme, l'élimination de Tele.ring en tant que contrainte pour la tarification empêcherait sans doute que les prix continuent de baisser sensiblement comme ils le faisaient auparavant. La fusion a cependant fini par être approuvée par la Commission, sous réserve du respect des engagements proposés par T-Mobil.

6. Étude d'un cas théorique de 'faille' – une fusion de banques

Cette dernière section du document présente un bref exercice théorique. Il s'agit de se demander si l'application de normes différentes d'examen des fusions peut aboutir à des évaluations différentes de la même opération. Cela pourrait être l'occasion pour les délégations qui n'ont pas expérimenté les deux critères d'apporter leur point de vue.

6.1 Présentation des faits

Ce cas théorique concerne le projet de rachat de la Bank of Investment (BoI) par la Bank of Commerce (BoC), toutes les deux étant des prestataires de services bancaires de réseau à des particuliers et des petites et moyennes entreprises (PME) dans le pays, l'Oceanica.

La BoC est actuellement la deuxième banque de l'Oceanica et propose un large éventail de services bancaires de réseau en privilégiant les services aux PME. Pour sa part, la BoI est la cinquième banque de réseau du pays et elle passe généralement pour être relativement nouvelle sur le marché, puisqu'elle a commencé son activité il y a 15 ans. Elle s'est développée rapidement au moyen d'acquisitions mais aussi par croissance interne et elle a acquis la réputation d'être une sorte de « franc-tireur » qui facture à ces clients des prix inférieurs à ceux de la concurrence. Selon des enquêtes auprès des consommateurs, la BoC et la BoI sont les concurrents les plus proches pour la prestation de plusieurs services bancaires.

Les deux banques proposent toute la gamme des services bancaires de réseau aux particuliers, aux PME et aux grandes entreprises et institutions. Elles sont en outre dotées d'un réseau national de succursales qui leur assure une présence sur tout le territoire de l'Oceanica. En raison de leur taille, de la gamme de services proposées et de l'ampleur de leur réseau de succursales, elles sont considérées comme des « banques nationales ». À ce titre, elles appartiennent au groupe des Cinq Grandes, ensemble de banques nationales qui dominent le système bancaire d'Oceanica.

On trouve aussi dans ce groupe Bank One, le leader historique du marché de l'Oceanica, juste devant la BoC. Ensemble, les Cing Grandes représentent plus de 85 % de l'activité bancaire en Oceanica. Les 15 % restants sont contrôlés par une multitude de banques plus petites qui sont spécialisées dans différents domaines et n'ont pas de présence nationale. La plus grande d'entre elles est beaucoup plus petite que la BoI.

Le secteur a sensiblement évolué ces 20 dernières années. Après une période d'expansion générale au cours de laquelle plusieurs banques sont entrées sur le marché de l'Oceanica – dont certaines ont y acquis une présence importante comme la BoI – le secteur a connu un mouvement de consolidation ces dernières années. Plusieurs acquisitions sont intervenues et ont abouti à une concentration grandissante des parts de marché entre les mains des Cinq Grandes.

En particulier, ces dernières années, la BoC a développé sa présence sur le marché au moyen d'une série d'acquisitions médiatisées – ce n'était pas la seule, car d'autres banques du groupe des Cing Grandes sont aussi parvenues à cette position au moyen d'acquisitions. Durant toute cette période, Bank One est restée le leader, seule la BoC commençant depuis peu à lui contester cette position.

Aux fins de cet exercice, nous considérerons que l'analyse par l'indice HHI met en évidence un certain nombre de marchés sur lesquels la fusion peut poser des problèmes de concurrence. Comme le montre le tableau ci-après, Bank One est en position de leader sur tous les marchés pertinents. Avec le projet de fusion cependant, la nouvelle entité prendrait la place de leader sur le segment des crédits aux PME. Sur les autres segments suscitant des préoccupations, Bank One conserverait sa position – mais de peu.

Tableau 2. Parts de marché

Tableau 3.	BoC	BoI	BoC+BoI	Bank One
Cinq marchés de la clientèle de particuliers (sur tous les segments, les parts de marché sont analogues)	20 %	10 %	30 %	33 %
Crédit à court terme aux PME	25 %	10 %	35 %	30 %

Encadré 8. Questions et problèmes à examiner

18. Sur la base du critère légal qui est appliqué dans votre pays, veuillez expliquer si la fusion hypothétique entre la BoC et la BoI risque d'avoir des effets anticoncurrentiels.

19. Veuillez indiquer le type d'effets anticoncurrentiels potentiels sur lesquels vous allez vraisemblablement enquêter.

20. Veuillez expliquer dans quelle mesure la définition du marché et les parts de marché constituent des facteurs importants de votre analyse.

21. Veuillez expliquer quels sont les autres facteurs dont vous considérez qu'ils complètent l'analyse des parts de marché.

22. Veuillez expliquer si la réputation de « franc-tireur » de la BoI peut avoir un impact sur votre analyse, en particulier en ce qui concerne les préoccupations pour la concurrence relatives au choix des consommateurs.

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AUSTRALIA

1. Introduction

Australia's restrictive trade and competition laws are contained in the Federal *Trade Practices Act 1974* (the TPA). Section 2 states that the object of the TPA is to enhance the welfare of Australians through the promotion of competition and fair trading. Australia's merger control regime is contained in section 50 of the TPA and has been the subject of considerable debate and revision. When the TPA was introduced in 1974, it contained a 'substantial lessening of competition' (SLC) test for the assessment of mergers and acquisitions cases. This was replaced in 1977 by a dominance test, and then replaced again with a revised SLC test in 1992.

While the SLC test is widely supported in Australia by both consumer and business groups, there have been other revisions to Australia's merger regime since 1992. The provision of a formal clearance option, the process for authorisations, and the transparency of decision making were the focus of the *Review of the Competition Provisions of the Trade Practices Act* (the Dawson Review), released in January 2003.

More recently, there have been calls for the Government to address concerns that Australia's SLC test is unable to adequately deal with 'creeping acquisitions'. These are commonly described as a series of acquisitions that may only collectively, rather than individually, breach the SLC test. The Government is currently undertaking a public consultation process in order to determine the best way forward in relation to creeping acquisitions concerns. However, the Government remains committed to the SLC test for the majority of mergers and acquisitions cases

2. Australia's substantive test for mergers and the factors featured in determining whether competition is likely to be harmed by a merger

Section 50 prohibits mergers or acquisitions that would have the effect, or likely effect, of substantially lessening competition in an Australian market. Specifically, section 50 states:

> *A corporation must not directly or indirectly:*
>
> *(a) acquire shares in the capital of a body corporate; or*
>
> *(b) acquire any assets of a person;*
>
> *if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.*

Subsection 50(6) defines 'market' as a substantial market for goods or services within Australia, or a State, Territory or region of Australia. The relevant market for consideration may have product, geographic and other dimensions. The precise definition of 'market' depends on the particular facts, and a given acquisition may impact on more than one market.

'Substantial' has been interpreted by the courts to mean something that is 'real or of substance'/'meaningful or relevant' to the competitive process. The Australian Competition and Consumer

Commission (ACCC) generally takes the view that a lessening of competition is substantial if it confers an increase in market power on the merged firm that is significant and sustainable.

Whether a merger is ‘likely’ to have the effect of substantially lessening competition depends on the facts of the case. However, the likelihood needs to be more than speculation or a mere possibility for it to be ‘likely’, but does not need to be a certainty.

In assessing whether a merger would be likely to substantially lessen competition, subsection 50(3) provides a non-exhaustive list of factors[1] that are taken into account. These factors illuminate the policy intent underlying section 50. In particular, they highlight key potential constraints on a merged firm (eg. new entry and imports) and identify market characteristics that could potentially affect the impact of a merger on competition (eg. growth in demand, innovation or the level of vertical integration).

2.1 The merger process

A number of changes were made to the ACCC’s merger process following the Dawson Review (2003). Under the TPA, prospective acquirers have three avenues available to have a proposed acquisition considered and addressed:

- assessment of the proposed acquisition on an informal basis by the ACCC; or
- an application for formal clearance of a proposed merger by the ACCC; or
- assessment by the Australian Competition Tribunal (the Tribunal) of an application for authorisation of a merger, using a net public benefits test.

The ACCC will investigate and review those mergers that have the potential to raise concerns under section 50. While there is no obligation to notify the ACCC of a proposed merger, there is a strong culture of compliance and many parties still approach the ACCC to seek its view. In general, most mergers are brought to the attention of the ACCC by the merger parties who themselves request an informal clearance of the transaction. The ACCC may also instigate an investigation of a merger under the informal process based on press reports, notification from a member of the public or from other government bodies.

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1 The factors that the court may consider include:

(a) the actual and potential level of import competition in the market;

(b) the height of barriers to entry to the market;

(c) the level of concentration in the market;

(d) the degree of countervailing power in the market;

(e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;

(f) the extent to which substitutes are available in the market or are likely to be available in the market;

(g) the dynamic characteristics of the market, including growth, innovation and product differentiation;

(h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;

(i) the nature and extent of vertical integration in the market.

2.1.1 Informal clearance

Informal clearance is not a statutory regime under the TPA, but rather results in a non-binding assurance from the ACCC that it will not bring action for a breach of section 50 in relation to a particular merger (ie. the ACCC considers that based on the information that it has considered, the merger does not substantially lessen competition in any market).

After receiving and assessing an application, the ACCC will conduct market inquiries and aim to make a decision within 2-8 weeks of receiving the application (depending on the complexity). At that point, the ACCC may determine it needs further information on particular matters and may publish a Statement of Issues with a secondary timetable, for up to a similar period of time. If the ACCC considers that a merger contravenes section 50, the parties may agree to modify (including by means of agreed remedies) or abandon the proposal.

Should the applicant disagree with the ACCC's decision, it is not a legally reviewable 'decision', but rather the applicants could proceed with the merger and it would be incumbent on the ACCC to bring proceedings in the Federal Court to restrain the parties from consummating the merger and challenge the merger as a breach of section 50. The ACCC may seek remedies from the court including an injunction, divestiture or penalties. Under the informal process, it is the role of the Federal Court of Australia to make the ultimate determination as to whether a merger would have the effect, or be likely to have the effect, of substantially lessening competition in a substantial market in Australia.

2.1.2 Formal clearance

Since 1 January 2007, parties have been able to seek formal clearance for a merger from the ACCC under section 95AC(1), where the ACCC is satisfied the merger would not have the effect, or be likely to have the effect, of a substantial lessening of competition. Formal clearance is a statutory process that prevents any party from subsequently commencing legal action on the basis of an alleged contravention of section 50.

Unlike the informal clearance procedure, the formal regime has statutory timelines which require the ACCC to make a determination within 40 days. In complex matters, this can be extended by 20 days with an agreement from the applicant. If the ACCC does not provide clearance within the relevant timeframe, the ACCC is deemed to have made a decision not to clear the acquisition.

Formal clearance decisions made by the ACCC are reviewable by the Australian Competition Tribunal on an application by the merger parties, unlike informal clearances, which do not represent an official 'decision'.

2.1.3 Authorisation of acquisitions by the Australian Competition Tribunal

Prior to 1 January 2007, firms could apply to have a merger authorised by the ACCC. Now firms seeking authorisation of a merger must apply directly to the Tribunal under section 95AT of the TPA. While the ACCC does not make any decision regarding the merger, it is consulted as part of the Tribunal's process.

The Tribunal may grant authorisations for acquisitions when it is satisfied that the proposed acquisition is likely to result in such a benefit to the public that it should be allowed to occur (section 95AZH). This involves a net public benefits assessment which may take up to 6 months to reach a conclusion.

To date, no applications for formal clearance or direct assessment by the Tribunal have been lodged since these processes commenced on 1 January 2007.

3. Possible anti-competitive effects covered by Australia's substantive test

Australia's previous merger test was for single firm dominance. This test did not address mergers which modified the structure of the market and favoured a collusive equilibrium among the remaining firms (ie. collective dominance). The dominance test was able to address unilateral effects of mergers but was less suited to deal with coordinated effects; that is, it was not able to block mergers simply on the basis that they created a strong likelihood of coordinated effects.

The SLC test now used in Australia can be used to review both unilateral and coordinated effects of mergers. In evaluating possible contraventions of section 50, the ACCC assesses the ability of a firm or firms to profitably divert price, quality, variety, service, innovation or any other aspect of the competitive process or its performance outcomes from their competitive levels for a significant period of time.

4. Adequacy of Australia's merger test in addressing some anti-competitive effects of mergers

The Government considers that the SLC test is working well and that section 50 operates appropriately for the majority of mergers and acquisitions cases. However, the ACCC has raised concerns that section 50 may not enable it to appropriately deal with creeping acquisitions. Creeping acquisitions are understood to relate to a series of small acquisitions that individually would not substantially lessen competition in a market, but collectively may have that effect over time. It is argued that concerns with creeping acquisitions typically arise where firms with substantial market power make one or more small-scale acquisitions, such that even a small enhancement of that market power may cause a level of competitive harm and/or consumer detriment that warrants concern.

The Government recognises concerns that a potential shortcoming in section 50 may allow creeping acquisitions to proceed unchallenged, and has committed to respond appropriately and carefully to these concerns. On 1 September 2008 the Government released a discussion paper seeking views from interested parties regarding options for responses to the creeping acquisitions issue. The Government is currently undertaking a second consultation process[2] to gauge the best way forward in relation to creeping acquisitions concerns.

5. Changes to Australia's substantive test over time

Australia has changed the legal test for the review of mergers twice since the TPA was enacted.

In 1974, section 50 prohibited any merger or acquisition likely to result in a substantial lessening of competition in a market for goods and services in Australia. However, the SLC test was criticised as capturing many small mergers where damage to competition was less likely to occur. Furthermore, the government of the day considered it beneficial for more mergers to take place unhindered by the TPA so that Australian firms could achieve economies of scale and improve international competitiveness.

In July 1977, amendments were made to section 50, changing the substantive merger regime to a dominance test. Under this test, mergers resulting in the creation of a firm in a dominant position in a

[2] On Wednesday, 6 May 2009, the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, Chris Bowen MP, released *a discussion paper on creeping acquisitions* seeking public comment to address concerns raised. Further information about the current consultation process can be found at the Treasury website.

substantial market for goods and services in Australia, or a State or Territory of Australia, were prohibited. Corporations with existing dominance in a market were also prohibited from making certain acquisitions under this test, including those that would, or would have been likely to, substantially strengthen the power of that corporation to dominate that market.

The TPA did not define 'dominance'. However, the ACCC's Merger Guidelines (the Guidelines), based on case law, stated that the dominance threshold was unlikely to be breached where:

- two well-matched competitors remained in the market; or
- there were a number of small independent competitors with the potential to develop further; or
- there was effective competition from imports.

The Guidelines suggested that the threshold for an investigation would be when the acquiring firm had 45% of the relevant market and was the largest competitor, or was the largest competitor and had a market share exceeding that of its nearest competitor by 15% or more.

The dominance test was controversial in Australia, as it was generally recognised as setting a high threshold that allowed substantial market concentration to occur. In particular, a number of significant mergers led to high levels of concentration in major industries. For example, the acquisition of the *Herald & Weekly Times* newspaper group by *News Ltd* gave *News Ltd* around 70% of the newspaper circulation market. However, despite the Government considering a return to the SLC test in 1984 and again in 1989, it did not proceed on the grounds that it would hinder desirable industry rationalisation.

Nonetheless, arguments for a return to the SLC test persisted, in particular:

- a test focusing on the effect on competition in a market, rather than on the dominance of a firm, would be more consistent with the policy underlying the TPA;
- it would have a pro-competitive effect because it would broaden the range of transactions that could be examined under section 50 and would allow the ACCC to deal explicitly with cases that raise issues of coordinated market power;
  - In Australia, there were particular concerns about high levels of concentration developing in sectors not exposed to the discipline of import competition and the flow-on effects for competitiveness for trade-exposed industries that are supplied by such sectors;
- it would help address concerns about markets that had either been recently deregulated or were soon to be deregulated, where mergers short of dominance were likely to defeat the objectives of deregulation (sectors such as electricity, gas and telecommunications);
- it would create consistency between the merger test and the prohibition on anti-competitive agreements (in section 45, which is based on an SLC test); and
- the dominance test had not led to increases in efficiency and international competitiveness, as had been originally envisioned.

The SLC test was reintroduced in 1992, with an amendment [subsection 50(3)] that provides for a non-exhaustive list of matters to be considered in establishing a substantial lessening of competition.

5.1 Dawson Review

In May 2002, the Government commissioned a review of the competition provisions of the TPA and their administration, to establish whether they were meeting the needs of business, consumers and the economy in the current environment or whether improvements might be made to ensure their effectiveness. The Dawson Review was released in January 2003 and was the first comprehensive review of the competition provisions since the Hilmer Review in 1993.

The Dawson Review did not consider that any amendments to the section 50 mergers test were necessary, but recommended some changes to the ACCC's merger processes, all of which were implemented. The Dawson Review recommended:

- that the ACCC provide adequate reasons for its decisions in the informal clearance process when requested by the parties and in cases where it rejected a merger or accepted undertakings. It was argued that this would promote better understanding of the ACCC's decisions and reduce uncertainty about the merger process, said to have resulted from a lack of case law;

- the introduction of a voluntary formal merger clearance process, to run parallel to the existing informal clearance process. This was intended to provide parties proposing a merger with an optional process through which they might gain a greater understanding of the reasons for the decision and be given the opportunity to have the Tribunal review an unfavourable decision. It was also argued that this formal process would increase business certainty; and

- that applications for the authorisation of mergers should be made directly to the Tribunal (rather than the ACCC), with specific statutory time limits for consideration and no recourse for review. This would address concerns about the ACCC's ability to look afresh at authorisation applications based on public benefit where it had previously considered the matter under section 50, and the time taken by the ACCC to reach a decision. It was also argued that this process would save time and enhance certainty of the outcome by allowing third party interests to be considered as part of the Tribunal's assessment, rather than through an appeal process.

6. The risk of over-enforcement

Australia's experience with the dominance test was that it led to substantial concentration in some industries, due to its high threshold, as interpreted by the Australian Courts. A comparison of several prominent cases conducted during the period of the dominance test in Australia, with likely outcomes had the SLC test been applied, suggests that application of the dominance test may have led to *under*-enforcement of mergers, with the result that competition may have been significantly harmed in some cases. Examples include:

- A merger between two of the three largest competitors in the department store and discount department store retailing sectors (*Coles-Myer*) and a merger between two of the four largest integrated supermarket chains in the supermarket sector (*Woolworths-Safeways*), which led to what appeared to be a substantial increase in concentration in the retailing sector.

- A merger between two of the three national newspaper-publishing groups (*News Ltd* and *Herald & Weekly Times*) in the newspaper market, which left *Fairfax* as the only remaining significant competitor.

However, this does not imply that application of the SLC test risks over-enforcement. Rather, as the SLC test adopts a less structural and more dynamic approach (allowing for review of both unilateral and coordinated effects). Accordingly, Australia's return to the SLC test has enabled a rebalancing of merger review towards more pro-competitive outcomes. It has shifted the focus to the effect of a merger on competition in a market (rather than on the dominance of a particular firm) and broadened the range of transactions which can be examined under section 50 (compared to the dominance test).

7. Broader policy impact of Australia's substantive test on the interpretation and enforcement of unilateral conduct rules and/or the prohibition of anti-competitive agreements

The overarching purpose of section 50 is to preserve competition. It seeks to do this by prohibiting mergers and acquisitions that would, or would be likely to, substantially lessen competition in a market. To underscore the importance of this objective, by way of deterrent, a divestiture remedy (under section 81) is provided to Courts for up to 3 years after a merger or acquisition in breach of section 50 has occurred.

The role of section 50 in seeking to preserve competition has broader policy implications for the enforcement of unilateral conduct rules and the prohibition of anti-competitive agreements. That is, the purpose of section 50 is to mitigate the need to use other sections of Part IV of the TPA that deal with anti-competitive conduct (section 45 (contracts, arrangements or understandings that restrict dealings or affect competition), section 46 (misuse of market power) and so on) and allow proactive rather than reactive decision making.

8. Implications of the choice of substantive test for legal certainty

The SLC test considers a broad range of factors in determining whether competition is (or is likely to be) affected in a market as a result of a merger, whereas the dominance test focuses more on the market power of an individual corporation. While the SLC test's more 'flexible' approach to merger review could be viewed as creating less legal certainty, in Australia, steps have been taken to provide greater transparency and clarity with respect to merger review procedures.

Due to the popularity of the ACCC's informal merger clearance process, and its inherent flexibility, very few merger disputes make it to Court proceedings. The majority of merger jurisprudence in Australia considers mergers subject to the dominance test, being merger before 1993. In the past seven years, there have been just three occasions where the ACCC's informal clearance findings on a merger have been challenged through the institution of court proceedings.

Of these, one matter was settled through provision of court enforceable remedies agreed between the parties and the ACCC (the recent Toll-Patrick matter), in one matter the merging party withdrew its defence during the court proceedings (the attempt by Boral to acquire Adelaide Brighton) and in the third, the matter was decided against the ACCC and in favour of the merging parties (the acquisition by AGL of a share of the Loy Yang A electricity generation facility).

8.1 ACCC's Merger Guidelines

The ACCC has recently (November 2008) released updated Merger Guidelines which give stakeholders a comprehensive insight into how the ACCC approaches merger reviews and what it is looking for as part of its analysis. The ACCC's Merger Guidelines provide an outline of the broad analytical framework applied by the ACCC when assessing whether a merger or proposed merger is likely to substantially lessen competition. The Guidelines aim to provide an enhanced level of predictability and certainty to merger parties, their advisers, the business community and the public so that they can:

- assess the likely level of scrutiny a merger will receive from the ACCC;

- increase understanding of the application of section 50;
- assist in structuring (or restructuring) mergers to avoid raising competition concerns;
- identify the types of information that will assist the ACCC to reach a view on how a merger is likely to affect competition; and
- identify the ACCC's broad approach to remedying possible anti-competitive mergers through undertakings.

8.2 Public Competition Assessments

While the ACCC releases summaries of all its merger review decisions, it also publishes comprehensive Public Competition Assessments after making decisions on high profile mergers or for mergers considered to be of major public interest, providing an extra level of transparency. These documents have been particularly important in Australia, supplementing limited jurisprudence on merger cases and are published on the ACCC's website.

9. International Convergence

From the ACCC's experience there has been significant cooperation on merger enforcement with counterpart competition authorities, regardless of any differences in tests applied by the jurisdiction. In Australia, when a merger is assessed in the current regime, consideration is given to an Australian market or markets. As note above, a market for the purposes of the TPA is a substantial market within Australia, or a State, Territory or region of Australia.

Mergers involving companies with a presence in a number of jurisdictions are considered by the ACCC. The ACCC will focus its analysis on the Australian market and the effects of the merger on Australian consumers. However, international factors including for example imports will be relevant to an assessment by the ACCC.

During its liaison with counterpart regulators, the ACCC's experience has been that jurisdictions which do not apply the SLC test in their merger analysis remain able to converse on the competition issues posed by the merger in question. Further, it is the ACCC's experience that where there has been a difference in the conclusion drawn by the ACCC and an international counterpart, without exception the difference has derived not from the application of a different test but from particular details relevant to the market or competitive landscape.

10. Conclusion

Australia's experience with the SLC test since 1992 has been successful and is widely supported in the community. The Government considers that section 50 is operating appropriately in the vast majority of mergers and acquisitions cases.

Australia has benefited from the experience of having applied both the dominance test and the SLC test in its mergers regimes over the past 35 years, and the SLC test is likely to remain the key substantive test for Australian merger assessments in the future. For Australia, the SLC test has, in many ways, enabled flexible and responsible analysis and the application of a more stringent standard, preventing single firm market power as well as coordinated conduct. Additionally, the merger factors in section 50(3) have possibly contributed to greater certainty for parties, courts and the ACCC.

CANADA

1. Introduction

Prior to 1986, predecessor legislation to Canada's current *Competition Act*[1] (the "Act") prescribed criminal sanctions for any merger giving rise to a "lessening of competition to the detriment or against the interest of the public."[2] Not surprisingly, a criminal standard of proof for mergers was difficult to satisfy. Indeed, over the 76-year period between 1910 and 1986, only nine criminal charges were brought in respect of mergers, resulting in only one successful prosecution (by way of a guilty plea).

Following extensive consultations with various stakeholders, an amended standard for merger review was introduced in 1986, through section 92(1) of the Act, providing Canada's Competition Tribunal (the "Tribunal") with the ability to make an order in respect of a merger that "prevents or lessens, or is likely to prevent or lessen, competition substantially" ("SLC"). The SLC standard eliminated explicit consideration of the "public interest" in favour of the notion of substantiality, and replaced the criminal standard of proof with the less onerous civil standard of the balance of probabilities.

Unlike other jurisdictions, Canada's merger review regime did not originate from or otherwise encompass a dominance standard. Rather, abuse of a dominant position is addressed under separate civil provisions of the Act.[3] Accordingly, this submission will focus on the experience of Canada's Competition Bureau (the "Bureau") in applying the SLC standard and the assessment undertaken in respect of its constituent elements.

2. Anti-Competitive Threshold and Analysis for SLC Standard

As described in the Bureau's *Merger Enforcement Guidelines*[4] (MEGs), a "lessening" of competition is considered to occur when a merged entity, unilaterally or in coordination with other firms, is able to

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1 R.S.C. 1985, c. C-34.

2 The terms "merger" and "monopoly" were first incorporated into the *Combines Investigation Act* in 1910, while the concept of combines (mergers and monopolies) that are likely to operate to the detriment of or against the interest of the public was introduced in 1919. These terms remained undefined until 1935, when amendments introduced a common definition for both. Finally, in 1960 the definition of merger was made distinct from the definition of monopoly, with the concept of "detriment to the public" incorporated into both.

3 Under Canadian competition law, abuse of a dominant position occurs when a dominant firm in a market, or a dominant group of firms, engages in conduct that is intended to eliminate or discipline a competitor or to deter future entry by new competitors, with the result that competition is prevented or lessened substantially. Sections 78 and 79 of the *Act* establish the bounds of legitimate competitive behaviour and provide for corrective action when firms engage in anti-competitive activities that damage or eliminate competitors and that preserve, entrench or enhance their market power.

4 (2004), online: Competition Bureau <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/2004%20MEGs.Final.pdf/$file/ 2004%20MEGs.Final.pdf>.

sustain higher prices[5] than would exist in the absence of the merger by diminishing *existing* competition.[6] Likewise, a "prevention" of competition is considered to occur when a merged entity, unilaterally or in coordination with other firms, is able to sustain higher prices than would exist in the absence of the merger by hindering the development of *future* competition.[7]

The MEGs outline the analytical framework to be applied in determining whether any such lessening or prevention of competition amounts to an SLC. In each case, an SLC results only from mergers that are likely to create, maintain or enhance the ability of the merged entity, unilaterally or in coordination with other firms, to exercise market power.[8]

Since its introduction in 1986, the SLC standard has proven flexible enough to apply broadly across industries, geographies, and in ordinary and extraordinary economic conditions. Pursuant to the MEGs, the Bureau's analysis begins by defining relevant product and geographic markets according to the so-called "hypothetical monopolist" test, which enables the identification of market participants and calculation of market shares and concentration levels. Importantly, pursuant to section 92(2) of the Act, a merger shall not be found to give rise to an SLC "solely on the basis of evidence of concentration or market share." Accordingly, the Act enumerates a number of additional factors for consideration by the Tribunal in assessing the likely competitive impact of a merger, including, for example: barriers to entry; the extent of foreign competition; availability of acceptable substitutes; whether either party to the merger is a "failing firm"; whether the merger would result in the removal of a vigorous and effective competitor; the extent of change and innovation in the market; and the effectiveness of remaining competition.

In the most recent merger case to be fully litigated under the SLC standard, *Commissioner of Competition v. Superior Propane*[9], the Tribunal described the application of the standard as follows:

> *The Tribunal concludes that evidence of an actual or likely price increase is not necessary to find a substantial lessening of competition. What is necessary is evidence that a merger will create or enhance market power which, according to paragraph 2.1 of the MEG's, cited above at paragraph [57], is "the ability to profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition". There is no requirement under the Act to find that the merged entity will likely raise the price (or reduce quality or service). The only requirement under section 92 is for the Tribunal to decide whether the merged entity has the ability to do so.*[10]

Accordingly, the current direction from the Tribunal is that it is the enhanced ability of the firm to raise prices (as opposed to whether it will actually do so) that is relevant when considering the SLC standard.

5 As noted in paragraph 2.2 of the MEGs, references to price includes any impact on quality, product choice, service, innovation or other dimensions of competition.

6 *Ibid*. at para. 2.9.

7 *Ibid*. at para. 2.10.

8 "Market power" is defined at para. 2.3 of the MEGs in relation to sellers as "the ability of a single firm or group of firms to profitably maintain prices above the competitive level for a significant period of time." The same framework applies when examining market power of buyers (*i.e.*, monopsony power), in which case the Bureau examines the ability of a single firm or group of firms to profitably depress prices paid to sellers below the competitive price for a significant period of time.

9 (August 30, 2000), CT-1998/002 (Comp. Trib.).

10 *Ibid*. at para. 258.

3. The Efficiencies Exception

Section 96 of the Act describes a framework under which a trade-off may be made between the gains in efficiency that a merger creates, such as cost savings, and the anti-competitive effects that may arise, such as an increase in prices. Specifically, if the efficiency gains that are likely to be brought about by the merger or proposed merger will be greater than and offset the "effects of any prevention or lessening of competition" that will result, then the Tribunal shall not make an order in respect of the merger under section 92 of the Act.

Canada's approach to the assessment of efficiencies in merger review contrasts with the integrated analysis of other jurisdictions, such as the United States and the European Union, where gains in efficiency are one consideration in the analysis of a merger's competitive effects. The Bureau's recently-issued *Bulletin on Efficiencies in Merger Review*[11] provides practical guidance to assist parties in understanding the Bureau's enforcement approach in this area. The *Bulletin* includes a description of the information that would be useful to the Bureau in its analysis of efficiency claims in general, and a clarification of the Bureau's approach to concepts such as dynamic efficiencies and gains in efficiency that are likely to be generated outside of Canada.

4. Consideration of Remedies

Where a merger or proposed merger is likely to result in an SLC in one or more markets, the Bureau seeks to remedy these concerns in the most appropriate manner, whether through contested proceedings or on consent of the merging parties. In this regard, the Supreme Court of Canada has described an acceptable remedy as follows:

> *The evil to which the drafters of the Competition Act addressed themselves is substantial lessening of competition. ... It hardly needs arguing that the appropriate remedy for a substantial lessening of competition is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger.*[12]

The Supreme Court has also emphasized the importance of a remedy in eliminating any SLC, even if the remedy goes beyond that which is necessary to restore competition to an acceptable level:

> *If the choice is between a remedy that goes farther than is strictly necessary to restore competition to an acceptable level and a remedy that does not go far enough even to reach the acceptable level, then surely the former option must be preferred. At the very least, a remedy must be effective. If the least intrusive of the possible effective remedies overshoots the mark, that is perhaps unfortunate but, from a legal point of view, such a remedy is not defective.*[13]

Ultimately, an effective remedy is based on the unique circumstances of the case and theory of competitive harm. The Bureau's *Information Bulletin on Merger Remedies in Canada*[14] provides guidance

11 (2009), online: Competition Bureau <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Bulletin-Efficiencies-Merger-Review-2009-03-02-e.pdf/$FILE/Bulletin-Efficiencies-Merger-Review-2009-03-02-e.pdf>.

12 Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748 at para. 85.

13 *Ibid*. at para 89.

14 (2006), online: Competition Bureau <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Mergers_Remedies_PDF_EN1.pdf/$FILE/Mergers_Remedies_PDF_EN1.pdf>.

on the objectives for remedial action and the general principles applied by the Bureau when it seeks, designs, and implements remedies.

5. Conclusion

Important amendments to the Act became law on March 12, 2009. These changes were aimed at modernizing the Act and aligning it more closely with the competition laws of Canada's closest trading partners. Notably, while the amendments introduced a new merger review and information-gathering process, the SLC standard has remained intact. In fact, the SLC standard is not only flexible enough to capture a spectrum of anti-competitive effects, it also facilitates greater procedural and substantive convergence across jurisdictions that have moved toward a similar test.

CZECH REPUBLIC

1. Substantive test and its development in the Czech Republic

The legal definition of the substantive test that is used for assessing the compatibility of concentrations of undertakings is a one of the key elements for the assessment of impact of concentrations of undertakings on competition on the market. There have been significant changes in competition legislation in the Czech Republic over the past ten years resulting in a change of approach of the Office for the Protection of Competition of the Czech Republic (hereinafter referred to as "the Office") in its decision-making practice.

1.1 Act No. 63/1991 Coll., on the Protection of Competition

The previous legal framework set out in Act No. 63/1991 Coll., on the Protection of Competition, which was the first administrative framework for competition in the Czech Republic, was based on a substantially different concept, both in respect of the notification thresholds and in respect of the substantive test. Pursuant to that Act a concentration of undertakings was subject to the Office's review if such a concentration distorted or was able to distort competition, which was deemed to arise where a combined market share of the parties to the concentration exceeded 30 % of the total turnover in the relevant national or local product or service market.

As regards the substantive test as set out in that Act, the Office approved the concentration if merging parties proved that the harm arising from the distortion of competition would be outweighed by economic benefits of the merger. Thus, the substantive test was not based solely on competitive criteria, but also enabled the Office to approve a concentration leading to the distortion of competition in case that implementation of this concentration was in the public interest. For the rest of the cases a concentration was not cleared by the Office. The Office could also attach to its decision conditions and obligations intended to ensure that the parties to a concentration comply with the commitments they have entered into vis-à-vis the Office necessary for the protection of competition. The above mentioned substantive test provided the Office with a great degree of administrative discretion and thereby did not ensure a sufficient degree of legal certainty for the parties to a concentration.

1.2 Act No. 143/2001 Coll., on the Protection of Competition

By adoption of the new Competition Act (Act No. 143/2001 Coll., on the Protection of Competition) the Czech legal framework came close to the existing EC framework, both in respect of the implementation of the objective notification thresholds based on undertakings´ turnover and in respect of the substantive test, which was close to the dominance test. By applying this new approach the Office would approve a concentration if the merger did not result in the creation or the strengthening a dominant position, as a result of which effective competition would be significantly impeded in the relevant market. If the proposed concentration led to the creation or the strengthening of a dominant position and the Office's competition concerns were not eliminated by the commitments or other measures proposed by the merging parties, the Office would not approve such a concentration.

1.3 The Czech Republic's accession to the EU and consequences in the field of concentration of undertakings

Following the Czech Republic’s accession to the EU in 2004, an amendment of the Competition Act modified the application of the substantive test. Based on the modified test, a concentration which would significantly impede effective competition in the relevant market in particular as a result of the creation or the strengthening of a dominant position *of the merged entity* would not be approved by the Office.

2. The current substantive test

Based on the above, the Competition Act (currently in force) has introduced the so-called SIEC (substantial impediment to effective competition) test. This substantive test reflects both elements of the U.S. concept of the SLC (substantial lessening of competition) test as well as the elements of the dominance test. The key element of this test is whether there is a significant impediment of competition as a result of a concentration. The new test therefore considers dominance as only one possible cause of a significant impediment to effective competition, and thus widens the net to catch other situations.

Market shares and the overall level of concentration in a market normally give useful first information about the competitive importance of both the merging parties and their competitors. The Office considers that post-merger market shares are calculated on the assumption that the post-merger combined market share of the merging parties is the sum of their pre-merger market shares. The Competition Act provides that concentrations which, by reason of the limited market share of the merging undertakings, are not liable to impede effective competition may be presumed to be compatible if a combined market share of undertakings concerned does not exceed 25%. In order to measure concentration levels, the Office applies the Herfindahl-Hirschmann Index (HHI) and the change in the HHI from pre-merger to post-merger ("delta") as first indications of the change in competitive constraints in the market following the merger, similarly to the practice of the European Commission.

The assessment of impact of concentration differs depending on the type of a concentration. The most frequent type of a merger and, from the standpoint of possible effects on competition, is a horizontal merger, i.e. concentration of actual or potential competitors in the same relevant market. The Office targets two main ways in which horizontal mergers may significantly impede effective competition: by eliminating important competitive constraints on one or more firms, which consequently would have increased market power ("non-coordinated/unilateral effects"), or because it makes anticompetitive coordination between the remaining firms more likely or more effective ("coordinated effects").

First, as mentioned above, the non-coordinated effects occur in situations where, as a result of a concentration, significant competitive constraints on one or more undertakings are eliminated and consequently the market power of these undertakings is strengthened without coordinating their activities in the market. Generally, a merger giving rise to such non-coordinated effects would impede effective competition by creating or strengthening the dominant position of a single firm and *cases of* non-collusive oligopoly.

Regarding the creation or the strengthening of the dominant position of a single firm, the newly-created undertaking will face either no or at least no significant competition after the merger and will be in a position to act to a considerable extent independently of its competitors, their customers and, ultimately, of consumers (as stated by the ECJ). The *other* alternative is represented by the situation where a concentration restricts the competition in oligopolistic markets where undertakings do not coordinate their activities so far, and where the investigation did not prove that the concentration itself could facilitate such collusion*, i.e.* the creation or the strengthening of a collective dominant position (or coordinated effects respectively). Even in such situations, elimination of one single competitor can cause distortion of the market equilibrium, increased price and reduced output. Usually such situations are often called as "unilateral effects" or non-collusive monopoly. In such situations a concentration carried out in the oligopolistic markets leads to neither the creation of the dominant position of a single firm nor the creation of a collective dominance (so it does not facilitate collusion among biggest players in the market), nevertheless the level of competition is reduced as a result of elimination of significant competitive constraints.

Second, anticompetitive effects of the merger may be represented by "coordinated effects", *i.e.* in situations where 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 behavior and raise prices.

Aforementioned coordinated effects include so-called tacit collusion, a situation that has been in the framework of the dominance test covered by the collective dominance doctrine. The probability of coordination of competitors is predominantly increased by factors, such as a comparable market position, stable and non-elastic demand, high degree of transparency in the market, product homogeneity, similar cost structure and also the existence of structural and contractual links between the undertakings in the market.

Using the substantive test, the Office also considers some factors outweighing the increase in market power of merging undertakings as a result of a concentration, such as the countervailing buyer power.

When assessing possible impacts of a concentration it is also necessary to take into account the efficiencies, that may counteract the effects on competition and in particular the potential harm to consumers that the merger might otherwise have. Examples of these benefits are allocation efficiency, which optimizes the allocation of product to customers *e.g.* by means of rationalization of distribution network allowing the customer to obtain demanded product at a lower price; production efficiency, whereby a producer reaches optimal output of the product *e.g.* through a rationalization of administrative or management processes, which due to the decrease of variable costs consequently results in lower prices for customers; and dynamic efficiency, *i.e.* optimal level of innovation, development and creation of new products contributing to the consumer welfare (*e.g.* through rationalization of research and development expenses, which as a consequence prevents doubled expenses to find innovative solution in one area and which leads to redirecting saved funds to other fields).

The concept of *Failing Firm Defence* is another element affecting economic assessment of impact on competition. The aim of this concept is to protect the company facing serious economic difficulties. The application of the *Failing Firm Defence* concept leads to clearance of a concentration, which should otherwise be prohibited. The Office has to prove that the economic situation of the acquired undertaking is so serious that the undertaking is likely to bring its activities to an end and to exit the affected market.

Besides horizontal mergers, the Office reviews vertical and conglomerate mergers where the risk of negative impact on competition is not so high. Vertical mergers could raise serious competition concerns where one of the merging undertakings has significant market power and the vertical integration could lead to the increase of barriers to entry in the relevant markets. Therefore, the Office, when reviewing such concentrations, focuses on the assessment of barriers to entry and relating market foreclosure risk. As regards conglomerate mergers, the Office assesses especially issues related to portfolio power. So far, the Office has not reviewed any conglomerate merger which would raise serious competition concerns.

3. The current and previous legal framework of the substantive test

As regards the comparison between the application of the SIEC test and the dominance test in the Czech Republic, it can be said that by applying the SIEC test the Office is in a position to better address such cases where market share of a merged undertaking does not lead to a dominant position but the concentration raises competition concerns due to the unilateral effects. For example, if one of the undertakings concerned increases the price before the implementation of the intended concentration, the undertaking usually has to face the risk of lowering its profit for the benefit of his close competitor. In case of the implementation of a concentration with such a close competitor, this risk is to be eliminated. Other competitors in the relevant market can also benefit from the reduction of competitive constraints that result from the merger, since the merging firms' price increase may switch some level of demand to the other competitors, which as a result may, be able to increase their prices. This reduction of the abovementioned competitive constraints could lead to a significant price increases in the relevant market. Such effect can usually occur in the markets, where merging firms have high market shares and they are close competitors, competitors are unlikely to increase supply if prices increase and customers have limited possibilities for switching suppliers.

To sum up, the Office's position is that the current substantive test makes the protection of competition in the field of concentrations more flexible and more effective. The Office is not strictly bound to the criterion of the creation or the strengthening of a dominant position and therefore the current substantive test widens the net to catch other situations, which would otherwise not be a subject to the Office's review.

3.1 The application of the SIEC test in the Office's practice

3.1.1 Raiffeisen Bausparkassen Holding / HYPO stavební spořitelna

In case *Raiffeisen Bausparkassen Holding / HYPO stavební spořitelna*[1], the Office has applied the SIEC test. The concentration was cleared without any remedies. The merging parties (build and loan saving banks operating in the relevant market for build and loan saving – saving phase), were the fourth and the sixth biggest player in the relevant market with a combined market share just below 20 %. From the dominance test point of view, the case would not raise serious competition concerns.

In the course of the merger review, the Office assessed all implications of possible impediment of effective competition in case of a horizontal merger, especially because of the highly concentrated relevant market based on the HHI analysis. The Office focused on assessing coordinated as well as the non-coordinated effects.

With regard to the non-coordinated effects, the Office concluded that the market shares of the merging firms are not so high, there are other competitors with a substantially higher market share, there are no high barriers to entry and that the financial and economic power of the merging firms is similar to the power of main rivals in the relevant market. All the above mentioned factors led to the Office's conclusion that the proposed concentration does not lead to the creation or the strengthening of a dominant position of the merging undertakings.

Similarly, on the basis of the assessment of the relevant market transparency, homogeneity of the products in the relevant market, market stability, elasticity of demand, symmetry of merging firms´ market shares in the relevant market and structural links among undertakings active in the relevant market, the Office concluded that the merging undertakings will not be able to coordinate their behavior without

[1] Case No. S 422/2007.

entering into an agreement with other players in the market in this way and raise fee for build and loan saving services.

In addition, the Office further considered the *unilateral effects* in the oligopolistic market scenario where the concentration does not lead to the creation or the strengthening of the dominant position of a single firm or a collective dominant position, however still involving the elimination of important competitive constraints. With regards to the above mentioned facts, especially the market power of the merging firms and the overall stability in the relevant market,, the Office ruled out *unilateral effects* in this case.

3.1.2 Teléfonica O2 Czech Republic / DELTAX Systems

The case *Teléfonica O2 Czech Republic / DELTAX Systems*[2] is another example of a concentration where the Office expressed serious doubts with respect to the substantial impediment to effective competition, although the concentration did not lead to the creation or the strengthening of a dominant position in the relevant market.

The activities of the merging firms overlapped in the market for provision of integrated solutions in the area of information and communication technologies and in the market for sale of mobile telecommunications equipment and accessories.

During the merger review, the Office concluded that there are many competitors in the relevant market, that the market is also highly innovative and that there are no significant economic or legal barriers to entry. From the dominance test point of view, the case would not raise serious competition concerns.

However, the Office established that DELTAX was a supplier of information system for the Czech Telecommunication Office, which is a national regulator in the telecommunication sector. Moreover, DELTAX took part in supplies for public bodies under public contracts, including the Czech Statistical Office.

The Office's concerns, also confirmed by rivals of Teléfonica O2, were that following the merger Teléfonica O2 would have access to confidential information about the electronic communications market, including the confidential information about main competitors. That would essentially lead to favoring one competitor to the detriment of the other competitors and, as a result, to a substantial strengthening of Telefónica O2's position in the relevant market. The Office accepted commitments proposed by the parties to the concentration that were deemed capable of rendering the concentration compatible and cleared the transaction. The commitment consisted of bringing participation of DELTAX in the above mentioned project to an end and of transferring this project to a third independent party.

3.1.3 Baring Communications Equity (TES) / Vision Networks Tsjechie Holding[3]

The concentration concerned cable network TV providers. Merging firms were active in different geographic markets, so the concentration did not increase their market shares. Nevertheless the concentration led to a significant strengthening of the market and the financial power of the merging firms.

In the course of the proceedings, the Office received a large number of complaints submitted by the consumers. By applying criteria laid down in the judgment of CFI *Airtours vs. Commission* (T-342/99) in particular, the Office assessed whether the concentration could lead to the creation of collective dominance

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2 Case No. S 239/2007.

3 Case No. S 128/02-4488/02.

of the merging firms and their main competitor in the area of the purchase of programme contents, advertisement and marketing.

During the investigation, the Office concluded that possible *tacit collusion* between the merged entity and its main competitor would not be sustainable in time. As the other criteria set by the above mentioned judgment were not fulfilled, the Office held that the concentration was not likely to result in the creation and the strengthening of the dominant position of the merged entity and therefore impede effective competition. As a consequence, the concentration was cleared by the Office.

3.1.4 AGROFERT HOLDING and AGROPOL GROUP

The latest case concerned a merger between the main groups of undertakings within the area of agricultural supply and purchase.

The merger was cleared after a five-month investigation (or Phase II) on condition that the party to the proceedings fulfilled commitments aimed to maintain effective competition. The difference of the approach between the dominance test and the SIEC test became obvious mainly because the Office required commitments concerning also the relevant markets, where the merged undertaking had no dominant position. The Office’s main concerns were that the merger would eliminate an important competitive force in case where the economic and financial power of the other competitors was not comparable to those of the merging parties. In addition, the merged undertaking was a vertically integrated entity engaged in a variety of activities ranging from agricultural production to food production, and also operating in other fields.

4. Conclusion

As mentioned above, the Czech competition law currently applies the SIEC test, which combines the SLC test and the dominance test.

The SIEC test widens the scope of possible cause of a significant impediment to effective competition (by creating or strengthening of the dominant position of a single firm, creating or strengthening of a collective dominance) more easily and therefore the examination of the impacts of a merger on competition is more flexible. This puts the party to the proceedings in a more difficult situation compared to the past legal framework of the substantive test, where it was enough to provide evidence that the merging undertaking had no dominant position in the relevant market. However, it cannot be said that currently the merging firms enjoy lower degree of legal certainty because criteria for assessing concentrations under the SIEC test are, especially thanks to the decision-making practice of the European Commission and also of the Office, quite well-established and accepted.

DENMARK

1. Introduction

This paper contains the views of the Danish Competition Authority (hereinafter: the DCA) on the change of merger review standard from the dominance test to the SIEC test.

In section 2 a few general comments are made. The purpose of those comments is (1) to address issues which are not covered explicitly by the specific questions posed by the secretariat, and (2) to make clear that the views of the DCA are, in part, based on legislative and structural conditions specific to Denmark, which may differ from those of other OECD countries.

In section 3 the specific *questions for discussion* posed in the issues paper by the secretariat are addressed.

2. General Comments

Merger control was only introduced in Denmark on October 1st, 2000. Since the introduction of merger control the DCA has handled an average of approximately 10 merger cases per year. The relatively low number of merger cases can, in part, be explained by high merger thresholds stipulated in the Danish Competition Act. The fact that merger control was introduced later in Denmark than in many other OECD countries combined with the low number of cases per year limits the scope of the DCA's experience with merger control.

3. Specific Questions and Issues for Discussion

Within the issues paper by the secretariat for the June 9th, 2009 meeting of Working Party No. 3 a series of specific questions for discussion are posed. The questions are addressed below.

3.1 Substantive tests for merger review

3.1.1 Question 1. Please describe the substantive test which is applied to mergers in your jurisdiction and what factors are featured in determining whether competition is likely to be harmed by a merger.

Since 1 February 2005, the substantive test applied in Danish merger control has been the Significant Impediment to Effective Competition test (the "SIEC-test"). The SIEC-test replaced the dominance-test which had been used since the introduction of merger control in Denmark in 2000.

The exact wording of the Danish test is to be found in section 12 (C) of the Danish Competition Act: "*A merger that will not significantly impede effective competition, in particular due to the creation or strengthening of a dominant position, shall be approved. A merger that will significantly impede effective competition, in particular due to the creation or strengthening of a dominant position, shall be prohibited.*"

It is stipulated in the remarks to the Danish Competition Act that the SIEC test is to be interpreted in accordance with the definition used in the EC Merger Regulation and in the guidelines on the assessment of horizontal mergers as well as in accordance with future decisions from the European Commission and judgments from the Community Courts.

The most important factors in determining whether competition is likely to be harmed by a merger include analyses of market shares/concentration levels, entry barriers, buyer power, demand characteristics, level of competition pre-merger, possible existence of maverick, demand and supply substitution patterns, industry capacities, switching costs, etc.

3.1.2 Question 2. Please discuss what type of possible anti-competitive effects are covered by the substantive test applied in your country.

It is the assessment of the DCA that the SIEC test is adequate to address all potential anti-competitive effects of mergers. This includes unilateral effects in cases where the merged entity becomes dominant. Specifically, the SIEC test is adequate to address (1) raising prices/reducing production, (2) raising rivals' costs, (3) input foreclosure, (4) customer foreclosure, (5) raising barriers to entry and/or expansion, and (6) conglomerate effects.

The SIEC test may also address unilateral effects in cases where the merged entity does not become dominant. This may be one aspect of the SIEC test which stands apart from the previously used dominance test, see section 3.2. This theory of harm has, however, not been applied in Denmark so far.

Furthermore, the SIEC test may address coordinated effects, e.g. in the form of coordination on prices, quantities, service levels and entry/exit.

3.2 Addressing the 'Gap' in the Dominance Test

3.2.1 Questions 1 and 2. Please explain if the substantive test for the review of mergers has been changed in your country. If yes, please describe the changes and provide some background as to the policy rationale that led to these changes.

As mentioned in section 3.1 the dominance test was replaced by the SIEC test on February 1st, 2005. There were several reasons for the introduction of the SIEC test in Danish Competition Law.

Firstly, the SIEC test was introduced in EU merger control procedures with the new merger regulation which entered into force on May 1st, 2004. One of the policy rationales behind the change of test in Denmark was to align the Danish merger control regime with that of the EU. This was seen as essential in terms of efficiency of merger control procedures and in terms of legal certainty for companies operating in several jurisdictions.

Secondly, the introduction of the SIEC test was intended to close the perceived and much debated gap in the dominance test as also described in the issues paper by the OECD secretariat, i.e. the theory that some mergers in oligopolistic markets might give rise to unilateral effects even in a market setting absent dominance.

It was however also acknowledged in connection with the change of test that mergers establishing or strengthening a (collective) dominant position would continue to be expected to raise the most serious doubts as to their compatibility with Danish competition rules.

3.2.2 Question 3. If you have recently changed your substantive test, please describe whether the change appears to have achieved the desired effect. Please discuss any issue that has arisen with the change in the substantive test.

The experience of the DCA with the SIEC test so far indicates that any change in merger control following the introduction of the SIEC test has mainly been one of revised angles of approach and analyses and, perhaps, to a lesser extent one in terms of outcomes, i.e. decisions.

Under the dominance test market shares were to some extent overemphasized as the prime focus in merger review and there was less of a focus on analysing the alleged anti-competitive effects of a merger.

The SIEC test has – at least in experience of the DCA – introduced a more economic-based approach to merger control. This has resulted in more detailed analyses of suspected theories of harm as well as a more explicit construction and assessment of the correct counterfactual.

With regards to outcomes it is not possible to identify any Danish decisions made under the dominance test which would plausibly have been different, had the SIEC test applied. Also, we cannot think of any Danish decisions made under the SIEC-test which would plausibly have been different, had the dominance test still applied.

So far only one merger has been blocked in Denmark. This was the AO/LM-merger[1], which was blocked in 2008, as it was argued that the proposed merger would have led to an increased risk of coordinated effects significantly impeding competition. However, under the old dominance test coordinated effects (collective dominance) was explicitly included in the test and it was further stipulated in the remarks to the Competition Act that the notion of collective dominance in Danish merger control should be interpreted in accordance with Community case-law. This merger would in all likelihood also have been blocked under the dominance test.

The DCA finds that it is unclear what the standard of proof would be for a competition authority to bring a so-called gap case, i.e. to prohibit a merger on an oligopolistic market with no dominance and no risk of coordinated effects. The fundamental question is: when exactly is a price rise likely post-merger in oligopolistic markets with differentiated products, when there is no single dominance and no risk of coordinated effects?

Recitals 34-38 of the EU guidelines on horizontal mergers indicate a number of factors, which can contribute to the analysis of the likelihood of non-coordinated effects also in a market setting without post-merger dominance:

- Merging firms have large market shares
- Merging firms are close competitors
- Customers have limited possibilities of switching supplier
- Competitors are unlikely to increase supply if prices increase
- Merged entity is able to hinder expansion by competitors

1 A merger in building materials. An english summary of the case can be found at: http://www.ks.dk/en/competition/decisions/decisions-2007-and-earlier/decisions-2008/konkurrenceraadets-moede-den-14-maj-2008/the-danish-competition-council-blocks-merger-in-building-materials/

- Merger eliminates an important competitive force

However, these factors are the same that would be analysed in a case involving non-coordinated effects by a dominant company. Therefore, the DCA finds it unclear what "extra" proof a competition authority would need to bring a merger case on non-coordinated effects without post-merger dominance.

The Danish delegation would very much welcome a discussion of this issue to hear if there are any country experiences with regard to cases and standard of proof.

One possible solution to the standard of proof-problem could perhaps – as Heimler (2008) seems to suggest – be to skip the market definition exercise in merger cases and instead introduce a SSNIP type test to see if a price-rise would be profitable for the merged entity post merger. However there are also significant practical problems involved in using the SSNIP-test in merger cases. For instance, how would a competition authority in practice solve the problems inherent in analysing and predicting consumer responses to a hypothetical price increase post-merger? One further problem might well turn out to be that such predictions would have to be based on at least a preliminary delineation of the market.

3.3 Broader Policy Issues Connected to the Dominance Test and the SLC Test

3.3.1 Question 1. Please discuss if the type of substantive test applied in your jurisdiction poses risks of over- or under-enforcement.

It is the assessment of the DCA that the scope of the SIEC test - at least in theory – might be broader than the dominance test, cf. the discussion above. Therefore, the dominance test may have led or have had the potential to lead to under-enforcement, though this view cannot be substantiated with concrete examples form Danish case-law.

This may inter alia be due to the fact that the experience of the DCA with the dominance test lasted only from 2000 to 2005. It may also be due to the fact that the thresholds for merger notifications in Denmark are relatively high, which has resulted in only about 10 notifications per year.

It may also be due to the fact that both tests in practice involve certain degrees of discretion for the competition authorities, so that differences between the tests might be blurred.

The Danish Government is currently considering, on the basis of a recommendation made by a committee, to lower the thresholds for merger notification.

3.3.2 Question 2. Please discuss if you think that the substantive standards applied to mergers have a broader policy impact on the interpretation and enforcement of unilateral conduct rules or on the prohibition of anti-competitive agreements.

The DCA does not see any direct impact of merger-tests on the interpretation of rules on unilateral conduct or anti-competitive agreements.

There is no direct link, as analyses in merger control are about predicting future competitive conditions based on an ex-ante assessment, whereas analyses in respect to abuse of dominance provisions are about past or ongoing behaviour by dominant companies and in most cases based on ex-post assessments.

However, if – for instance – a dominant position has been established in connection with a merger case, then this will be known to the alleged dominant company or companies. This might have an impact on the conduct of the dominant company or companies, but the DCA does not foresee that the establishment of a dominant position in a merger case would entail a change in the way alleged abusive conduct would be assessed after the merger.

The SIEC test can be seen as part of a general move towards a more economic and effects-based approach to the enforcement of competition rules, where the new guidance paper on article 82 enforcement priorities from the European Commission can be seen as a logical next step to ensure a coherent enforcement of competition rules.

3.3.3 Question 3. Please discuss to what extent legal certainty (i.e. ability of parties to predict the result of merger review in a specific transaction) can be affected depending on which competition test is applied to mergers.

In the view of the DCA, “national interest” or “public interest” tests are likely to result in less legal certainty and in some instances perhaps even economic nationalism.

Consider for instance a public interest merger control test, which includes other considerations than competition, e.g. concerns related to public security, employment or the environment.

If some businesses already consider legal certainty to be compromised under a pure competition test, then the introduction of other considerations will in all likelihood increase legal uncertainty.

As regards legal certainty under the dominance and SIEC tests respectively, it is not considered - as also outlined above - that the change of test has had a major impact on legal certainty for companies. We do not believe that the change from the dominance to the SIEC-test have had an effect on legal certainty because the SIEC-test has lead to increased focus on the theory of harm and the counterfactual and to improved underlying economic analyses. Under the previous dominance test the main focus was placed on market shares and therefore on market definition. However, companies could not beforehand be certain as to how the relevant market would be defined.

3.3.4 Question 4. In a world where merger enforcement is increasingly multi-jurisdictional, please discuss if competition authorities should consider converging on one of the generic merger tests (i.e. SLC, dominance or public benefit).

A point could certainly be made that convergence of merger tests among national competition authorities would be beneficial to businesses operating in multiple jurisdictions and, furthermore, increase the efficiency of merger control itself.

However, the exact differences between the dominance test and the SIEC-test would have to be spelled out. And, more importantly, competition authorities would have to apply the eventual new common test in the same fashion. Therefore, common guidelines for merger control enforcement and exchange of best practice might be more helpful for companies operating in several jurisdictions. Finally, it could be argued that a “one fits all” policy would neglect to consider possible country-specific differences in merger cases.

FINLAND

1. Substantive test for merger review

1.1 Question 1. Please describe the substantive test which is applied to mergers in your jurisdiction and what factors are featured in determining whether competition is likely to be harmed by a merger.

In Finland, the test used as a tool in merger cases is the dominance test that is similar to the test previously included in the EC Merger Regulation 4064/89. According to Article 11 d of the Act on Competition Restrictions, the Market Court may prohibit or order a concentration to be dissolved or attach conditions on the implementation of a concentration, if, as a result of it, a dominant position shall arise or be strengthened which significantly impedes competition in the Finnish markets or a substantial part thereof. Similarly with the former ECMR (4064/89), both single dominance and joint dominance are examined under Article 11 d (Article 3 of the Competition Act).

The approach is elaborated in more detail in answers to the question on the hypothetical bank merger at the end of this Issues Paper.

For the sake of completeness, it should be noted that the Competition Act has a special provision on concentrations in the electricity market, according to which concentrations whose combined share of the transmission operations of amount of electricity transmitted (at 400 V in the transmission grid) exceeds 25 percent on national level.

1.2 Question 2. Please discuss what type of possible anti-competitive effects are covered by the substantive test applied in your country.

The competition test applied by the FCA is a two-fold test consisting of the dominance and the significant impediment of competition. Assessing a concentration under the test requires first finding dominance and then assessing its significance to competition. The test is aimed at the negative effects to competition that are likely to ensure the attainment of such a position. It covers anticompetitive effects resulting from both single dominance and joint dominance.

1.3 Question 3. If you feel that the merger test which is currently applicable in your jurisdiction is inadequate to address some potentially anti-competitive effects of mergers, please explain why that is?

In the Finnish merger control, mergers are appraised under the dominance test. The dominance test requires that a dominant position is created or strengthened. As with the dominance test in general, also the substantive test applied in the Finnish merger control includes at least a risk of a gap concerning so-called non-collusive oligopolies. As the discussion below in relation to the hypothetical bank merger shows, at least a risk exists that mergers which create unilateral effects but do not result in the creation or strengthening of single dominance are not caught by the current substantive test.

2. Addressing the 'gap' in the dominance test

2.1 Question 4. If your jurisdiction is currently considering changing the test for the review of mergers in the foreseeable future, please summarise the current policy debate and explain why such legislative changes are being considered.

The preparation of a new Act on Competition Restrictions ("Competition Act 2010") is currently underway in Finland. It is expected to enter into force in 2010. One of the proposals includes a change from the currently used dominance test to the SIEC test.

The considerations for and against the change of the test have been thoroughly discussed in the report of the Competition Act 2010 working group appointed by the Ministry of Trade and Industry in 2007. According to the report, both practical reasons and material considerations can be seen to support the adoption of the merger test which is uniform with that of the EC merger regulation. Firstly, a uniform test would facilitate the transfer of cases between the FCA and the Commission. The uniformity of the tests would also increase the predictability of merger control. Since several Member States have moved or are currently in the process of moving to the SIEC/SLC test, the EU case-law relating to the dominance test will become rarer and rarer and its usefulness as a guide to interpretation will begin to fade. The congruity of the legislation applied in national and community legislation would also enable the similar treatment of cases irrespective of whether the case will be examined by the Commission or the FCA. It was found important that the conclusion of a merger investigation cannot vary according to which authority investigates the case and which test the investigative authority applies. The adoption of the SIEC test would promote harmonisation and cooperation between the EU authorities.

In the report, the change to the SIEC test was also justified by the possibility to better secure effective competition in the oligopolistic markets. The SIEC test would better enable intervention with problematic mergers which do not involve the creation or strengthening of a dominant position but as a result of which competition still significantly lessens. It is likely that in Finland, too, mergers and acquisitions have been approved as a result of which a dominant position has not been created or strengthened but competition has still decreased in the market as a result of the merger. Looking at the mergers notified to the FCA there does not seem to be a large number of mergers, which may have resulted in this kind of an outcome. However, this does not mean that the importance of the so called gap should be underestimated since individual cases can have wide reaching effects.

The report also favoured the SIEC test because it allows more room for economic analysis. Better than the dominance test, the assessment based on the SIEC test would enable the consideration of factors which balance market force, i.e. efficiency benefits, and would thus reduce the risk of over-reacting to mergers which promote competition.

Factors which are against the adoption of the test have also been brought up. It has been suggested that the change of the test would be problematic for the competitiveness of companies. According to the expert statement by Professor Tomi Laamanen commissioned by the Competition Act 2010 working group, the greatest worries from the point of view of Finnish businesses are related to whether the policy of the competition authorities will be tightened and whether the decisions will be more difficult to foresee. The change of the test has been suggested to lead to a significant lowering of the ban threshold and to create uncertainty as to what kind of mergers the FCA is able to intervene with in the future.

According to the expert statement commissioned by the Competition Act 2010 working group, both these threats may be considered unfounded. The uniformity of the tests may rather be assumed to increase the predictability of merger control. With the SIEC test, the case-law of the European Commission would become easier to use as a guide to interpretation. The significant lowering of the intervention threshold cannot be perceived to be a great threat either.

In his expert statement, Professor Laamanen analysed 34 merger decisions and the competitive situation thereafter in which the SIEC test could have been used. Professor Laamanen's conclusion was that in addition to one or two individual cases involving potential competition restraints related to vertical integration, the SIEC test would not have led to greatly differing results than the present dominance test. According to his statement, the number of transactions falling within the scope of merger control is so small in Finland that it is difficult to perceive any real problems for the competitiveness of the companies brought about by the change of the test.[1]

Both Professor Laamanen's statement and the report of the 2010 Competition Act working group come to the conclusion that the benefits obtained from the adoption of the SIEC test could be considered considerably higher than the drawbacks caused by it. The working group was unanimous in proposing in its report issued on 9 December 2009 that the dominance test be changed to the SIEC test.

3. Broader policy issues connected to the dominance test and the SLC test

3.1 Question 1. Please discuss if the type of substantive test applied in your jurisdiction poses risks of over- or under-enforcement.

The issue of under-enforcement was e.g. discussed during the 2004 EC merger review. In the EC merger control, the need to change the substantive criteria from the dominance test to the SIEC test was partly justified by the risk of under-enforcement resulting from an argued "gap" in the dominance test. A new substantive test was also needed to cover the potential anticompetitive effects resulting from so-called non-collusive oligopolies.

This potential risk of under-enforcement may also be detected in the Finnish merger control. According to the FCA's estimate, in practice a potential gap in the dominance test may have shown at least in one case (Elisa/Saunalahti, 510/81/2005), which was largely similar to the European Commission's T-Mobil/Tele.ring case (COMP/M.3916). However, as stated before the number of mergers that can be identified as so-called "gap" cases in the history of Finnish merger control does not seem to be high.

In the general discussion, the risk of over-enforcement is often connected to the inability to effectively claim efficiencies under the dominance test. It has been argued that a test that focuses more on post-merger effects than on structural issues is needed in order to decrease the risk of erroneous overreactions to pro-competitive mergers.

The FCA has acknowledged this discussion and finds it reasonable to discuss also with respect to the proposed new Competition Act, which is expected to enter into force next year. However, the issue has probably little effect on the Finnish merger control. Efficiency is already one of the factors assessed in the Finnish merger review. In practice, the merging parties only seldom claim efficiencies. The FCA has no reason to believe that over-enforcement had *de facto* materialized in the Finnish merger control, for instance, due to claimed but unaccepted efficiencies. Overall, according to the FCA's experience, there is generally no significant risk of over-enforcement in the Finnish merger control.

1 In Finland, 40 mergers and acquisitions annually fall within the scope of merger control (i.e. roughly 5 per cent of all mergers). Only 0.3 per cent of all the mergers conducted in Finland are intervened with on the basis of the merger provisions.

3.2 *Question 2. Please discuss if you think that the substantive standards applied to mergers have a broader policy impact on the interpretation and enforcement of unilateral conduct rules or on the prohibition of anti-competitive agreements.*

In Finland, mergers are assessed under Chapter 3 a of the Competition Act. The substantive test applied is the dominance test. Abuse of dominant position is assessed under Article 6, which is similar to that of Article 82 of the EC Treaty. In practice, finding abuse of dominance under Article 6 of the Competition Act may have some effects on the assessment of mergers and the other way around. For instance in Valio (a merger case, 1151/81/1999), the FCA took into consideration earlier Article 6 decisions finding Valio guilty of abusing dominant position in the Finnish markets. However, at this point it must be noted that a dominance defined in a merger process does not become automatically legally binding in a case concerning abuse of dominance on the similar markets.

On the relations between merger control and other areas of competition law enforcement it can be said that the emergence of the idea of joint dominance within merger control has since had some effect on the way in which abuse of dominance cases have been looked at.

Moving from the dominance test to the SIEC test in the proposed new Competition Act will likely separate mergers and abuse of dominance cases further from each other, also affecting the possibilities to cross-use findings made under Chapter 3 a and Article 6.

3.3 *Question 3. Please discuss to what extent legal certainty (i.e. ability of parties to predict the result of merger review in a specific transaction) can be affected depending on which competition test is applied to mergers.*

Several factors may have positive effects on legal certainty. A coherent case law is probably the most important factor. In the Finnish merger control in which travaux préparatoires have a great deal of importance for interpretation, legal certainty is also affected by the formulation of preliminary works, such as the Government's proposals and committee reports. Legal certainty may also be improved, for instance, by preparing clear and informative NCA's guidelines and notices.

The FCA has no reason to believe, however, that legal certainty would significantly depend on the type of test applied. The SLC type of test allows emphasis on economic analysis, which often requires special knowledge and easily results in misunderstanding and interpretational problems. But the dominance test also includes critical elements, such as the delineation of relevant markets and dominant position that in practice may constitute uncertainty and considerable interpretational issues. In addition to this there is a lot of room for interpretational issues in estimating the competitive impact of a dominant company. Therefore it is hard to argue that the dominance test would be somehow less problematic from the perspective of legal certainty than the SLC type of test.

3.4 *Question 4. In a world where merger enforcement is increasingly multi-jurisdictional, please discuss if competition authorities should consider converging on one of the generic merger tests (i.e. SLC, dominance or public benefit).*

Several reasons may be found that support converging on one generic merger test. For instance in the EU, a consistent test would ease the referral of cases between the NCAs and the Commission, decrease forum shopping and the risk that similar cases are treated differently between different authorities. Several Member States have already moved, or are considering moving, from the dominance test to the SIEC test or to an equivalent test. It will be increasingly difficult to find assistance to interpretational issues (such as assessing efficiency defense etc.) from the EU merger control practice in the future without moving to an equivalent test. A consistent test may increase harmonization and cooperation between national competition authorities and the Commission. But the FCA also appreciates that different jurisdictions are not necessarily consistent with their grounds and objectives to merger control, which may affect the possibility to adopt a generic European-wide or global merger test. For instance differences in the characteristics and the competitive circumstances between member states and their economies may lead to justifiable differences in the national legislation as well.

4. An hypothetical 'gap' case for discussion - A bank merger[2]

4.1 Question 1. Based on the legal test that is applied in your country, please discuss if the hypothetical merger between BoC and BoI is likely to raise anti-competitive effects.

This hypothetical merger seems to be a so called gap case - that is a case, which might be caught by the SLC or SIEC tests but not by the dominance test.

The current test applied to merger cases in Finland is the dominance test. As is well known, this test allows for intervention only in mergers that will give rise to or strengthen a dominant position on some relevant product or geographical markets. In addition to single dominance, the concept of joint or collective dominance is recognized within this paradigm. These principles would be taken into account in the FCA's analysis. In defining a joint or a collective dominance, the FCA applies the criteria laid down in the Airtours Plc vs. the Commission decision of the CFI of 2002. The three conditions that are necessary for a finding of collective dominance are: (1) the market must be transparent (i.e., each member of the oligopoly must have the ability to know how the other members are behaving); (2) the situation of tacit coordination must be sustainable over time (i.e., there must be an incentive not to depart from the common policy); and (3) the foreseeable reaction of current and future competitors, as well as of consumers, cannot jeopardize the results expected from the common policy.

Based on the given information in this hypothetical bank merger and considering the prevalent dominance approach and the existing case law, it is hard to imagine that this particular merger could be prohibited or that substantial remedies could be required of the merging parties. Based on the information given it would be quite hard to argue that the merger would result in a single or a joint dominance. However, even if the description of the hypothetical case does not go deep into the details of the banking sector, it is well known that there are a number of structural factors that create interconnections between competing banks and result in at least some transparency on the markets. This and the fact that after the merger there would be only four major banks left in the market may give rise to questions similar to those posed in evaluating the possibility for collective dominance.

At the same time, this does not mean that the FCA would not be aware of the risks involved in this kind of a scenario, especially considering the maverick nature of the BoI and the consolidating phase of the markets. In this kind of a market situation, the acquisition of a maverick company by the second biggest established company in the market might turn out quite harmful to the competitive process.

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2 The views expressed in the answers to the following questions are points raised for discussion and based on the features of this hypothetical merger case. They do not represent an exhaustive description of all possible factors that the Finnish Competition Authority would take into consideration if such a case was to be notified.

4.2 Question 2. Please describe what type of potential anti-competitive effects you are likely to investigate.

Investigations of the possible effects of the merger would concentrate on the likely nature of the competition between the few big remaining players after the merger. The potential for tacit collusion would be of major interest, of course.

In practice, this would mean investigating the likely effects of the merger on pricing and other terms of service offered by the remaining banks. One of the central questions would be whether it is likely that the remaining players would still have an incentive to challenge each other's positions. From this perspective, it may be of some importance that BoC and BoI are described as each others' closest competitors. Other features that would be addressed would be the effects of the merger on the probability of entry. E.g. the importance of a country-wide network for any entry of significance would have to be analyzed. In this respect, the history of BoI after its entry on the markets could provide some guidance.

4.3 Question 3. Please discuss to what extent market definition and market shares are important factors in your analysis.

Market definition is the first step in the process leading to a decision. Because of the basic concept of the dominance test, market definition and the market structure are bound to have a central role for the decision adopted in the case. Other findings and factors affecting competition are of course of great importance as well. The nature of the competitive process and the factors affecting demand and supply side substitutability actually give the meaning to market shares measured as proxies of market power. This is the reason why there are no fixed market share thresholds in the Finnish legislation for establishing dominance in the first place. Of course if the market shares of the merging parties are very high in comparison to the competitors, the countervailing factors will have to be quite substantial.

4.4 Question 4. Please describe what other factors you would consider to complement the analysis of market shares.

The remaining choice that the various customer groups are facing after the merger would play a central role in the investigations. A detailed analysis of the various services provided by the remaining players, their position in the markets and their pricing would be conducted. The competitors' competitive advantages and disadvantages would have to be analyzed as well. Also factors that affect for instance the possibility of the customers to switch from one bank to another would be of interest. In this respect, it would be quite helpful to have access to some sort of market data on the past behavior of the customers. At the same time the existence or in this case the lack of buyer power (bank vs. consumer) would be taken into consideration

As to the supply side substitutability and potential competition, the possibilities for the expansion of the competitors' activities and the sources of potential competition, cost of entry and industry history would come under scrutiny. The role of developing and launching new services and products and track record of the Big Five banks might be of interest as well. If the parties claim that the merger results in efficiencies that will be relayed to the customers, these claims are of course analyzed as well.

4.5 Question 5. Please discuss if the so-called "maverick" reputation of the BoI may have an impact on your analysis, particularly regarding competition concerns about consumer choice.

The maverick reputation of BoI will have an effect on the analysis as described before under question 1. However, if the merged company will not become dominant on any of the relevant markets, it will be quite difficult for the competition authorities to set behavioral or structural conditions for the execution of the merger, however beneficial this might seem for the good of the consumer.

As a conclusion it should be noted that the reasons why Finland is considering the change of the test used in merger investigations are mostly related to the objective of harmonizing the national legislation with Community legislation in this respect as well. According the FCA's experience, there have been only few notified mergers that can be seen as so called gap cases since the adoption of the merger control rules in the Finnish law in 1998. The FCA does not expect that changing the test would dramatically change the face of merger control in Finland. The FCA expects that if the proposed change is adopted it will help dealing with difficult cases such as this one in a manner that better serves the purpose of merger control as a whole.

GERMANY

1. Introduction

The German Act against Restraints of Competition (ARC)[1] provides for the dominance test as the substantive test in merger control proceedings. Under Section 36 (1) ARC, the relevant question is whether the merger leads to the creation or strengthening of a dominant position.

Merger control was introduced in Germany in 1973. Since that time, merger control has been of great importance in German competition law and in the practice of the Bundeskartellamt.[2] Appeals by parties to the merger as well as third parties against the decisions of the Bundeskartellamt have led to a substantial body of court decisions including significant rulings on issues concerning the creation or strengthening of dominance as a consequence of a merger.

Before the last major amendments to the German Competition Act in 2005, which brought further harmonization with EC competition law, a change to the SLC/SIEC test was discussed, but ultimately rejected. A major argument against the introduction of the SLC/SIEC test at the time was the extensive and well established case law based on the dominance test and the legal certainty for businesses resulting from it. Furthermore, there was a widespread view that the dominance test was broad enough to address all types of potentially anticompetitive effects of merger projects. It is, however, to be expected that there will be further discussion concerning the legal standard in German merger control in the future.

2. Is there a gap in the dominance test that needs to be closed?

Probably the most pertinent question and the one most difficult to answer is whether the dominance and SLC/SIEC tests lead to different results and whether only the SLC/SIEC test is capable of addressing effectively all mergers that may seriously harm competition – in other words: whether there is a gap in the dominance standard that needs to be addressed by changing to the SLC/SIEC test.

Broadly, one view argues that the dominance test does not catch all potentially anticompetitive mergers, in particular because unilateral effects analysis stretches beyond the reaches of the concept of

1 An English version of the ARC is available at: http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/0712_GWB_mitInhaltsverzeichnis_E.pdf.

2 In 2008, the Bundeskartellamt received notifications of 1,685 merger projects. The number of merger notifications is expected to decrease in future after the introduction of a second domestic turnover threshold in March 2009. In the last years roughly 2% of the notified merger projects were subject to in-depth investigations in Phase II.

dominance.[3] The other view holds that the dominance test is a sufficiently comprehensive standard to address all those mergers that may significantly harm competition.[4]

In 2004, the revised EC Merger Regulation (ECMR)[5] introduced the SIEC test on the Community level. According to Article 2(3) ECMR, the Commission shall declare incompatible with the common market "a concentration which 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."

The wording of Article 2 ECMR makes clear that the SIEC test is a hybrid test that combines the dominance and SLC tests. The revised ECMR maintains the dominance criterion as the main example for a significant impediment to effective competition. There is good reason for this: If market structures are such as to conclude that the merging parties will become dominant post-merger, it is highly likely that effective competition is harmed as a consequence of the proposed merger. The same applies if changes to the market structure brought about by the merger strengthen a pre-existing dominant position.

Recital 25 of the ECMR which refers to the change to the SIEC test states that "in the interests of legal certainty it should be made clear that this Regulation permits effective control of all such concentrations [i.e. including unilateral effects in an oligopoly where coordinated effects are absent]", and goes on to explain that "[t]he 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."

While the wording of the first citation of recital 25 mentioned above may suggest, by referencing legal certainty, that the substantial test in merger control remains unchanged so that the amendment to the ECMR would be a mere change in language, the latter citation clarifies that this is not the case: The new test is meant to be broader and to cover situations where a dominant position, in particular a collective dominant position by more than one firm, cannot be proved. The new test thus seems to increase the scope for intervention for the Commission.[6]

2.1 The EC practice - The T-Mobile/tele.ring case

It is still not clear, however, if this increased scope for intervention for the Commission was necessary to effectively address significant competition issues; in other words, if there are cases that pose a significant threat to competition but cannot be addressed under the dominance test.

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3 See, e.g. Völcker, Mind the Gap: Unilateral Effects Analysis Arrives in EC Merger Control, [2004] E.C.L.R., 395. Kokkoris, The Reform of the European Merger Control Regulation in the Aftermath of the Airtours Case – the Eagerly Expected Debate: SLC v Dominance Test, [2005] E.C.L.R., 37-47; Baxter and Dethmers, Unilateral Effects Under the European Merger Regulation: How Big is the Gap?, [2005] E.C.L.R., 380-389.

4 Christensen/Fountoukakos/Sjöblom, in: Faull & Nikpay, The EC Law of Competition, 2nd ed. (2005), paras. 5.205-5.206; Montag/v. Bonin, in: Münchener Kommentar Europäisches und Deutsches Wettbewerbsrecht (Kartellrecht), vol. 1 (2007), Art. 2 ECMR para. 34; Böge/Müller, From the Market Dominance Test to the SLC Test: Are There any Reasons for a Change?, [2002] E.C.L.R., 495-498.

5 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:EN:PDF.

6 Cf. Bishop and Ridyard, Prometheus Unbound: Increasing the Scope for Intervention in EC Merger Control, 2003] E.C.L.R., 357-363.

Since the introduction of the new test, there have been only few cases which could be argued to fall within the much-invoked gap. The case that is probably the one that is most often mentioned in this context is the *T-Mobile/tele.ring* merger:[7] T-Mobile, at the time the number two in the Austrian mobile telephone market, planned to take over a particularly active, smaller provider, tele.ring, the "maverick" in the markets that showed oligopolistic structures. None of the parties to the merger but a third provider, Mobilkom, was the market leader. The case was seen as a typical 'gap case' by many observers. However, in its decision the Commission itself argued that, in addition to unilateral effects, the emergence of coordinated effects was also to be feared[8], although the Commission did not see a need to investigate the issue in more depth in this case.

In the view of the Bundeskartellamt, it appears that the case might just as well have been taken up on the basis that it would have led to the strengthening of a collective dominant position of T-Mobile and Mobilkom. In fact, the merger resulted in two network operators of roughly equal size and the elimination of the maverick firm tele.ring. Furthermore, product and market features were such that they seemed to favour oligopolistic behaviour. It seems highly likely, in the Bundeskartellamt's assessment, that the dominance test would have been able to address any negative effects resulting from the merger.

2.2 No gap in the Bundeskartellamt's practice so far

In the practice of the Bundeskartellamt, there are no cases to date in which the Bundeskartellamt had competition concerns but where it was not able to remedy those cases effectively under the dominance standard - but would have been able to do so under the SIEC standard.

3. Standard of proof

Under both standards, the competition authority needs to assess the evidence and balance the probabilities of harm to competition that is to be expected if the merger were put into effect. The question is if it matters whether such harm to competition is qualified as a significant impediment to effective competition or as the creation or strengthening of a dominant position. In particular, under the SIEC standard, harm to competition needs to be "significant". Under the dominance standard, the hurdle for the competition authority is the demonstration of dominance.

3.1 Role of economic methods

In connection with the new SIEC test it was also intended to improve the basis for deciding cases at the European level by applying economic methods.

The Bundeskartellamt holds the view that the use of economic methods is not constrained by the dominance test. In its analysis of whether market dominance is created or strengthened the Bundeskartellamt conducts a comprehensive assessment of all relevant competition factors. Of course, the depth of the analysis depends on the complexity of the case under investigation. In the last years, decisions have indeed been based more and more on economic considerations. This includes more recent

7 Commission decision of 26 April 2006 in case COMP/M.3916 *T-Mobile Austria/tele.ring*, OJ L 88, 29 March 2007, p. 44.

8 Commission decision of 26 April 2006 in case COMP/M.3916 *T-Mobile Austria/tele.ring*, C (2006) 1695 final, paras. 127-129. The Commission expressly notes at para. 127 that "[f]urthermore, the Commission does not rule out the possibility that the proposed merger, besides producing the non-coordinated effects as described above, may also lead to a weakening of competitive pressure as a result of coordinated effects." (the relevant paras. are not reported in OJ L 88, 29 March 2007, p. 44.).

developments in economic theory. For example, in recent decisions concerning collective dominance, account was taken above all of incentive considerations based on the oligopoly theory.[9]

3.2 Scope of discretion for competition authorities

Some commentators have argued that the SIEC test may confer a wider discretion to the Commission and that this may at least matter at court level. In particular, Bo Vesterdorf, former President of the European Court of First Instance, has pointed out that, "when you get to the court, the criteria of whether you create or strengthen dominance are something that the court can adjudicate quite clearly about. If you have the SIEC test, it necessarily leaves a much larger margin of appreciation to the Commission, and the court would normally refrain because it is a complex technical matter of market examination…"[10]

Five years after the introduction of the SIEC test at Community level, it seems to be too early to judge on this position. However, what can be said when considering experience in Germany is that the dominance test provides quite a clear and strict standard which gives courts the possibility to scrutinize the Bundeskartellamt's decisions rather strictly.

4. Ramifications for multi-jurisdictional mergers

The introduction of the SIEC standard at Community level has brought the EC more in line with important jurisdictions, in particular the United Kingdom, the United States, Canada, Australia and New Zealand.

One may argue that the use of the same substantive standard in merger control eases the burden for businesses in multi-jurisdictional mergers. On the other hand, both the SIEC/SLC and the dominance tests use the same criteria when analyzing if a specific merger project harms competition. The competition assessment thus arguably does not differ significantly under both tests.

5. Conclusion

There are good arguments for as well as against keeping the dominance test or changing to the SLC/SIEC test, as the case may be. In the case of Germany, where the dominance test has been used since 1973 in merger control proceedings, the factors speaking in favour of introducing the SIEC test on a Europe-wide basis, e.g. having a level playing field in the EU, would need to be balanced against the advantage of the existing test, e.g., a high degree of legal certainty due to the existing substantial body of case law.

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9 Bundeskartellamt, decision 11 April 2007 in case B 3 – 578/06 – *Phonak/ReSound*, WuW/E DE-V 1365, excerpts available in English at:
http://www.bundeskartellamt.de/wEnglisch/download/pdf/entscheidungen/07_Phonak_e.pdf.
See also decisions of 17 February 2009 in case B 2 47/08 - *Nordzucker/Danisco* (available in German at http://www.bundeskartellamt.de/wDeutsch/entscheidungen/fusionskontrolle/EntschFusion.php) and of 7 March 2008 in case B 8 – 134/07 – *Shell Deutschland/Hanseatic Petrol*, available in German at http://www.bundeskartellamt.de/ wDeutsch/download/pdf/Fusion/Fusion08/B8-134-07.pdf.

10 See, Focus: Merger Review – Do National Competition Authorities Apply the Same Test as the European Commission? Discussion, p. 191-195, Statement by Bo Vesterdorf, p. 194 et seq., in, Neueste Entwicklungen im europäischen und internationalen Kartellrecht, 15. St. Galler Internationales Kartellrechtsforum, Band 10, 2008 (forthcoming).

HUNGARY

1. The substantive test for merger review

Please describe the substantive test which is applied to mergers in your jurisdiction and what factors are featured in determining whether competition is likely to be harmed by a merger. Please discuss what type of possible anti-competitive effects are covered by the substantive test applied in your country. If you feel that the merger test which is currently applicable in your jurisdiction is inadequate to address some potentially anti-competitive effects of mergers, please explain why that is.

The Hungarian competition law is just under modification. The law amendment brought by the Hungarian Competition Authority (Gazdasági Versenyhivatal – GVH) passed on 23th March 2009 and will come into force on 1st June 2009. One of the core modifications involves the merger control as the GVH switches to the SLC test from the previously applied dominance test.

According to the current legislation "[t]he Hungarian Competition Authority may not refuse to grant authorisation for a concentration where [..] the concentration does not create or strengthen a dominant position, which would impede the formation, development or continuation of effective competition on the relevant market".[1] It implies a two-step test: the GVH has to consider first whether the merger creates or strengthens dominance, and then decide about its effects on competition. While evaluating these effects, all the advantages and disadvantages of the merger have to be assessed, taking into consideration the impact of the merger on stakeholders and the characteristics of the relevant market and the firms concerned.[2] This kind of approach means that the GVH can prohibit a merger or approve it with conditions only if dominance or strengthening of dominance is proved.

Concerning the anti-competitive effects covered by the test we apply: those abuses can be prevented which would be committed by a dominant firm or by firms which are collectively dominant. Although we think that most of the potential effects of mergers are covered by this test, the GVH had a case that showed that there can be situations in which the current legislation is not suitable to handle the competitive

1 Hungarian Competition Act (Act LVII of 1996), Article 30 (2). The wording of the Act is in line with the EC merger regulation applied till 2004 (Council Regulation No. 4064/89).

2 According to the Hungarian Competition Act (Act LVII of 1996), Article 30 (1):

"When assessing an application for authorisation of a concentration, both concomitant advantages and disadvantages shall be considered. In the course of this consideration, the following aspects shall be examined, in particular:

a) the structure of the relevant markets, existing or potential competition on the relevant markets, procurement and marketing possibilities, the costs, risks and technical, economic and legal conditions of market entry and exit, the prospective effects of the concentration on competition on the relevant markets;

b) the market position and strategy, economic and financial capacity, business conduct, internal and external competitiveness of the undertakings concerned and likely changes in them;

c) the effect of the concentration on suppliers and on intermediate and final consumers."

concerns. This is why the necessity of switching to the SLC test emerged. (Concerning the description of this case and the other reasons that led to the modification, see the next section.)

2. Legislative changes in the standard of review of mergers

Please explain if the substantive test for the review of mergers has been changed over time in your country. If yes, please describe the changes and provide some background as to the policy rationale that lead to these changes. If you have recently changed your substantive test, please describe whether the change appears to have achieved the desired effect. If your jurisdiction is currently considering changing the test for the review of mergers in the foreseeable future, please summarise the current policy debate and explain why such legislative changes are being considered.

As already mentioned above, the change of the substantive test applied in merger control is under way at present, since the amendment of the Hungarian Competition Act involves a switch from dominance test to the SLC test. The new law follows the line of the EC merger regulation[3], thus the lessening of competition will be of interest, while the creation or strengthening of dominance becomes just one special case.[4]

The immediate cause for considering the initiation of law amendment was the case *HTCC/Matel*[5]. Although finally the GVH reached the conclusion that the merger did not raise any competitive concern, the situation was like that if it had been problematic, the authority would not have had the possibility to handle it due to lack of dominance. The market share of the merging parties was around 25% on the relevant market, namely the provision of business Internet and data communication services. This proportion is generally not sufficient to establish dominance, and in this case, the much higher market share of the market leader (Magyar Telekom), which was above 50%, clearly excluded this possibility. On the other hand, tenders were common on the market, which warned that turnover-based market shares might not have been good proxies for the competitive constraint the firms posed on each other. In addition, as the number of the significant market players was to reduce from four to three following the merger, it was reasonable to check whether it could have led to the lessening of competition and to coordinated effects. The bidding study, which was carried out by the GVH and covered more than 100 tenders submitted in the previous three years, showed that the two merging parties did not exert significant competitive pressure on each other, and a so-called maverick firm was also identified, so the transaction could be cleared without any worry.

Anyhow, if the bidding study had ended differently, the GVH would not have been able to intervene as the merging party did not obtain dominant position. In this way, the case presented a situation in which the GVH cannot prohibit a merger potentially harmful to consumers through dominance test, while it would be possible through SLC standards. Although the authority has the view that gap cases are not too common, the welfare loss they may involve is high enough to give the motivation to change the test applied.

Another decisive argument for changing the substantive test in the analysis of mergers was that the EC had already switched to the SLC test in 2004. As a member of the European Union, Hungary tries to

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3 Council Regulation (EC) No. 139/2004

4 "*The Hungarian Competition Authority may not refuse to grant authorisation for a concentration where [..] the concentration would not significantly reduce competition on the relevant market [..], in particular as a result of the creation or strengthening of a dominant position.*"

5 Vj-019/2007

adopt all the significant changes of the European legislation to its own law. Moreover, the effect-based assessment is more and more comes to the forefront in different fields of antitrust, thus the need to harmonise the approaches applied in these fields also supports the introduction of the SLC test which is also effect-based oriented.

Some other arguments in favour of the SLC test were also taken into account, for example that the ability to raise prices (which is used to show the competitive effects) is more exact and objective than the concept of "independence to a large extent" (which is the core of the definition of dominance). Finally, the GVH does not agree with the view that the introduction of the SLC test would cause trouble or difficulties to firms in Hungary in the understanding and the application of the new standards (as the merger review process becomes the same at European and national levels, and previous European merger cases and other effect-based analyses can serve as a point of reference).

3. Enforcement issues

Please explain if the change in the merger test has had an impact on how your agency assesses the effects of a merger. For example, discuss if the choice of competition tests makes a difference in the roles played by market definition, market shares, barriers to entry and to expansion, efficiencies and concentration indexes in the assessment of a merger. More generally, explain if difference in competition tests applied may lead to different emphases on economic analysis as opposed to legal characterisation. If your jurisdiction has not changed its merger test, please discuss if, based on your experience, a different substantive test would require changes in the analytical and investigative techniques that your agency currently uses for assessing mergers. Please discuss if the choice of competition test influence the choice of remedy for or against a structural solution.

In our view there is no substantial difference in the roles what fundamental competition policy concepts (such as market definition, entry barriers or efficiencies) play in the assessment of a merger, at least in theory. In each case, both tests deal with the same issues that influence the opinion of the competition authority about competitive effects. However, if dominance is sufficiently improbable, the analysis can be considered complete earlier than it would be under SLC.

Although the latter argument implies that applying dominance test often makes the analysis simpler, the GVH has not taken advantage of this in the last few years. Since the need to change the test emerged, the chief economist section of the GVH, beyond the traditional economic assessment, has also analysed the competitive effects of mergers almost in every potentially significant case, even if dominance could easily be rejected (for instance in *Shell/Tesco*[6], where the second biggest market player had taken control over a smaller firm, but it still could not reach the level of market power the market leader possessed). This does not mean that the GVH has already switched to applying the SLC test in merger cases, it should be viewed as a preparation instead.

On the basis of this kind of parallelism in the economic analysis, due to which the GVH has some experience in comparing the results of the two possible approaches, we can conclude that, so far, none of the merger notifications would have ended differently if the authority had already applied the SLC test. An interesting "would be exception" was the case *Strabag/Cemex*[7] where the increase of market power was suspected in several local markets, but dominant position was not proven. In this sense, it could have been a gap case. Nevertheless, due to data deficiencies, the competitive effects analysis (e.g. the future/expected price changes) would have been also seriously problematic, therefore the final decision would not have

6 Vj-017/2009

7 Vj-146/2008

altered even if the GVH had applied SLC test. (The Competition Council obliged the merging entity to sell one of its factories in only one market where dominance was clearly established.)

4. Broader policy considerations deriving from different merger standards

Please discuss if the type of substantive test applied may affect the risk of over enforcement in Please discuss if you think that the substantive standards applied to mergers have a broader policy impact on the interpretation and enforcement of unilateral conduct rules or on the prohibition of anti-competitive agreements. Please discuss to what extent legal certainty (i.e. ability of parties to predict the result of merger review in a specific transaction) can be affected depending on which competition test is applied to mergers.

The GVH has not experienced any policy impact of merger standards on other antitrust issues yet. The effect-based approach is increasingly peculiar to the enforcement of unilateral conduct rules and to the prohibition of anti-competitive agreements, but we do not think that it is due to the change of the test applied in merger assessment. Instead, the two changes might be rooted in the same phenomenon, namely that economic thinking, the role of economic analysis and actual effects have become more and more important in the GVH just like in other competition agencies.

5. International cooperation

In a world where merger enforcement is increasingly multi-jurisdictional, differences in standard of reviews of mergers, please discuss if competition authorities should consider converging on one of the generic merger tests (i.e. SLC, dominance or public benefit). Please discuss any instance where differences in substantive tests for mergers have had any relevance in the context of international cooperation in a merger case.

In general, it can be said that applying the same merger standard in different jurisdictions is beneficial for international companies as the procedures are less divergent, thus the possible outcomes are more predictable. In this sense, converging on one of the generic merger tests is beneficial. On the other hand, the GVH has not had a case in which it would have been of relevance or decisive in the cooperation that the other competition authority involved applied the other type of test (SLC).

Those mergers which have a European Community dimension according to their significance, but affect competition in a distinct market within a Member State, can be referred to National competition authorities.[8] The GVH takes into consideration the difference in the applied merger standards when decides about requesting a case. For instance, in *E.On/MOL*[9] the creation of dominance was questionable, but some potential competitive concerns were identified and the lessening of competition was likely. Thus the GVH took into account, among other factors, that the European Commission might had better tools to handle those concerns, and did not request the case.

8 Council Regulation (EC) No. 139/2004, Article 4 (4)

9 M.3696

IRELAND

1. Introduction

This is the written submission from the Irish Competition Authority ("the Authority") to the June 2009 OECD WP3 Meeting on the standard for merger review. The submission considers the discussion questions and issues contained in the Issues Paper by the OECD Secretariat, by tracing the developments of the Irish merger review regime since the Authority's submission to the October 2002 OECD Roundtable on "Substantive Criteria Used for the Assessment of Mergers" (the "2002 Submission"). In addition, a hypothetical merger case is also discussed (see Appendix A for a background to the case).

2. Substantive tests for merger review

2.1 Question 1: Please describe the substantive test which is applied to mergers in your jurisdiction and what factors are featured in determining whether competition is likely to be harmed by a merger

The substantial lessening of competition test ("SLC test") is the substantive test applied to mergers by the Authority. Under section 21 of the Competition Act 2002 (the "Act"), the Authority has to determine within one month after the notification of the transaction whether, in its opinion, a merger or acquisition will not be to substantially lessen competition in any market for goods or services in Ireland and, accordingly, whether a merger or acquisition may be put into effect or that it intends to carry out a full investigation. In sum, if the Authority cannot clear a merger during the preliminary investigation, it must carry out a full investigation under section 22.

Under section 22 of the Act, on the completion of a full investigation in relation to a merger or acquisition concerned, the Authority shall determine whether the merger or acquisition may be put into effect (with or without conditions) or not.

The application of SLC test is not set out in the Act but in the Authority's *Notice in Respect of Guidelines for Merger Analysis* (the "Merger Guidelines").[1] In light of the fact that the Act is expected to be amended as part of the government's review of the Act (see the responses to question 7 below) and given its experience in applying the SLC test to over 400 merger notifications under the Act, the Authority intends to publish a new set of Merger Guidelines. Since it is unlikely that the Act will require a change of the substantive SLC test, the general thrust of any new guidelines can be expected to remain the same.

The SLC test is interpreted in terms of consumer welfare. Consumer welfare depends on a range of variables including price, output, quality, variety and innovation. In most cases, the effect on consumer welfare is measured by whether the price in the market will rise. The conclusion that an SLC will result from a merger is thus based on whether the price to buyers is expected to rise (or output to fall). Where price is not the appropriate variable, welfare is measured by the changes in the relevant variables.

Horizontal mergers are analysed by assessing the following elements:

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[1] The Authority's *Notice in Respect of Guidelines for Merger Analysis*, December 2002, are available at: http://www.tca.ie/MergersAcquisitions/MergersAcquisitions.aspx.

- Relevant geographic and product markets are defined to establish the analytical framework in which the analysis of competition takes place.

- For each relevant market identified, the effect on market structure is assessed. For horizontal mergers, this involves calculating the post-merger HHI and the change in the HHI resulting from the merger. HHI thresholds are used to screen relevant markets into categories of likelihood of a SLC in the market.

- For the relevant markets, an assessment is made of whether the merger has an effect on the level of rivalry among the existing competitors in the market. Both unilateral and coordinated effects are examined.

- As well as considering the effect of the merger on rivalry among existing competitors, the extent to which entry by a new competitor would be sufficiently likely and timely so as to act as a competitive constraint is examined.

- Also, the extent to which the merger leads directly to efficiency gains that cannot be realised by any means other than the merger is examined.

2.2 Question 2: Please discuss what type of possible anti-competitive effects are covered by the substantive test applied in your country.

The Merger Guidelines covers three main anticompetitive effects:

- Unilateral effects;

- Coordinated effects; and,

- Merger with an entrant.

2.2.1 Unilateral Effects

Unilateral effects refers to the general case of a market characterised by a non-cooperative oligopoly, i.e., a market with a relatively small number of participants, each of which maximises its own profits, but is taking account of the actions of other participants in the market. Unilateral effects arise where, as a result of the merger, the merged firm finds it profitable to raise price, irrespective of the reactions of its competitors or customers. The unilateral effects term also captures the situation where, as a result of the merger, the non-cooperative equilibrium changes, and some or all of the firms modify their behaviour.

First the **market structure** is examined and described, having regard to the following factors:

- Market concentration, including the market share of the merged firm relative to the market shares of its competitors;

- The stability of market concentration over time;

- The level of vertical integration;

- Cost and technology factors;

- Product differentiation; and

- The intensity of research and development.

If the key strategic variable is other than price (e.g., location, quantity, innovation, quality, variety, etc.), this is noted.

Second, the effect of the merger on the **behaviour of the merging party** is examined. One test that may be used here is the displacement concept. This refers to the incidence of any sales lost as a result of a price increase by the merging firm. If a sufficient proportion of the sales lost would be gained by the other firm in the merger, then these sales would not be lost post-merger. The ability to internalise sales that would be lost absent the merger would make it profitable for the merged firm to increase the price. This would happen if the two products were close substitutes.

Third, the **reactions of existing competitors** are examined. Of central importance here is whether capacity or other constraints limit the ability of competitors to win sales if the merged firm increases its price. If competitors were not able to increase output to satisfy customers who switch, this is evidence that market power would result from the merger. Also relevant is the ability of other firms to reposition existing products or brands or otherwise develop substitutes of sufficient homogeneity, substitutability, quality and status to induce consumer switching.

The analysis of the **reaction of other firms** may also include a change in the non-cooperative equilibrium that formerly operated in the market. If the merger creates a change in circumstances such that some or all firms may have the power to unilaterally raise price, this will be considered in the analysis. Such a change could be related to one of the merging firms being a "maverick" firm that previously priced aggressively, but could be a result of other factors also.

Fourth, **the reactions of customers** are analysed so as to see whether there are consumer switching costs or other impediments to consumers switching from the merged firm to competing suppliers in the event of a price increase. Evidence used may include: the market shares of the merging parties and competitors; cross-price elasticities of demand between the products; product characteristics; level of product differentiation; customer switching patterns in the past; and, customer loyalty in response to previous price changes.

Countervailing buyer power is also examined at this stage. The fact that buyers are large and have a degree of bargaining power is not sufficient to conclude that the merged entity's market power is effectively constrained. Effective buyer power requires that buyers have alternative sources of supply, or are capable of credibly threatening to set up alternative supply arrangements. Most importantly, the Authority will assess whether customers will have countervailing buyer power post-merger. Where buyers resell the products of the merging parties, this is an important factor to be considered in determining whether there is sufficient countervailing buyer power.

Unilateral Effects Scenarios

Unilateral effects may apply in different scenarios. One scenario is where the merger results in monopoly, near-monopoly or single-firm dominance by the merged firm. The larger the market share of the merged firm relative to its competitors, the more likely it is that market power of the kind described as monopoly would be created by such a merger.

A second scenario is where the merging firms produce two close substitutes in a market for a differentiated product. Because differentiated products are not perfect substitutes for each other, it is possible that some products are closer substitutes than others within a given relevant market. The merger of two very close substitutes could increase unilateral market power, even if the market shares are not particularly high.

A third scenario is where competitors are capacity constrained. Again, if the largest firms in the market are capacity constrained, it is possible that smaller firms with extra capacity could have market power. Important factors to consider are whether the non-merging market participants are operating at close to full capacity, whether capacity can be increased relatively speedily and economically, and historical evidence on capacity limits.

A fourth scenario is where output or capacity is the strategic variable on which firms compete. If one firm reduces its output, it pushes up the market price and benefits from the price increase in proportion to its market share. A merger that increases market share would increase the incentive to cut output, as the price increase would be obtained over a larger range. In applying this theory, known as the Cournot theory, it would be necessary to show that output, and not price, was indeed the strategic variable. This would require evidence of a commitment to output levels, such as advance purchase. Evidence on the stability of market shares over time would also be relevant.

A fifth scenario is where competition depends on the actual number of firms in the market. One example is an auction market where the presence of three or more firms may increase the intensity of bidding. Another example might be where reliability is important to the customer so that each buyer requires a main supplier and a secondary supplier. In this case, if the market only had two suppliers, there would be no choice of secondary supplier.

A sixth scenario is where one of the merging firms is a "maverick". A maverick is a firm that has a history of cutting price or otherwise deviating from conventional market behaviour in a pro-competitive manner. The Authority will assess the extent to which the behaviour of this firm alters the competitive behaviour of other firms in the market. Even a merger involving low market shares that eliminated such a presence from a market could result in unilateral market power.

2.2.2 Coordinated Effects

A merger may diminish competition if it facilitates competitors engaging in coordinated interaction to raise price. Such interaction refers to actions that are profitable for each of them only as a result of the accommodating reactions of the others. This behaviour includes tacit or explicit collusion. In essence, each firm would forego profitable sales in the expectation that others would do likewise. Such behaviour is known as coordinated effects.

In order for such interaction to be successful, the group of firms must reach terms of coordination that are profitable to all concerned, and must have some ability to detect and punish deviations from the coordinated behaviour. The ability to detect and punish reduces the incentive for any firm to deviate in the pursuit of short-term profits.

The first step is to identify whether the market is characterised by factors that are conducive to such coordination. Of particular importance are the subset of those factors that could possibly be changed as a result of the merger, and these include:

- The degree of transparency about market conditions, particularly the availability to competitors of information concerning market prices and other variables;

- The homogeneity of the product, especially in terms of substitutability among competitors;

- The homogeneity of the firms, especially in terms of symmetry of market shares, similar cost conditions, levels of vertical integration; and
- The presence of the same firms in several markets (known as multi-market contact).

The more of these, or any other relevant, factors that a merger enhances, the more likely it is that it could result in an increased probability of coordination.

Terms of coordination need not be complex, but may instead follow simple precepts such as a common price, stable market shares, or some form of territorial restrictions. Such behaviour does not need to reach the monopoly outcome to be harmful to consumers; coordination may damage consumers even where it omits some participants, or some aspects of competition, and/or where there are occasional lapses into price wars.

The second step is to consider whether post-merger conditions are conducive to the detection and punishment of any deviations. Factors here may include the degree of information available to firms concerning other firms' pricing and business decisions and the degree of homogeneity with regard to products sold by the firms. Collusion can be difficult to sustain due to the incentive for a firm to deviate from the coordination, and obtain extra short-term profits. When detection and punishment of such deviations are likely to be rapid, the incentives are diminished. Key factors in this process include information about transactions, or individual prices, or output levels. If orders for the relevant products are frequent and small relative to a firm's total output in a market, it may be difficult for a firm to deviate without giving its rivals an opportunity to react. Also, if there is little fluctuation in demand or costs, deviations may be easier to deter.

In contrast, if detection or punishment is slow, incentives to deviate are enhanced, and coordinated action will be hard to sustain. If demand and costs fluctuate substantially; if there is very limited information concerning individual prices or quantities; then it will be hard to detect any deviations.

The severity of the punishment may also be a factor. Punishment may involve reversion to the non-collusive equilibrium, or firms pricing lower than this in an attempt to have a harsher punishment. If such behaviour is credible, then the harsher punishment may further facilitate collusion by ensuring that if any one firm deviates it will face a more stringent penalty. Even when punishment implies reversion only to the non-collusive equilibrium, if this equilibrium is relatively competitive, and implies low profits for each firm, such an outcome may be sufficiently harsh, and thus further facilitate collusion, than an outcome where the non-collusive equilibrium is less competitive.

Coordinated interaction can be made more difficult by the presence of "maverick" firms that have a greater economic incentive to deviate than their rivals. For example, in a market with significant capacity constraints, a firm with particularly large capacity may be more likely to deviate, due to its greater ability to increase sales in any given period. Another example is a firm that prefers a different "monopoly" price than others in the industry because its costs differ or it is more impatient. An acquisition of a "maverick" firm may enhance the probability of successfully sustaining coordinated behaviour post-merger. In general, coordinated interaction can be made much more difficult if firms outside the coordinating group take actions that work against the interests of the group, and this issue is analysed carefully.

Previous history in similar product and geographical markets is also considered. Instances of previous collusion, where the characteristics of the market have not changed dramatically, may be seen as evidence that market conditions are conducive to coordinated interaction. Overall, however, in assessing whether a particular merger may enhance coordinated action, attention focuses on whether the merger in itself leads to circumstances where such action is more likely.

2.2.3 Mergers with an Entrant

There is one type of merger that is horizontal in nature and yet does not increase market concentration. This occurs when a firm that is about to enter a market merges with a firm that is already in that market. An SLC could result for one of two reasons.

- Entry may eliminate a competitive threat that currently constrains the behaviour of firms in the market. For example, if rivalry was already weak in the market, then a merger involving a potential entrant may eliminate a main competitive threat.

- Entry may eliminate a future competitive threat. This could be the case, for example, if the entrant merged with the market leader, whereas it would otherwise merge with a smaller firm or enter in a green-field manner. In this case, the merger would be less pro-competitive as compared with other entry scenarios.

A necessary condition for a finding of SLC in a merger involving a new entrant is that the Authority must show that the new entrant will enter or is sufficiently likely to enter absent the proposed merger and that the proposed merger will remove a competitive constraint.

2.3 Question 3: If you feel that the merger test which is currently applicable in your jurisdiction is inadequate to address some potentially anti-competitive effects of mergers, please explain why that is.

The Authority considers the SLC test to be an adequate test.

3. Addressing the "gap" in the dominance test

3.1 Questions 1 and 2: Please explain if the substantive test for the review of mergers has been changed in your country. If yes, please describe the changes and provide some background as to the policy rationale that led to these changes.

At the time of the 2002 Submission, Ireland was undergoing the last phase of a transition from a merger review regime based on a public interest test to an SLC test. This transition was part of a wider review process of competition legislation in Ireland initiated by the Minister for Enterprise, Trade and Employment (the "Minister"), who established for this purpose a Competition and Mergers Review Group in September 1996. The outcome of the review process was the enactment of the Act, which replaced the previous competition legislation[2] and became effective from 1 January 2003.

The biggest change in the overall design of the Act related to mergers (Part 3). The transfer of the entire merger process, including investigation and decision-making, was moved from the Minister to the Authority; this was deemed to be important because it unified all competition decisions within a single body and with a single underlying set of principles. The Act adopted international best practice, with the US-style SLC test and the EU-style two-stage investigative procedure with tight time-limits. It was believed that the removal of political control, the move to a pure competition test, and the introduction of

2 The Mergers, Take-Overs and Monopolies (Control) Act 1978, the Competition Act 1991 and the Competition (Amendment) Act 1996.

greater transparency in the process would provide greater certainty and predictability for business, thereby reducing costs. [3]

Part 3 of the Act applies to mergers and acquisitions in all sectors, with special provisions applying to media mergers. The Act allows for the possibility that a media merger cleared by the Authority on competition grounds after a full investigation may still be prevented from being put into effect by the Minister on public interest grounds. These essentially relate to media diversity and plurality, the strength and competitiveness of media businesses indigenous to the State and the dispersion of media ownership amongst individuals and other undertakings.

3.2 Question 3: If you have recently changed your substantive test, please describe whether the change appears to have achieved the desired effect. Please discuss any issue that has arisen with the change in the substantive test.

Not applicable.

3.3 Question 4: If your jurisdiction is currently considering changing the test for the review of mergers in the foreseeable future, please summarise the current policy debate and explain why such legislative changes are being considered.

On 13 November 2007, the Minister announced a public consultation on the Act. On 14 October 2008, the Minister for Finance announced in the 2009 budget that the Competition Authority would be amalgamated with the National Consumer Agency. Therefore the review of the Act is now part of the wider process of introducing legislation that would incorporate both consumer and competition protection functions. At the time of writing this submission, the new Act is still being drafted but no changes to the legal test have been envisaged so far. As mentioned in 2.1, a new version of the Merger Guidelines is also intended to be published.

4. Broader policy issues connected to the dominance test and the SLC test

4.1 Question 1: Please discuss if the type of substantive test applied in your jurisdiction poses risks of over- or under-enforcement.

The Authority considers that there are fewer risks of over- or under-enforcement under a merger review regime based on an SLC test compared to one based on other tests such as a dominance test. The SLC test covers all anti-competitive mergers while in the dominance test mergers which allow firms to unilaterally raise prices but do not create or reinforce a single or collective dominant position cannot be prohibited. Conversely, an acquisition in which a dominant firm buys another firm but does not increase the market power of the dominant firm may be allowed under a SLC test but not under a dominance test.

4.2 Question 2: Please discuss if you think that the substantive standards applied to mergers have a broader policy impact on the interpretation and enforcement of unilateral conduct rules or on the prohibition of anti-competitive agreements.

No views. However, the Authority considers that sections 4 and/or 5 of the Act (which relate to anticompetitive agreements and abuse of dominance positions) can apply to mergers other than where application is specifically excluded in 4(8) or 5(3) of the Act: arrangements constituting restrictions which

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[3] For a discussion of the Irish merger review regime in place before the Act and the legislative process, see the Irish contribution to the *2002 OECD Roundtable on OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers in OECD*, 2003, pages 199-200.

are directly related and necessary to the implementation of a merger or acquisition and are referred to in the notification of the merger or acquisition are not prohibited under section 4 and/or 5 of the Act.

4.3 Question 3: Please discuss to what extent legal certainty (i.e. ability of parties to predict the result of merger review in a specific transaction) can be affected depending on which competition test is applied to mergers.

The Authority's view is that that an SLC test provides a better trade-off between legal certainty and flexibility than, for instance, a dominance test. In the 2002 Submission, the Authority set out in great detail its view that the SLC provides a more correct and efficient legal characterization of merger cases that offers the possibility of greater transparency, clarity and legal predictability[4]. This is because an SLC test is more suited to an economics-based approach because it focuses not only on market structure but also on behaviour of the firms, thus relying on empirical evidence and economic analysis.

The Authority considers that the use of guidelines on the application of the SLC test would limit any possible concerns over the fact that economic analysis is conducted on a case-by-case basis. In addition, the publication of merger decisions in previous cases gives parties the opportunity to study the Authority's approach.

4.4 Question 4: In a world where merger enforcement is increasingly multi-jurisdictional, please discuss if competition authorities should consider converging on one of the generic merger tests (i.e. SLC, dominance or public benefit).

Based on the Authority's experience with multi-jurisdictional mergers and its active participation in international fora such as the International Competition Network, it appears that what is ultimately important is that the legal language of a test (SLC, dominance etc.) allows for a full and clear analysis of market power. A dominance test may be capable of doing so but requires some broadening. An SLC test is a broader test where certain concepts are applied on a case-by-case basis in order to focus on market power.

4.5 Question 5: Please discuss any instance where differences or similarities in substantive tests for mergers have had any relevance in the context of international cooperation in a merger case.

No instances.

5. Hypothetical case of a bank merger[5]

5.1 Question 1: based on the legal test that is applied in your country, please discuss if the hypothetical merger between BoC and BoI is likely to raise anti-competitive effects

Based on the Authority's SLC test, the hypothetical merger between BoC and BoI may give rise to anti-competitive effects since:

- BoC and BoI are the closest competitors for the supply of several bank services;
- BoI is a "maverick" competitor; and

[4] See Irish Contribution to the *2002 OECD Roundtable on OECD Roundtable on Substantive Criteria Used for the Assessment of Mergers in OECD*, 2003, pages 201-205.

[5] See Appendix A for a background to the case.

- BoI is the most recent entrant into the market.

5.2 Question 2: Please describe what type of potential anti-competitive effects you are likely to investigate.

The types of anti-competitive effects that are likely to be investigated relate to the above mentioned facts.

5.2.1 Unilateral Effects

As indicated in 2.2.1, a merger of two entities who offer close substitutes for some services could increase unilateral market power, even if the market shares are not particularly high. BoC and BoI are the closest competitors for the supply of several services: this implies that if BoC were to increase the prices of its products (or reduce its product portfolio or its customer service etc), a sufficient proportion of the customers/revenues lost as a result of the price increase would be gained by BoI. However, these customers/sales would not be lost if the merger between BoC and BoI is implemented. This ability to internalise revenues/sales that would be lost absent the merger would make it profitable for the merged firm to increase the price (or reduce its product portfolio or its customer service etc).

As noted 2.2.1, when one of the merging firms is a "maverick", i.e., a firm that has a history of cutting price or otherwise deviating from conventional market behaviour in a pro-competitive manner, then even a merger involving low market shares could result in unilateral market power by the merged firm. In addition, the merger between BoC and BoI may bring a change in the non-cooperative equilibrium that formerly operated in the market such that some or all other major banks may have the power to unilaterally raise prices.[6] Besides being a maverick, BoI is also the most recent entrant and this can raise some competition concerns as well (see 2.2.3).

The investigation of the above-mentioned anticompetitive effects is likely to include an assessment of the competition dimensions in the banking sector and the reactions of other banks, customers and consumers to the potential anticompetitive concerns of the proposed merger. As to the dimensions of competition, the Authority is likely to investigate, among other things, the following:

- Price competition: charging structures and levels for each product (e.g., trends and changes in interest rates and charges, national pricing policies, etc); differences in offerings between existing customers and new potential customers (i.e., competition for customer groups);

- Non-price competition (e.g., investments, customer service levels in local branches, etc);

- Internet banking and its impact on local branch usage for financial services;

- The "maverick" character of BoI and the effect of the merger on it; and

- Barriers to entry: e.g., customer inertia (costs of searching and switching, customer attitudes and satisfaction, etc.), network effects etc.

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6 However, one may also argue the opposite: that the merger may create a even stronger competitor to the market leader Bank One, thus making markets more competitive. For instance, the combined BoC and BoI may become the new maverick player in the market.

As to barriers to entry, we know that BoI is the most recent entrant into the market. It should be noted that it took BoI 15 years to establish its national presence: network effects; consumer inertia; reputation can be some of the barriers to entry in the banking industry.

5.2.2 Coordinated Effects

In addition to unilateral effects, the merger might also result in anticompetitive effects in a coordinated manner. The merger could affect market conditions such that they would be more conducive to coordinated interaction (see 2.2.2): post-merger, BoC/BoI and Bank One will be similar in size overall and in each of the various markets. In addition, important information regarding banking products and prices are quite transparent and homogeneous. BoC/BoI and Bank One might be able to reach terms of coordination as outlined in 2.2.2. Past history of coordination is likely to be investigated and used as evidence.

Interestingly, one of the factors which can make coordinated interaction more difficult is the presence of a maverick firm, which has a greater economic incentive to destabilise the coordination among firms (see 2.2.2). The proposed merger is likely to eliminate the only maverick firm in the industry, BoI, thus making potential coordination between BoC/BoI and Bank One more sustainable over time.

5.3 Question 3: Please discuss to what extent market definition and market shares are important factors in your analysis.

The Authority's Merger Guidelines state that market definition is important because it provides a basis for analysis in which existing competitors and consumers/customers who are likely to provide the most immediate and timely competitive constraint are identified and distinguished from new entrants who may exercise a weaker or less immediate constraint. However, it is also stated that it is not always necessary to reach a firm conclusion on market definition.

Once the markets are defined by products and geographical areas, the effect of the proposed merger on market structure can be analysed. One dimension to market structure is the concentration of the market. A concentrated market is one with a small number of firms with large market shares, and an unconcentrated market is one with a large number of firms with a small market share. Other aspects of market structure include the level of vertical integration, cost and technology factors, and product differentiation.

The Herfindahl-Hirschmann Index (HHI) is used by the Authority to describe market concentration. In rare cases, usually when figures for the HHI are not available, the individual market shares, the 4-firm concentration ratio (the sum of the market shares of the largest four firms) or the number of firms in the market, may be used to describe concentration.

The level of the post-merger HHI gives a snapshot of market concentration. The change in the HHI (known as the "delta") arising from the merger describes the change in market concentration resulting directly from the merger. Together, the level and the change of the HHI are used to form a threshold of market concentration. The calculation of the thresholds is set out below. For clarity, zones called A, B, and C, are used. All HHI figures are post-merger.

Table 4 – HHI Thresholds of Market Concentration

Zone	Definition	
	HHI	**Delta**
A	Less than 1000 Between 1000 and 1800 Above 1800	Any Less than 100 Less than 50
B	Between 1000 and 1800 Above 1800	Greater than 100 Between 50 and 100
C	Above 1800	Greater than 100

The Authority uses HHI thresholds as a screen for deciding whether to intensify its analysis of effects on competition. It is emphasised that these thresholds are intended mainly to give initial guidance to the merging parties and practitioners, and thus provide a 'rule of thumb' indicator of the likelihood of the deepening of an examination of competitive effects, and not a hard and fast rule to be applied in all cases.

Mergers in zone A are less likely to have adverse competitive effects. Mergers falling in zone B may raise significant competitive concerns. Zone C mergers occur in already highly concentrated markets and more usually be those that raise competitive concerns.

In the hypothetical bank merger, the HHI figures are shown in Table 2 below[7]:

Table 5 – Hypothetical Bank Merger – HHI Calculation

Personal Banking		**Banking for SMEs**	
Pre merger HHI =	2,456	Pre merger HHI =	2,550
Post merger HHI =	2,056	Post merger HHI =	2,050
Delta =	-400	Delta =	-500

7 Assumptions: (i) all the remaining banks other than the big five account for the 15% and they are grouped together; (ii) consequently, the fourth and the fifth major banks have equal market shares for personal banking (11% each) and for services to SMEs (10% each); (iii) product markets are those suggested by the hypothetical: five markets for personal banking and one for short-term credit to SMEs; and, (iv) geographic markets are defined nationally.

Therefore, based on a first screening using the HHI indicator, the Authority would say that the proposed merger is likely to have adverse competitive effects (Zone C). However, this first consideration heavily relies on the assumptions made, namely that the geographic scope of the markets concerned is national and all remaining players other than the big five (accounting for 15%) are considered as one entity (see footnote 7).

In particular, the national market assumption may not be true for the markets for personal banking services where close relationships with local branches can be still important for individual clients, despite the growing popularity of on-line banking. Markets may have a wider geographic scope in case of banking services to SMEs: they may be regional, national or even international. However, the concentration at local or regional levels may still remain unchanged if they mirror the national situation: that is, the presence of all the five big banks and the level of economic activity are homogeneous across the country.

5.4 Question 4: Please describe what other factors you would consider to complement the analysis of market shares.

Other factors that complement the analysis have been highlighted in 5.2.1 and 5.2.2 and they would include, *inter alia*, barriers to entry; customer switching costs; the maverick character of BoI and any history of collusion.

5.5 Question 5: Please discuss if the so-called "maverick" reputation of the BoI may have an impact on your analysis.

Please see 5.2.1 and 5.2.2.

APPENDIX A

FACTUAL BACKGROUND TO THE HYPOTHETICAL MERGER CASE

This hypothetical case concerns the proposed acquisition of the Bank of Investment (BoI) by the Bank of Commerce (BoC), both active in retail banking services to personal consumers and small and medium enterprises (SMEs) within the country of Oceanica.

BoC is currently the second largest bank in Oceanica and it offers a wide range of retail banking services with a particular emphasis on services to SMEs. The BoI is the fifth largest retail bank in that country and is widely seen as a relative newcomer in the market, having started its operation 15 years ago. It has grown rapidly through acquisitions as well as organically and has developed a reputation of something of a "maverick" that charges lower prices to consumers than its competitors. According to consumer surveys, BoC and BoI are the closest competitors for the supply of several bank services.

Both banks offer the whole range of retail banking services to private consumers, SMEs, large firms and institutions. They also possess a country-wide network of branches that gives them a presence all over the national territory of Oceanica. Due to their size, the range of services offered and the breadth of their branch network, they are considered to be "national banks". As such, they belong to the group of the Big Five, all national banks that dominate the bank system in Oceanica.

Within the Big Five we have also Bank One, the historical market leader in Oceanica, just ahead of the second largest bank (the BoC). Together, the Big Five banks account for over 85% of the banking business in Oceanica. The remaining 15% are controlled by a multitude of smaller banks that specialize in different areas and have no national presence. The largest of these is much smaller than the BoI.

The sector has evolved substantially in the last 20 years. After a period of general broad expansion, where several banks entered the Oceanica market – and some of them achieved a significant presence in the market like the BoI - the sector has been consolidating over the recent years. Several acquisitions have occurred leading to a growing concentration of market shares in the hands of the Big Five banks.

Notably, BoC has expanded its presence in the market through a series of high-profile acquisitions during the past years – it was not the only one, other banks in the Big Five group have also achieved this position through acquisitions. Throughout the whole period, Bank One has remained the leader of the market, with only BoC starting to challenge its position recently.

For the purpose of this exercise, we will assume that the HHI analysis identifies a selected number of markets where the merger could raise concerns for competition. As shown in the Table below, Bank One is the leader of all the relevant markets. With the proposed merger, however, the new entity would become the market leader for credit for SMEs. For the remaining markets of concern, Bank One would still remain the leader - although by a narrow margin.

Market Shares

	BoC	BoI	BoC+BoI	Bank One
Five markets for personal retail consumers (all markets have similar market shares)	20%	10%	30%	33%
Short term credit for SME	25%	10%	35%	30%

JAPAN

In Japan, any business combination such as mergers, shareholding or other transactions, are prohibited if "the effect may be substantially to restrain competition in a particular field of trade". This is regarded as the so-called "substantive test" for merger review [Article 10, 13, 14, 15, 15-2 and 16 of the Antimonopoly Act (AMA)].

The Japan Fair Trade Commission (JFTC) has formulated and published the "Guidelines to Application of the Antimonopoly Act concerning Review of Business Combination[1]" (hereinafter referred to as the "Guidelines"), which clarified the interpretation of "the effect may be substantially to restrain competition in a particular field of trade" as the requirement for prohibition under the AMA. The Guidelines set out the analytical framework for assessing what kind of business combination may be substantially to restrain competition in a particular field of trade.

The "substantial restraint of competition" that refers to the anticompetitive effect is defined as "bring about a state in which competition itself has significantly decreased and a situation has been created in which a specific business operator or a group of business operators can control the market by determining price, quality, volume, and various other terms with some latitude at its or their own volition" (Decision of Tokyo High Court on December 7, 1953, concerning Toho Company, Limited, et al). Given the sentences handed down in this case, the Guidelines provided the interpretation of "the effect may be" as the likelihood of the emergence of conditions that could easily lead to the substantial restraint of competition. Concretely speaking, "if the market structure is altered in a non-competitive way by the business combination, and if conditions are likely to emerge that would allow the company a certain latitude to manipulate price, quality, volume, and other conditions by acting unilaterally or coordinately with other companies," the effect of the business combination may be substantially to restrain competition.

In this manner, "the substantive test" in Japan covers two types of anticompetitive effects: the unilateral conduct by the company group[2] and the coordinated conduct between the company group and its competitors. Individual business combinations are reviewed in respect of these two viewpoints. So, there may be a case in which a business combination may be substantially to restrain competition from the viewpoint of the latter even though it may not be substantially to restrain competition from the viewpoint of the former.

Under the Guidelines, the analysis of the substantial restraint of competition by unilateral conduct is classified into two cases, such as when goods are characterized as homogenous and when goods are characterized as differentiated.

1. When Goods Are Characterized as Homogenous

When goods are characterized as homogeneous, typical cases in which the effect may be substantially to restrain competition are, for example, when the company group raises the prices of the goods

1 http://www.jftc.go.jp/e-page/legislation/ama/RevisedMergerGuidelines.pdf

2 "The company group" refers to all companies that would form, maintain, and strengthen the joint relationships by the business combination.

unilaterally, competitors cannot increase the amount of production or sales due to their small production or sales capacity, and therefore, users may be unable to switch suppliers to the other competitors.

2. When Goods Are Characterized as Differentiated

When goods are characterized as differentiated by brand, etc., if the price of the goods of one brand is increased, the users of the brand do not necessarily intend to buy the goods of other brands indiscriminately as a substitute, but may buy goods of another brand that has higher substitutability. When goods are differentiated, typical cases in which the effect may be substantially to restrain competition are, for example, when business combinations are formed between business operators that sell substitutable brand goods and competitors do not sell such goods that are substitutable with those of the company group.

In particular, when goods are differentiated, if there is a case in which business combinations are formed between business operators that sell substitutable goods while competitors do not sell such substitutable goods, the company group can offset the loss of sales of one of the goods by its price increase with the gain of sales of the other substitutable good after the business combination would be offset by the gain of sales of the other substitutable good after the business combination. As a result, the company group will be able to raise the price of goods without an overall reduction in group sales, and so this business combination will have a large impact on competition even if the market share or ranking of the company group is not so high. Therefore, it is essential for the analysis of the anticompetitive effect of a business combination to consider whether goods are differentiated or not.

In deciding whether the effects of business combinations may be substantially to restrain competition through unilateral conduct, the following determining factors are given comprehensive consideration:

The Position of the Company Group and the Competitive Situation

1. Market Share and Ranking

2. Competition among the Parties in the Past

3. Market Share Differences from Competitors

4. Competitors' Excess Capacity and Degree of Differentiation

Import

Entry

Competitive Pressure from Related Markets

Competitive Pressure from Users

Overall Business Capabilities

Efficiency

Financial Conditions of the Company Group

In deciding whether the effect of business combinations may be substantially to restrain competition through the coordinated conduct, the following determining factors are given comprehensive consideration:

(1) The Position of the Company Group and the Competitive Situation

5. Number of Competitors

6. Competition among the Parties in the Past

7. Excess Capacity of Competitors

(1) Trade Realities

Conditions of Trade

8. Trends in Demand, Technological Innovation

9. Past Competitive Situation

(1) Import

(2) Entry

(3) Competitive Pressure from Related Markets, etc.

(4) Efficiency

(5) Financial Conditions of the Company Group

3. A hypothetical case – A bank merger

As explained in paragraphs 1 and 4 above, in Japan, any business combinations are prohibited if "the effect may be substantially to restrain competition in a particular field of trade" (the so-called "substantive test"). Whether business combinations might raise competition problems should be considered in respect of two viewpoints: through unilateral conduct by the company group and through coordinated conduct between the company group and one or more of its competitors.

As described below, the JFTC would review the hypothetical merger along with the Guidelines and analyze whether or not it may be substantially to restrain competition in any particular field of trade in light of the substantive test under the AMA.

With respect to the business activities of the company group, the JFTC defines the product range or geographic range that are the subjects of a particular field of trade, in principle, from the perspective of substitutability for users[3], and then determines whether the effect of a business combination may be substantially to restrain competition in a defined particular field of trade.

Market share is mainly used for the following purposes: (a) for calculating the HHI (Herfindahl-Herschmann Index) to decide whether it is normally considered that the effect of a horizontal business combination may not be substantially to restrain competition (safe harbor) and (b) for using it as one of the determining factors for considering the effect of the merger from perspectives of unilateral conduct and coordinated conduct (when failing to fulfill the safe harbor).

3 The JFTC adopts the so-called Hypothetical Monopolist Test in considering substitutability for users. Further, when necessary, substitutability for suppliers is also considered.

The safe harbor of a horizontal business combination is determined by a combination of the HHI after the business combination and the increment of the HHI. When the business combination falls under either of the following standards (a) to (c) below, it is normally considered that the effect of a horizontal business combination may not be substantially to restrain competition in a particular field of trade:

(a). The HHI after the business combination is not more than 1,500.

(b). The HHI after the business combination is more than 1,500 but not more than 2,500, while the increment of the HHI is not more than 250.

(c). The HHI after the business combination is more than 2,500, while the increment of the HHI is not more than 150.

Based on the relevant markets and market shares indicated on the table, as the HHI after the business combination in any retail bank market would be at least over 1500[4] and the increment of the HHI would be more than 250[5], the hypothetical case would not fall under the safe harbor. Therefore, the JFTC would determine the effect from the perspectives of unilateral conduct by the company group and through coordinated conduct between the company group and one or more of its competitors by comprehensively taking into consideration all relevant determining factors described in 4 and 5 above. The market share is a critical factor in considering the position of the company group and the competitors' situation. However, as described in 3 above, the impact on competition depends on whether goods are homogenous or differentiated in the particular field of trade.

It is difficult to determine for sure whether this hypothetical merger will have anticompetitive effects or not with the limited information provided. However, given the highly concentrated market structure with the Big Five banks, the hypothetical merger can be analyzed in terms of the following viewpoints, for example, as explained below: (a) Regarding the market share, Bank One has consistently remained the market leader of the relevant market. Though the new bank (BOC+BOI) could be the leader in the field of short-term credit for SMEs, Bank One would remain as a strong competitor anyway, (b) BOI which has the reputation of a "maverick" would be acquired.

(a). Market Share

Analysis from the perspective of unilateral conduct

When the difference of the combined market share of the company group from the market shares of competitors is large, it is more difficult for the competitors to maintain a sufficient supply of goods at the same price in place of the company group, in response to the company group's attempt to raise the price. The ability of the competitors to constrain the company group's price rise is therefore weaker. On the other hand, if there are competitors with market shares equal to

4 Based on the provided market share information, the HHI in retail banking services to personal consumers after the business combination would be at least 1989 ($=30^2+33^2$) and the HHI in retail banking services to SMEs would be at least 2125 ($=35^2+30^2$).

5 The increment of the HHI derived from a business combination can be calculated by doubling the multiplied value of each market share of the company group.

In the retail banking market to personal consumers: the BOC share (before combination)×the BOI share (before combination)×2＝20×10×2＝400.

In the retail market to SMEs: the BOC share (before combination)×the BOI share (before combination)×2＝25×10×2＝500.

or greater than those of the company group even after the business combination, these competitors could be factors that prevent the company group from controlling the price and other factors to a certain extent. (It should be mentioned that, in considering the market share differences from the competitors, the excess capacity of competitors and the degree of substitutability between goods sold by the company group and those by the competitors are considered.)

10. Analysis from the perspective of coordinated conduct

On the other hand, regarding the analysis of coordinated conduct, when there are few competitors or the market share is concentrated on a few leading business operators, the behavior of the competitors can be forecast with high probability. In this hypothetical case review, if Bank One, as the competitor, does not have any particular limitation of its ability from the perspectives of excess capacity and the substitutability for the products of the new bank, the perspective of coordinated effect[6] would be more emphasized than that of unilateral conduct in the review of the hypothetical case, as the market structure will become more oligopolistic.

(b). “Maverick”

The existence of a maverick is generally regarded as a deterrence factor to coordinated conduct among competitors in the market. In analyzing coordinated conduct, the JFTC considers competition among the parties in the past relating to cases where the parties have been competing for market share or one of these parties has been aggressive in cutting prices[7]. In this hypothetical case review, the impact on competition of the acquisition of the BOI by the BOC is considered by taking into consideration information like how the BOC has behaved in the market competition in the past.

In addition, as explained in paragraphs 9 and 10 above, factors such as the possibility of potential new entries are also considered in the review from the perspectives of unilateral conduct and coordinated conduct.

6 See paragraph 10 above. Generally speaking, competitors can more easily forecast each other’s behavior and more easily take coordinated conduct in cases where there are few competitors, the market share is concentrated on a few leading business operators, the companies sell homogeneous goods, competitors have similar cost conditions or conditions of trade in the market are highly transparent.

7 In cases where the parties have been competing for market share or one of these parties has been aggressive in cutting prices, the fact that the parties have competed vigorously or the fact that their conduct in the market has stimulated competition may be deemed to contribute to a reduction in prices, an improvement in quality or an extension of the range of goods throughout the market. If the business combination eliminates these conditions, it will have a serious impact on competition, even if the combined market share or the rank of the parties is not high. (Part Ⅳ-3 (1) B. Competition among the Parties in the Past, etc. of the Guidelines.)

KOREA

1. Changes of merger review regime

1.1 Change of the merger review standards

1.1.1 Abolition of the time limit for ex-ante merger notification

On March 25, 2009, the Korea Fair Trade Commission (hereinafter “FFTC”) amended the Monopoly Regulation and Fair Trade Act (hereinafter “MRFTA”) to abolish the time limit for ex-ante merger notification. Before the amendment, large-scale firms were required to notify the KFTC of its merger within 30 days after the date when the concerned contract was signed. Until 30 days pass after such notifications(a 90-day extension possible), merger activities could not be implemented.

The KFTC found the previous statutes problematic as follows. First, setting the notification time limit was unnecessary in the first place given that the objective of ex-ante review of mergers could be achieved as long as such review takes place any time before the concerned merger is completed. Second, the time limit put considerable burden on businesses as they had to pay fine for negligence when they failed to meet the deadline out of ignorance of the relevant regulation. Furthermore, the time limit was said to be non-compatible with global standards on merger notification setting no time limit for ex-ante notification as evidenced in many other countries and the best practices concerning merger notification set out by the International Competition Network.

Therefore, the KFTC has removed the 30-day time limit to allow businesses to notify their merger any time before they see fit before the concerned merger is put into force.

1.1.2 Upward revision of the criteria of firms subject to merger notification

On June 25, 2008, the KFTC amended the Enforcement Decree of the MRFTA to revise upward the criteria of firms whose mergers are subject to notification. Previously, companies were required to notify mergers to the KFTC in case their asset(or turnover) was 100 billion won or more and the merged firm’s asset (or turnover) was 20 billion won or more.

However, this regulation was pointed out as having become rigid enough to make even negligibly small scale mergers subject to notification, failing to consider the growth in size of the national economy. It’s noteworthy that whereas the asset(or turnover) threshold of the merged firm was once revised upward to 20 billion won from 3 billion won in November 2007, the threshold of the notifying firm has never been adjusted since 1997. Moreover, some raised concern that the rigid notification regulation requiring even small-scale mergers to be notified not just put significant burden on businesses but also hampered the KFTC from conducting in-depth merger review due to heavy workload.

Therefore, the KFTC eventually increased the asset(or turnover) threshold of the notifying firm to 200 billion won in consideration of the fact that Korea’s GDP grew from 491 trillion won in 1997 to 901 trillion won in 2007 and the average proportion of asset between the notifying and the merged firm in most foreign countries is 10:1.

1.2 *Change of merger review standard*

1.2.1 Summary

On December 5, 2007, the KFTC amended the *Merger Review Guidelines* that was enacted back in 1998 in order to raise predictability of merger review for businesses and rationalize merger review procedure. The revision led to complementing some weak points exposed during the previous merger review process, aiming to incorporate theoretical development made thus far in merger review field and global trend so as to make merger review regime more rational and sophisticated.

1.2.2 Specific changes

Introduction of HHI as a measure of market concentration

Before the revision, CR_k was used to measure market concentration level. In an attempt to better capture competitive structure of the market, the KFTC newly introduced HHI as a new tool, adjusting the Safe Harbor[1] as follows.

- Safe Harbor[2] in case of horizontal merger (referring to mergers between firm in the same business area)

  (a) when post-merger HHI is less than 1,200,

  when post-merger HHI is 1,200 or more and less than 2,500 and the increment is less than 250,

  when the post-merger HHI is 2,500 or more and the increment is less than 150

- Safe Harbor[3] in case of vertical merger (referring to mergers between businesses in raw material supply and demand relationship) or conglomerate merger (referring to merger types other than horizontal or vertical ones)

  1. when the post-merger HHI of each merging party is less than 2,500 and the market share of each firm is less than 25%,

  (b) when after merger, each firm ranks 4th or below by market share

Removal of the market concentration requirement for determination of anti-competitiveness level

The KFTC has removed the provision of the horizontal merger review standards that a merger can restrict competition when the combined market share of the merging firms is 50% or more or when the post-merger top three companies' combined market share is 70% or more. In fact, because of the

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1 In case the post-merger market concentration reaches a certain level, the merger is assumed to be not anti-competitive. Accordingly, under the simplified merger review procedure, the KFTC handles the merger within 15 days after notification ("Safe Harbor").

2 Before-revision Safe Harbor of horizontal merger: (1) after the merger, the combined market share of the top 3 firms is less than 50% and the merging firms' market share is less than 25%, (2) the post-merger firm ranks 4th or below in the market.

3 Before-revision Safe Harbor of vertical or conglomerate merger: (1) in the business area in which each merging firm belongs to, the combines market share of the top 3 firms is less than 50% and each merging firm's market share is less than 25%, (2) in each transaction area, the post-merger firm ranks 4th or below.

concerned provision, the KFTC, in its merger review, tended to automatically assume anti-competitiveness when the aforementioned requirements were met.

So, by removing the provision, the KFTC tried to take full and comprehensive consideration of other elements as well, such as one firm's restriction of competition through unilateral conduct, possibility of collaboration, pressure from foreign competition and potential new entry to the market in determining anti-competitiveness. However, the provision of anti-competitiveness assumption is still effective. So in case where a firm falls under the assumption criteria, the firm must prove that the merger would not create anti-competitiveness.

Consideration of foreign competition

The KFTC newly established a provision stipulating that in case a merger leads to considerable price increase at home but import is expected to increase in the near future, the anti-competitive effect by the merger might be compromised. With this, the KFTC added "pressure from potential foreign competition" as well as pressure from incumbent one as a factor to mitigate anti-competitiveness.

In addition, by instituting a provision that where a competitor is highly export-oriented and so capable of diverting its export volume to domestic demand in the face of price raise at home, the anti-competitive effect of a merger would be reduced, the KFTC incorporated "the possibility of diversion of export volume to domestic market" to one of the criteria in determining anti-competitiveness.

Other changes

Besides those illustrated above, the KFTC carried out sweeping revision by incorporating what had been under consideration in day-to-day operation into new review standards and by rationalizing the standards to be compatible with economic theory and global trend.

For instances, the revised guideline elaborates on assessing anti-competitiveness of the post-merger firm's unilateral conduct and standards to determine possibility of collaboration in horizontal merger. Also concerning the criteria to determine a non-viable firm, non-viable "business areas" have been newly added.

1.2.3 Expected benefits

To assess the revised Merger Review Guidelines as a whole, the KFTC expects that the Guidelines would raise business predictability to lessen the burden accompanying mergers and improve KFTC's review quality with rationalized and sophisticated review procedure.

The enlarged Safe Harbor would help reduce burden on businesses. In fact, the KFTC conducted analysis of the horizontal merger cases that were notified for the latest 2 years with the new measure of HHI finding that Safe Harbor is notably enlarged compared to the CR_K-based one. In case of vertical and conglomerate mergers, the existing Safe Harbor was confined to lowly concentrated market (CR3<50%), but after the revision, it has been extended to a mid-level concentrated market (HHI<2,500), indicating a larger Safe Harbor.

Also, by newly instituting a provision of "evident investment activities" like participation in creating a private equity fund to be under simplified merger review, the KFTC expects to see lessened burden on businesses.

2. Recent merger cases

2.1 (KFTC deliberation case) HomePlus's acquisition of shares in Homever

2.1.1 Case summary

The second largest hypermarket HomePlus(Samsung Tesco Corporation) signed a contract to acquire 91.2% of the shares in Homever, the 4th largest hypermarket operated by E-Land Retail and they notified the KFTC of the merger on May 16, 2008.

2.1.2 Market definition

Relevant product market

A hypermarket refers to a one-stop shopping place with size of 3,000 square meters or more in floor space that offers a variety of consumer goods like groceries, clothes and daily products as well as various types of cultural and convenient services. Especially, reflecting the trend where a hypermarket is transforming itself into a place for shoppertainment where people can enjoy shopping and culture & entertainment, the KFTC defined a hypermarket as the relevant product market to distinguish it from other general retailing channels and this was a recognition shared by consumers and merging parties as well.

To sum up, the KFTC defined a hypermarket as the relevant market, differentiating it from the general retailing market for its aforementioned distinct features.

Relevant geographic market

Defining the relevant geographical market, the KFTC in principle uses the method of union of overlapped circles. To illustrate, the KFTC first selected areas where stores of HomePlus and stores of Homever compete within a 5-km radius and then at first marked the area within a 5-km radius of a store of Homever (the acquired firm). Then it marked again the area within a 5-km radius of all large retailers located in the first marked area, and then defined the areas combined of the first and second round of definition as the relevant geographical market.

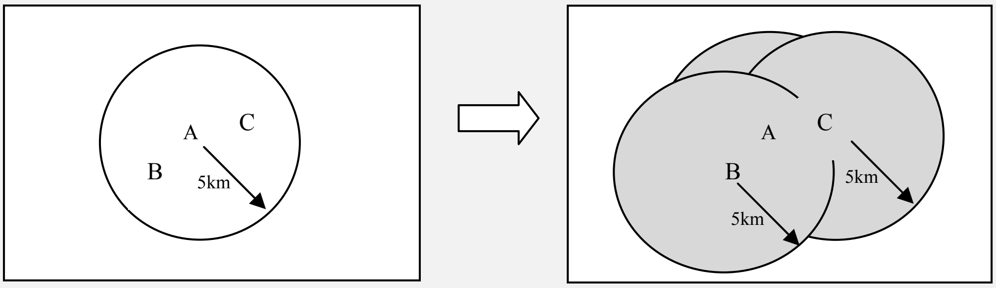
After that, if separating a market is apparently necessary considering geographical features like natural geography and road conditions and customer distribution condition, it made reasonable adjustment within a certain range and finally defined the geographical market.

As a result, the geographical market was defined as 15 markets in total.

Box 9. The Union of Overlapping Circles Approach

1. Select areas where there is any store of the acquiring firm within a 5km radius of a store of the acquired firm.

2. Define as the relevant geographic market the entire area within a 5km radius of each hypermarket store located in the areas selected through process 1.



A: a hypermarket store of the acquired firm
B: a hypermarket store of the acquiring firm
C: a hypermarket store of a competing firm

2.1.3 Determination of anti-competitiveness

The KFTC considered not just structural indicators like market share but also diversion ratio, actual store-specific substitutability by store location, adjacent markets and other competition factors to decide anti-competitiveness and its analysis result is as follows.

First of all, the KFTC conducted market concentration analysis to select areas for focused examination. As a result, out of the 15 geographic markets, 7 markets were found to fall under, by the combined market share, the condition of anti-competitiveness assumption set out by the MRFTA[4] and another 7 markets were found to be subject to general merger review, surpassing the Safe Harbor[5] area.

In reviewing the markets selected above, the possibility of restricting competition was closely examined. As proximity to consumers is an important factor for consumers to choose a hypermarket, competition conditions might change according to how stores are distributed and located. Considering this, the KFTC estimated diversion ratio by asking customers if in case Homever shuts down its business, which store they would choose instead. The more interviewees choose HomePlus, the higher anti-competitiveness would be assumed.

Second, the KFTC considered actual store substitutability by store location and competition condition in each market. In addition, it analyzed competition pressure from traditional markets, department stores and other nearby competitors.

For instance, the Suncheon city was thought to be negatively affected by the merger because its market concentration would soar with higher post-merger market share. However, the diversion ratio analysis of customers to the acquired firm Homever Suncheon store revealed that the customers would go to E-Mart Suncheon store (67.3%) rather than HomePlus Suncheon store (18.3%). Based on this survey result, the KFTC analyzed that given the high preference of customers of E-Mart store over HomePlus one, a post-merger price raise would lead to customer diversion to E-Mart, clearing the merger of potential anti-competitiveness.

4 In case the concerned firm falls under the category of automatic assumption of being a dominant firm (CR1>50% or CR3>75%) and its market share ranks top and the market share gap with the 2nd player is 25% or more of the total market share.

5 In case (i) HHI is 1,200 or more and less than 2,500, and the increment is 250 or more, (ii) HHI is 2,500 or more and the increment is 150 or more.

With this analysis, the KFTC saw that a total of 5 markets (stores) were at risk of constrained competition or potential consumer harm like price raise.

2.1.4 Imposed remedies

Rather than imposing structural remedies, the KFTC decided to impose remedies that can actually protect consumers from potential post-merger harm.

That is, out of product items sold at stores subject to remedies, prices of product items[6] applied to local pricing policy have been required to be maintained below the national average price of the each concerned product item.

In addition, regarding all product items of stores subject to remedies, the KFTC ordered to introduce the "price match system", so accordingly where a consumer reports the product price of a store subject to remedies is higher than that of a store in comparison in the same market, the former store would have to compensate the amount twice the price gap to the consumer.

The merging parties can ask the KFTC to reconsider these remedies according to changes in market conditions such as opening of new stores, etc. for the following two-year period.

2.2 (Court decision) Samick Musical Instruments

2.2.1 Case summary

Samick Musical Instrument Co., Ltd. (including its affiliates, hereinafter "Samick") acquired on March 12, 2004, 48.13% of the shares in Young Chang Musical Instrument Co., Ltd. (hereinafter "Young Chang") to become the largest shareholder of Young Chang and consequently securing management power by appointing and electing executive members like CEO of the firm. Thereafter, Samick bought some machinery and facilities essential to manufacture core parts of the piano from Young Chang.

Samick and Young Change had been maintaining oligopoly in the local piano market, especially upright piano market and through this merger, the post-merger firm virtually became to secure dominance close to a monopolist's. With this, the KFTC imposed corrective orders on Samick to sell off all of its Young Chang shares to a third party within a year and re-sell machinery and facilities to Young Chang within 3 months. But Samick challenged the KFTC decision to file the case with the Seoul High Court only to lose and again appealed to the Supreme Court with the case but failed as well.

The bones of the contention regarding this case were as follows: (i) what to make of secondhand pianos (in market definition and determination of anti-competitiveness), (ii) whether pianos made in Japan and China could deter anti-competitive behaviors by the post-merger firm (in determination of anti-competitiveness), (iii) regarding the efficiency gain defense, what are the criteria to determine efficiency gain and how much efficiency has been created and (iv) whether the defense of non-viable firm stands or not.

2.2.2 Market definition: distinction between new and secondhand product market

With respect to merket definition, an especially controversial issue of the case, the court ruled that defining "new" upright, grand and digital piano markets as the relevant product market respectively and

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6 They refer to a product category of which consumer sensitivity is high. As to HomePlus, a total of 100 product items as of September 2008 were priced under local pricing policy.

the local market as the relevant geographic market were legitimate. In this case, whether secondhand pianos could form a single same market with new ones was a contentious point. Regarding this, the Supreme Court found that secondhand pianos were different from new ones in terms of usage, price, target sellers and buyers, transaction pattern and operation strategy and hardly substitutable with new ones from both supply and demand sides, standing by the original KTFC decision.

2.2.3 Anti-competitive effect

When it comes to determining substantive lessening of competition regarding horizontal mergers, the Supreme Court stated the basic principle that mergers should be case-by-case examined in comprehensive consideration of before and after merger market concentration level, the level of foreign competition introduced and global competition condition, new entry possibility, potential collaboration between competitors and similar goods or adjacent markets.

Based on this logic, the Court upheld the KFTC decision citing the following reasons. First, the merger was assumed to be anti-competitive as set out by Article 7 (4) of the MRFTA and there's little possibility of new market entry, little possibility of potential foreign competition and negligible competition in adjacent markets. Especially, the merger would create a virtual monopoly in the local piano market, with two products in substitutable relationship to be manufactured by a single company, consumers would have less scope of product choice and the post-merger firm could exploit it to rake in a lager profit through price raise. Therefore the concerned merger should be seen as substantively lessening competition in the relevant market.

2.2.4 Efficiency gain effect: presentation of analysis standards

The Supreme Court ruled that a merger can be exceptionally approved pursuant to Article 7 (2) 1 of the MRFTA, where the efficiency gain that would allegedly have been impossible without the merger outweighs the harm of anti-competitiveness by the merger. In this case, said the Court, the burden of proof for such efficiency gain falls on the concerned firm, and the efficiency gain should be evaluated through comprehensive consideration of the firm's production, sales and R&D aspects and the balanced development of the national economy, and such efficiency gain should be proved to be likely to occur in the near future.

Under this logic, the Court upheld the KFTC decision again since the efficiency the firm argued had no clear cause-and-effect relationship with the merger itself and was hardly regarded as actual efficiency gain due to no relevancy with consumer welfare. What's noteworthy here is that the Supreme Court cited "local consumer's welfare" as one of the criteria to determine efficiency gain.

3. Standards to determine anti-competitiveness in merger review

3.1 Dominance test& Substantive Lessening of Competition (SLC) test

In Korea, standards to determine anti-competitiveness of mergers are sort of a mix of dominance test and SLC test. In the past, the KFTC weighed more in dominance test-related features, but through the revision of the Merger Review Guidelines recently, shifted to SLC test.

That is to say, before December 2007, the KFTC mainly considered factors related to market structure like market concentration level and change patterns concerning horizontal mergers, while other factors including the level of foreign competition, new market entry possibility, the potential collaboration between competitors, and similar goods and other adjacent competitors came secondary in determining anti-competitiveness. In the end, with dominance test taking up the better part with focus on structural features, SLC test features were just things for concern in assessing anti-competitiveness.

After the revision, market concentration in horizontal merger review still is a factor to consider but set out as "meaningful just as a starting point to analyse the competition impact of a merger and the substantive lessening of competition should be looked at with other factors as well as market concentration", indicating that now factors other than structural indicators have taken more importance. On top of this, by stipulating that the possibility of the merging firm's unilateral anti-competitive behavior should be considered as a factor, the revised Guidelines are seen to incorporate clearly SLC test features. Moreover, to have a more thorough analysis of the collaboration effect on competition, the possibility of collaboration between competitors has been set out in details like the easiness of collaboration and availability of supervision over implementation and sanction against violation.

3.2 Review standard details

3.2.1 Characteristics of dominance test

Under the current Merger Review Guidelines, market concentration should be analyzed. Particularly, Article 7(4) of the MRFTA states that in case a merger meets a certain market share condition, it is assumed to be anti-competitive.

Box 10. Article 7 of the MRFTA

④ If a combination of enterprises falls under any of the following subparagraphs, it is presumed that competition is practically suppressed in any particular business area:

1. In cases where the aggregate of the market share of a company taking part in a combination of enterprises (referring to the aggregate of market shares of the affiliated companies; hereafter the same shall apply in this Article) falls under any of the following categories: and
   A. In a case where the aggregate market share of the company concerned satisfies the presumptive requirements* for a dominant firm;
   B. In a case where the aggregate market share of the company concerned is the largest in the business area concerned; and
   C. In a case where the aggregate market share of the company concerned exceeds the market share of the company with the second largest market share (referring to a company with the largest market share besides the company concerned) by not less than 25 percent of the aggregate market share.

* Presumption of market-dominating enterprise (Article 4)
1. Market share of one enterpriser is 50/100 or more; or
2. The total market share of not less than three enterprisers is 75/100 or more; provided that those whose market share is less than 10/100 shall be excluded.

Under the MRFTA, where market concentration in the concerned market is recently on the upward trend, mergers carried out by firms with high market share are regarded to be able to substantively restrain competition. However, in cases like this, factors like development of new technology and patents that might cause changes in the market competition landscape are required to be considered as well, preventing determination of anti-competitiveness solely based on rise in market concentration.

Plus, under the Guidelines, where the market concentration indicator meets certain conditions as below, the concerned merger is assumed to be free of anti-competitiveness, thereby requiring the KFTC to review just notified contents and notify the firm of the review result within 15 days after the review request submitted. This regulation has been arranged out of policy considerations that mergers deemed to have little anti-competitiveness, after testing with market structure indicator alone, should be handled quickly, provided that under a SLC test requiring quantitative and economic analysis could take a long time and so raise uncertainty on the part of the notifying firm.

Box 11. Merger Review Guidelines II. 1. (5)

(A) in case a horizontal merger falls under any of the following;
1. when HHI is less than 1,200
2. when HHI is 1,200 or more and less than 2,500 and the increment is less than 250
3. when HHI is 2,500 or more and the increment is less than 150

(B) in case a vertical or a conglomerate merger falls under any of the following;
1. when in a certain business area involving the concerned firm, HHI is less than 2,500 and the firm's market share is less than 25/100.

3.2.2 Characteristics of SLC test

Under the incumbent Merger Review Guidelines, in determining anti-competitiveness of a horizontal merger, the possibility of collaboration between competitors as well as the merging firm's unilateral conduct should be considered.

In particular, the Guidelines see that in case of unilateral conduct by a single firm, if its competitors have difficulty in supplying substitutes at a timely manner, such unilateral conduct can be deemed to be substantively lessening competition.

Meanwhile, under the current Guidelines, decrease in the number of competitors due to a merger can lead to reduced competition, if competitors could easily collaborate, explicitly or tacitly, terms and conditions of price, volume and transactions or the firms engaged in collaboration have means to supervise and punish deviators.

To sum up, the possibility of unilateral conduct and collaboration are under consideration in determining whether a merger might substantively lessen the competition or not.

3.3 Issue paper case analysis

This hypothetical case concerns the proposed acquisition of the Bank of Investment (BoI) by the Bank of Commerce (BoC), the 5th largest player and the 2nd largest player respectively in retail banking services to personal consumers and small and medium enterprises (SMEs), thereby constituting a horizontal merger. Given the size of operating network and financial services on offer by the concerned parties, the relevant market could be defined as the Oceania's local market.

As assumed in this case that the HHI analysis identifies a selected number of markets where the merger could raise concerns for competition, we will assume that this merger does not fall under a category for simplified merger review.

3.3.1 Market concentration

It was analyzed that in the short term credit market for SMEs, the post-merger firm's market share would reach 30%, making it the 2nd largest bank after Bank One and the 1st largest bank with 35%. Moreover, the combined market share of the top 3 firms including Bank One would reach 63% in most of the markets while recording 65% in the short term credit market for SMEs, which keeps the post-merger firm from being assumed to be a market-dominant firm.

In recent years, a multitude of mergers have taken place and in particular, the 2nd player BoC has grown its size through consistent merger moves, indicating higher market concentration and accordingly more chances of lessening of competition in the concerned market.

3.3.2 Possibility of post-merger firm's unilateral conduct

Chances of unilateral conduct seem to be not so high for the following reasons.

First, in terms of the increased margin of market share and the market share gap with its competitors, the post-merger firm's unilateral conduct to restrain competition is not so plausible. It was observed that after the merger, BoC would see its market share grow 10 percentage points in 5 retail banking services to personal consumers and SMEs, making it closer to that of Bank One. In addition, as the top 5 banks take up 85% of the total market share, the average market share of the rest except those of Bank One and the two merging firms would be about 12%, the market share difference with its competitors would be not so big. Second, when it comes to features of the financial services, the post-merger firm's unilateral conduct seems to be unlikely. Provided that the top 5 banks are considered to be "national banks", with their presence in the overall national territory and various financial services on offer, demand substitutability and diversion ratio between competitors is assumed to be high. Moreover, as the operating network between the post-merger firm and its competitors seems to be similar in capacity, the competitors would be able to increase their sales revenue through their network of branches.

Third, given that the post-merger firm's financial services are in retail banking area targeting individual consumers and SMEs, a large demand does not exist, which indicates a little room for lessening of competition by its unilateral conduct.

3.3.3 Chances of collaboration between competitors

It is considered that the merger at issue would not increase chances of collaboration between competitors for the following reasons.

Above all, by the nature of the relevant market concerned in the merger, collaboration seems to be easy to take place, but the merger does not seem to be a factor to increase the chances of such collaboration.

First, in this market, sharing information concerning transactions is relatively easy with regular disclosure of financial data like interest rates, credit amount and deposit amount. But the merger in question is not a facilitator of this information sharing. Rather, such sharing is the result of banking sector regulations to secure soundness of the financial market.

Second, in this market, it is available to check the development status of each financial service and its specific terms of transaction, and similarity of financial services on offer is assessed quite high. However, this phenomenon inherent to this market does not seem likely to deepen through the concerned merger.

Third, in the retail banking sector targeting general consumers and SMEs, buyers with a large demand through a long term contract could hardly exist, and chances of expanding capital available for credit are not that high. But again, these features are not something resulting from the merger at issue, but the outcome of banking sector regulations set out by financial regulatory authority to secure soundness of the financial market.

In addition, in this case, given that BoI is a relative newcomer in the market but has grown through acquisitions and developed a reputation of sort of "maverick", it is allegedly viable to rein in collaborative attemps by its competitors.

3.3.4 Other things for consideration

As seen in the recent influx of newcomers in the market, there are chances of new market entry.

3.3.5 Conclusion

In light of growing market concentration in the relevant market in recent years, one could think that chances of lessening of competition might increase as well. However, considering that chances of unilateral conduct by a dominant firm and collaboration between competitors seem to be not so high and newcomer's market entry is likely to occur, we deem that the merger at issue would not substantially lessen competition.

MEXICO

1. Legal framework for the analysis of mergers

The Federal Law of Economic Competition (FLEC) defines mergers as the merger, acquisition of control, or any other action whereby an economic agent acquires assets, stock holding, equity interests, trusts, or assets in general from another economic agent (Article 16, FLEC).[1]

Mexico's Federal Competition Commission (CFC or the Commission) is empowered to challenge and impose sanctions on any merger whose aim or effect is to reduce, lessen or prevent competition and free market access to products and services that are equal, similar or substantially related.

In accordance with Article 17 of the FLEC, the CFC may consider the following as grounds for challenging a merger: i) that the transaction grants or may grant to the merging parties unilateral power to set prices or restrain supply in the relevant market, and competitors may not able to counteract this power; ii) that the transaction has the purpose of unduly displacing competitors or impede entry to the relevant market; and iii) that the new agent gains or strengthens market power to participate in monopolistic practices as referred to in Chapter II of FLEC, namely, absolute (Article 9 on Cartels) or relative (Article 10 on single firm conduct) practices.

In addition, Article 18 of the FLEC defines the elements that must be analyzed in order to decide if the merger is going to be rejected, conditioned, or approved. This Article establishes the basis of an analysis following the principles of a dominance test. The analysis begins with the definition of the relevant market, according to a procedure that is defined in the FLEC and its bylaw. Secondly, the Commission identifies the economic agents that participate in the market, defines their market shares, analyzes their power in the market and estimates the degree of concentration. To do this, the Commission uses the Herfindahl-Hirschman Index (HHI), and the Dominance Index (DI). The use of concentration indexes is regulated by a rule.[2]

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1 The full text of the FLEC can be consulted at: http://www.cfc.gob.mx.

The provisions concerning only to mergers can be consulted at: http://www.cfc.gob.mx/index.php?option=com_content&task=view&id=1053&Itemid=117

2 The rule is called "Resolución por la que se da a conocer el método para el cálculo de los índices para determinar el grado de concentración que exista en el mercado relevante y los criterios para su aplicación" and was published in the Official Gazette (Diario Oficial de la Federación) on July 24th, 1998. The dominance index (ID), used as a complement of the HHI, has the characteristic that it diminishes when the merging parties are minor competitors in the market so that presumably competition is enhanced by a "new stronger" agent.

An increase in the ID does not imply that a dominant position will be attained by the merging parties; in any case, the level and its change are taken as a presumption of the ability of the "new" agent to achieve or strengthen market power. The concentration indexes only use market share information and for this reason, are at most considered auxiliary elements for the analysis of market power. To determine if an economic agent has market power or could obtain market power as a result of a merger or acquisition, the Commission has to take into consideration barriers to entry, the power and presence of competitors, access to inputs, the recent behavior of economic agents involved in the transaction, access to imports, the ability

Article 18 defines other elements that open the possibility for an analysis that is similar to a Substantial Lessening of Competition Test (SLC). Particularly, this Article considers the examination of the effects of the merger on other related markets, and looks at efficiency arguments presented by the parties that are involved in the transaction.

In the evaluation of efficiencies, Article 16 of the LFCE's bylaw considers that a concentration can improve efficiency in the market and can have a positive impact in the process of competition and free market access if the parties show that there are permanent benefits for consumers that exceed the anti-competitive effects of the merger. The kind of efficiencies that could be accepted in an efficiency defense is primarily related to permanent cost reductions, technology transfer and improvement of infrastructure and distribution networks.

In addition to Article 18, the rule that defines the methodology to estimate concentration indexes stipulates that even in the case where indexes are below the risk thresholds, the Commission may conclude that a transaction could reduce, damage or impede competition and free market access, when: i) the involved parties have participated in previous transactions in the same relevant market; ii) the parties are related with another agent and from this relationship the parties can obtain privileged access to any essential input or advantages in distribution, marketing or advertising in the relevant market; iii) the parties can obtain market power in related markets; or iv) any other element that could lead the parties to obtain market power, and that may not be reflected in the market shares before the transaction occurs.

2. Anti-competitive effects covered by the substantive test

As can be seen from section I, the review of mergers and acquisitions under the LFCE includes a combination of elements related to both the Dominance and SLC Tests.

During the first years of existence of the Commission, it was a common practice to use the Dominance Test, as was reported in the contribution presented for the Policy Roundtable conducted by the OECD in 1992 on *Substantive Criteria used for Merger Assessment.* There were two reasons why the Commission gave preference to the use of the Dominance Test: i) given the lack of experience of the Commission, the Dominance Test was easier to implement; ii) besides the possibility of structural bias, the Dominance Test provided more certainty from the legal point of view.

The Dominance Test was helpful to cover different anticompetitive situations that arose from the fact that an economic agent can obtain market power, particularly in situations in which barriers to entry are significant.[3]

3. Insufficiency of the Dominance Test

The Dominance Test assumes that there is a relationship between high levels of concentration and the possibility of unduly displacement of competitors from the market or unilateral behavior.

The use of the Dominance test is not enough to cover anti-competitive situations in which the concentration indexes and market shares do not demonstrate that the merger may create a dominant economic agent. In particular, the test could be of limited use when dealing with concerns associated with coordinated effects, related markets or changes in the nature of competition in the form of "non-collusive

to fix prices unilaterally without the competitors being able to actually or potentially counteract that capacity, the cost for the consumers to access other suppliers, and other elements.

3 This has been the case of the analysis that the Commission has carried out in different moments about the possibility of a merger between the two main airlines that service domestic markets in Mexico.

oligopoly". The following examples are helpful to show the kind of situations that may affect competition and that are not captured by the Dominance Test.

4. Relevant Cases

4.1 Coca-Cola/Jugos del Valle

In 2007, Coca-Cola Group notified the acquisition of the company "Jugos del Valle". The merger had effects in three markets: soft-drinks, juices, and nectars and other beverages. The main discussion was in the market of juices and beverages, in which "Jugos del Valle" had a market share of 32%, and Coca-Cola had 2%. Because there was another leading company that had a market share of 48%, this resulted in a relatively low Dominance Index, indicating that the merger was unlikely to affect competition.

This analysis was not enough to address two possible implications of the merger: i) the possibility of coordinated behavior; and ii) the possibility of unduly displacing independent producers of juices and nectars.

In the first case, the Commission examined the potential of a coordinated behavior as a result of the reduction in the number of competitors in the market. The conclusion was that Coca-Cola´s market share was insufficient to consider the company as a disruptive player, and that the effect of the merger was marginal.

Regarding the potential to unduly displace competitors, the Commission considered that Coca-Cola was the leader in the market of soft-drinks, with a national share of almost 65%. Because soft-drink and juices and nectars markets have some similarities, the Commission concluded that Coca-Cola could transfer its market power in soft-drinks into the market of juices and nectars, so as to induce or obligate exclusivity, or to tie sales, in the traditional distribution channel. At the same time, the Commission considered that the transaction could produce some efficiencies. For that reason the Commission resolved to approve the merger but it imposed conditions to avoid the possibility of monopolistic practices.

4.2 Televisa/Cable companies

In 2006 and 2007, Televisa engaged in the acquisition of a significant share in two providers of cable television and internet services that operate in different regions. Televisa is a worldwide media company, leader in the production of video contents in Spanish, which participates in different markets: broadcast television; cable television; Direct-To-Home (DTH) television; broadcast radio; and sports, among other activities.

Televisa has a market share of more than 65% in broadcast TV, and in the case of cable TV, controls the main company (which offers its services in Mexico City). Televisa´s company, Sky, was the only supplier of DTH services in the country.

The transactions had an impact in the services of pay TV, which includes cable and DTH, in several local markets in which the concentration level increased substantially above the thresholds considered to determine that the transactions may damage competition.

The Commission concluded that the contents Televisa produces for broadcast TV are an essential input for cable companies. At the same time, Televisa´s presence in pay TV could facilitate the exclusion of broadcast TV competitors. On the other hand, the Commission accepted that the transactions could help Televisa to consolidate a network to compete more efficiently in telephone and broadband services. For those reasons the Commission decided to approve the transactions, subject to must-offer, must-carry, and carry-one carry-all obligations, intended to prevent monopolistic practices that could unduly displace competitors.

4.3 Inbursa/Criteria Caixacorp

In 2008, Criteria Caixacorp acquired 20% of the shares of Inbursa. Criteria is the main investor in Caixa d' Estalvis i Pensions de Barcelona, a company that manages investments in financial markets in different countries. Neither Criteria nor Caixa have investments in financial services markets in México. Inbursa is a Mexican company that participates in banking, insurance, pension funds, investment funds and stock exchange activities.

According to the Dominance Test, the merger would not affect competition in markets, because Criteria Caixacorp was not a player in financial markets in Mexico. But the parties had corporate links that had to be analyzed in order to prevent coordinated behavior.

Criteria is one of the most important investors in Telefonica, a Spanish telecommunications company that participates in the provision of mobile telephone services in Mexico. Inbursa is a financial company that is part of a group of companies controlled by the Slim family, including Telmex and America Movil, providers of basic and mobile telephone services in Mexico, respectively, that are actual or potential competitors of Telefonica in Mexico.

The Commission evaluated the risks of coordination, and concluded that the transaction would not confer Criteria either the opportunity to participate in or influence decisions related to telecommunications, or to have access to internal information from Telmex or America Movil, so the merger was authorized.

5. Use of a SLC Test approach

As explained in section I, the legal provisions under the LFCE are flexible enough to allow the combination of Dominance and SLC Tests elements. For this reason, it has not been necessary to introduce legal reforms to modify the analytical framework, in order to allow for the use of a SLC approach.

In particular, the Commission takes some elements of the SLC for analyzing mergers whenever the Dominance test is not enough to make a decision on these transactions. In such cases, the gathering of direct evidence is a way to give support to the Commission's analysis, thus reducing the possibility of making a mistake.

Until now the use of direct evidence has not affected the CFC's ability to reject a transaction. But the use of more analytical tools has strengthened the Commission's decisions, and improved the defense before the judiciary.

It is not foreseen that the Commission will promote a legal change of the test, but it may be worthwhile to modify the definition of the types of mergers that have to be reviewed, because the Commission has to analyze many transactions that do not modify competition conditions in the markets. By streamlining the process, the Commission could employ its resources in a more efficient manner, and could concentrate on more important investigations.

6. Policy issues linked to the use of tests

6.1 Over-enforcement and under-enforcement

The CFC recognizes that the use of the Dominance Test could lead to a rigid analysis that may not be appropriate to assess anticompetitive issues, and that is actually limited in its ability to examine oligopoly markets. The strict use of this test provides certainty to the parties but may lead to wrong decisions.

The flexibility that the LFCE provides has been used to focus in ´gap´ cases. The Commission is conscious of the risk of over-enforcement, and because of that, it reviews criteria and guidelines that can contribute to generate greater legal certainty.

6.2 Links between merger tests and unilateral conduct rules

For the Commission, the criteria used to determine if a party is dominant are the same for the analysis of mergers as for unilateral conduct. The concept of collective dominance has been recently used for the review of mergers, but it has not had a significant impact on CFC decisions.

6.4 Legal certainty and predictability

As explained previously, the Dominance Test provides more legal certainty but fails to capture some anticompetitive situations that can arise from a merger. In order not to significantly affect the development of business or to impose additional costs to the parties, the Commission focuses its efforts on those cases that have a profound economic impact, and when it is not clear whether the merger could lead to the creation of a dominant agent. In order to improve predictability, the Commission tries to follow case methodologies that have been used by other agencies, such as the Office of Fair Trading and the UK Competition Commission, for the review of similar situations.

6.5 Convergence and international cooperation

The Commission recognizes that geater homogeneity in the analytical standards that are used for the review of mergers is desirable. For this reason, especially in complicated cases, the agency pays attention to the studies that have been carried out by other authorities, and is in permanent contact with them. The CFC is interested in strengthening international cooperation on merger issues with competition agencies throughout the world.

7. Hypothetical case

Let the following two markets be established: a) personal retail consumers; and b) short term credit for Small and Medium-sized Enterprises (SME). Assume that 15% of both markets is divided between 15 companies of the same size, and take as given the rest of their respective market shares. The purpose of the analysis will be to exemplify that the Dominance Test is not sufficient to determine whether a merger could lead to anticompetitive outcomes.

First of all, the LFCE obligates the CFC to start the review of the case with a Dominance Test in order to determine how concentrated the markets are.

As mentioned above, the following table represents a scenario to calculate concentration indexes, assuming that 15% of the market is divided between 15 companies of the same size.

Player	Five markets, personal retail consumers Market share %	Short term credit for SME Market share %
Bank One	33	30
BoC	20	25
BoI	10	10
Bank "4"	11	10
Bank "5"	11	10
Other 15 banks (1% each)	15	15
Total	100	100

As explained in section I, the Commission uses the traditional HHI Index and the Dominance Index.[4] Using this information, the indexes and their changes that would arise from the merger between BoC and BoI are:

		Personal retail consumers (five markets)	
	Before	**After**	**Change**
HHI	1,846	2,246	400
Dominance	4,064	4,014	-50
		Short term credit for SME	
HHI	1,840	2,340	500
Dominance	3,634	4,256	621

The Commission considers that a transaction has low possibilities to affect competition when any of the following conditions is met:

- The increase in HHI is lower than 75 points.
- HHI is lower than 2,000 points.
- There is a decrease in ID.
- ID is lower than 2,500 points.

In the case of the five markets for personal retail consumers, even though the HHI would be higher than 2,000 points and its increase would be higher than 75 points, the Dominance Index would fall, a fact that could indicate that the merger may not affect competition.

In the particular market of short term credit for SME´s, the indexes would not meet any of the conditions considered in the criteria, because the HHI would be higher than 2,000 points; its increase would be higher than 75 points; the Dominance would be higher than 2,500 points and it would have an increase.

The Commission would investigate all the selected markets, not only the short term credit for SME´s market, even though the calculations of indexes would indicate a low possibility of anticompetitive effects in the markets for personal retail consumers. The CFC would have several concerns:

4 To calculate the Dominance Index (DI), let (qi/Q)x100 be the market share of firm i:

$HHI = \Sigma_i q_i^2$

$h_i = (100 x q_i^2)/HHI$

$DI = \Sigma_i h_i^2$

(a) Unilateral conducts

It would be necessary to analyze whether the transaction can create a dominant agent that could unilaterally increase prices or manipulate supply. Some of the aspects that would be scrutinized are:

- Is it possible that the merger can lead to an increase in fees and rates charged or offered by the banks to consumers? Is it possible to increase the scope for discrimination among consumers? How important are switching costs?

- Do the parties have a relevant position in companies that provide services to the banks? Could the access of competitors to some network facility, for example switches or ATM´s, be affected by the merger? Is there a chance of an unduly displacement of competitors?

(b) Coordination

Which are the consequences of the high concentration of the business (more than 60%) in only 2 banks? Can this lead to a dual structure, in which there is a duopoly that could decide not to compete, with small followers that accommodate in a second-level market?

(c) Oligopoly effects

The elimination of a competitor could relax intensity of competition in the markets, and also influence changes in rates and fees, without the need to be involved in coordinated behavior. The risk would be higher if the acquired party has a reputation of being a "maverick" that acts as a disruptive competitor.

NETHERLANDS

1. Introduction

In 2007, the Dutch Competition Act 1998 was amended, to change inter alia the standard by which merges are reviewed under Dutch competition law. This contribution outlines that amendment and discusses the degree to which the amendment led to a change in the way in which mergers are reviewed in the Netherlands.

2. From dominance to SIEC

Under section 41 of the Dutch Competition Act 1998, a concentration falling under section 34 of the Act would be permitted or prohibited on the basis of whether it created or strengthened a dominant position. This provision in the Dutch legislation reflected the provision in the EC Merger Regulation on which it was based.[1] The Netherlands explicitly chose to model the national legislation on the EC rules, and when the Netherlands Competition Act was adopted, the legislator specifically instructed the NMa to follow the case law of the EC Courts and the Commission's decisions on competition law issues.[2]

No particular problems were encountered in the application of the dominance test to mergers in the Netherlands in the period from 1998 to 2007. Dominance was already broadly defined to include collective dominance. An advantage of the dominance test was that it had a developed history of case law, which lent a certain legal certainty to deliberations.

In 2004 the Commission altered the test in article 2(2) of the EC Merger regulation, to the test of whether there is a significant impediment to effective competition, in particular as a result of the creation or strengthening of a dominant position.[3] When, in following years, amendments were being formulated for the Dutch Competition Act, it was considered to be opportune to change Dutch law accordingly. Like the Commission, the Netherlands has chosen to incorporate the old dominance test into the SIEC test. This ensures that legal certainty is maintained while creating a more transparent merger test.

The new test is considered sufficiently broad to encompass all relevant unilateral, multilateral and market-wide consequences of mergers. It closes any possible "gap" left open by the dominance test and does not seem to have created any legal 'uncertainty' in the Netherlands.

3. Differences between the dominance and SIEC tests

Both the dominance test and the SIEC test consider what the impact of the concentration will be on the market post merger. Where the dominance test places emphasis on whether the new undertaking will

1 Article 2(3), Regulation 4064/89 of 21 December 1989, O.J. L395 30-12-1989.

2 Memorie van Toelichting van de Mededingingswet (Explanatory legislative declaration adopted with the Dutch Competition Act). This obligation refers to substantive law, procedural law remaining a matter for the national courts.

3 Regulation 139/2004 of 20 January 2004 on the control of concentrations between undertakings, O.J. L24, 29-1-2004, p. 1-22.

gain a dominant position, the SIEC test focuses purely on the changes to the market wrought as a consequence of the concentration.

The emphasis of the new change in the law makes it more economics based. Nevertheless, it is considered to be consistent with how the European Court of Justice has defined dominance in merger cases. In practice, the same analytical approach is used to evaluate mergers under both tests, typically leading to similar outcomes. In the end, the influence the amendment has on Dutch competition law will ultimately be up to the courts to decide.

The Dutch test, which has been in place since 1 October 2007, now states that an application to for a license to merge "shall be refused if, as a result of the proposed concentration, effective competition on the Dutch market or a part thereof would be appreciably impeded, specifically as a result of the creation or strengthening of a dominant economic position".[4]

Both tests examine whether substantial competition remains following the closure of the concentration. However, the dominance test was not so clearly applicable in the case of a non-collusive oligopoly, a scenario which typically involves;

- the merger of the second and third largest players in the market,
- where the two are the closest substitutes, and
- the merged entity would obtain market power and be able to raise prices unilaterally.

The main difference with the new test and the old test is that the new test clearly covers cases where a maverick is removed from the market - as in the Commission's *T-mobile Tele-ring* case.[5] In practice, a similar approach is used to evaluate both tests, typically leading to the same outcomes. A certain shift towards an analysis, focusing less on market shares and market definition is evident in Dutch merger law. The removal of the legal "straightjacket" of having to prove dominance may enhance this and lead to a significant move to an effects-based approach.

4. Enforcement issues

The amendment to the merger test served as a clarification rather than as a major change. The NMa merger investigations have, in any case, never been grounded on a rules-based approach, but rather on a facts-based approach. If parties have a dominant position in the traditional rules-based sense, i.e. over 50%, the NMa has always nevertheless considered other factors such as buyer power, barriers to entry and the failing firm defence in order to assess what the actual effect would be on the market concerned.

Indeed, even prior to the amendment, dominance was not limited to companies with a market share exceeding 50%, but rather on the effect that a concentration would have, and whether actual, rather than perceived, dominance exists. The NMa might, for example, wish to investigate further if, following a concentration, an undertaking would achieve a 40% market share, while the other parties all had shares below 10%, and there were barriers to expansion. Although this is not a strict dominance test (above 50%), it does fall within the meaning of dominance as perceived by the NMa.

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4 Article 41, Dutch Competition Act 1998, as amended in 2007.

5 Commission decision T-mobile Austria/Tele-ring M 3916 26 april 2006.

The NMa change has not drastically shifted the emphasis placed on either the economic analysis or the legal characterisation. The NMa is of the opinion that the SLC/SIEC tests emphasize the need for both sound economic and legal analysis in any merger investigation.

The NMa has not experienced any differences in terms of rigour, flexibility or effectiveness of the competitive assessment. The NMa continues to look at such aspects as market shares, market structures, barriers to entry, innovation and countervailing buyer power under the new test, as it did under the old. Two cases illustrate some of the challenges faced by the NMa before and after the change in merger test. In the *Nuon-Reliant* case, which dates from before the legislative change, the NMa was of the opinion that the competition problem involved, could not be described in terms of market share, because that would not have been in accordance with the underlying economics.[6] The recent *Yellow Pages* case appeared to present a similar problem, although in that case, the NMa faced the additional issues of the two-sided nature of the market and some other case-specific issues.[7] Finally, the *KPN/Reggefiber* case shows how the new merger test allows room for the approval of mergers that promote innovation, in spite of, on the face of it, seeming to allow for the creation of a monopoly situation.[8]

4.1 Nuon/Reliant case[9]

Independent energy producers and (wholesale) energy traders Nuon and Reliant intended to merge. With respect to electricity production, Nuon was a relatively small player, while Reliant had ample production capacity.

The NMa cleared the merger by accepting the remedy that 90 tranches of 10 MW of Nuon's firm capacity would be auctioned. Important Dutch market parties like Nuon, Essent and Electrabel were excluded from these auctions. Nuon and Reliant objected to the remedy.

The NMa had based its decision, among other reasons, on an econometric 'supply function equilibrium' simulation model (SFE-model) of the Dutch electricity market. SFE-models are relatively complex and typically generate many equilibria.

The model's prediction was that the merger would lead to an average price-increase of ca. 10%, depending on those moments per day which allowed the parties to exercise (significant) market power. The SFE-model's forecast was that the merger would lead to a different set of equilibrium-solutions so that, compared to the pre-merger set of equilibria, the low-price equilibria disappeared. The 'median' price was thus higher and was presented as the predicted result.

The Court of Rotterdam ruled on appeal that the NMa had failed to prove that the merger would result in a dominant position with respect to electricity production. One important reason for this conclusion was that the Court did not accept the outcome of the econometric analysis as proof of dominance, but considered it to be merely an indication that prices could rise as a result of the proposed merger. In addition, the Court ruled that the NMa had not established what the pre-merger equilibrium price was and in what sense the proposed merger would lead to a higher equilibrium price.

6 NMa Case 3386 Nuon/Reliant Energy Europe, 8 december 2003.

7 NMa Case 6246 European Directories (Telefoon Gids)/Truvo Nederland (Gouden Gids),28 august 2008.

8 NMa Case 6397 KPN/Reggefiber, 19 December 2008.

9 NMa Case 3386 Nuon/Reliant Energy Europe, 8 december 2003.

All in all, the Court was not convinced that the SFE-model in particular, with its many equilibria, could forecast with precision whether prices would rise. Based on market share analysis the Court was therefore not convinced that a dominant position would be created.

On further appeal, the Dutch court of final instance, the Trade and Industry Appeals Tribunal (CBb) agreed with the Court of Rotterdam that the market share analysis did not point to a position of dominance. The Trade and Industry Appeals Tribunal also reasoned that the econometric model's prediction of price rises assumed dominance instead of being proof of dominance.

4.2 Yellow Pages Directory/Telephone Directory case[10]

In the Yellow Pages case, the two major publishers of telephone directories in the Netherlands applied for clearance to merge. In this case, dominance (and market shares) were only marginally used in order to determine the effect on competition, instead the decision was based on the likely level of competition following the merger. In this case, both undertakings provided business listings, telephone listings, business number and addresses as well as advertisements for businesses, both on paper and online.

The NMa surveyed advertisers in order to discover whether advertisers would switch to another medium should prices increase. It appeared that a very large part of the advertisers would stop advertising in case of a price rise by the merged company (free listing is always an alternative). Also, there appeared to be little substitution between the parties. Rather, substitution pressure seemed to come from alternatives, such as online advertising and local paper advertising.

In the NMa's view it was neither helpful nor advisable to define the relevant market as the market would have been defined according to a range of highly diverse substitutes. Instead, the new test allowed the NMa to refrain from determining whether dominance (based on market definition and market shares) existed, and enabled the NMa to focus on the fact that the parties felt very little pressure from each other given the disciplining effects of all the other alternatives. In addition by combining both guides, it appeared likely that advertisers would generally profit. This is because post-merger, those advertisers that had previously only advertised in one of the guides would now find a larger reach in a (merged) guide, while those advertisers who used to advertise in both guides, would now only have to contact one central point instead of two.

The merger was allowed to go through under the condition that the two guides would disappear and be substituted by one guide. This was in order to reap the advantages of one guide for both types of advertisers. An interested party has appealed this decision.

4.3 KPN/Reggefiber case[11]

In another recent case, the NMa approved the setting up of a joint venture by two Dutch companies to roll out fibreglass networks throughout the Netherlands. This joint venture may result in dominance, or even in the creation of a natural monopoly, for access to fibreglass (and copper) internet networks. The NMa was nevertheless able to clear the merger, by accepting remedies. These remedies ensure that competition is not significantly impeded and they meant that the NMa could approve a joint venture which would increase innovation in the field of communications.

At present, copper lines are still in use for the main telephone and internet network in the Netherlands. It is broadly accepted that the copper lines have limited capacity and eventually will be phased out. Given

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10 Case 6246 European Directories (Telefoon Gids)/Truvo Nederland (Gouden Gids),28 august 2008.

11 NMa Case 6397 KPN/Reggefiber, 19 December 2008.

the discussions within the EU, and given the activities of market participants, the copper lines will most probably be replaced by a network of fibreglass across the EU in the near future, which results in much higher transmitting capacities.

One of the companies to set up the joint venture is KPN, which is the former state-owned monopoly in telecommunications. KPN wants an upgrade from its current, relatively slow, copper-cable network, but lacks the knowledge of building the much faster fibreglass networks itself. Therefore it approached Reggefiber, which specialises in rolling out fibreglass networks.

The planned joint venture would be able to use Reggefiber's knowledge of building fibreglass networks while using KPN's customer database and thereby speed up the expansion of the fibreglass network. It would be relatively easy to find KPN/copper-using-customers willing to switch to the new network which would give those internet providers the possibility to offer all kinds of interactive services, because of the substantially increased download possibilities, thereby increasing competition on those markets.

The remedies proposed by the parties to the joint venture were such that the NMa, in close co-operation with the Dutch Telecom Regulator, was able to reach a satisfying result, developing a regulatory framework of the future fibreglass network that will guarantee access for other internet providers for a reasonable price.

4.4 Traditional 'market share analysis' versus effects-based approach

The cases described above illustrate that under both the new and the old merger tests, it was, and is, possible to complete a succinct analysis of the effects of the proposed merger, without needing to employ a standard market share test. The cases above were in fact all analysed using an effects based approach, whether they were cleared prior to the enactment of the new test or not. *Nuon/Reliant* was decided under the formerly applied dominance test, and the *Yellow Pages* and *KPN/Reggefiber* cases were decided under the 2007 SIEC case.

The Courts' decisions in the *Nuon/Reliant* case seems to point to the tension between an analysis of dominance in terms of market shares and qualitative analysis on the one hand, obviously preferred by the Courts, and (direct) econometric evidence of dominance on the other. Whether and in what way this is due to the presentation of the analysis by the NMa remains to be seen. The NMa has considered the possibilities of presenting the same type of econometric analysis used in the case of a proposed merger between Nuon and Essent. However, this could not be put to the test, due to the fact that both parties withdrew their merger plans in this case.

The same tension between a traditional market share analysis and a more direct approach to the effect of a merger (including taking account of efficiencies) was present in the case of *Yellow Pages*. Since an interested party has appealed the decision, this tension will now be put before the Courts. It will be interesting to see whether the fact that the SIEC merger test emphasises an effects-based approach will have any bearing on the Court's decision.

5. Broader policy considerations deriving from different merger standards

One of the concerns raised when an amendment was first proposed was that if the test is changed too drastically, the entire body of case law based on the dominance test would be lost and as a result, legal uncertainty would ensue. Another concern was that legal certainty might be affected by the imposition of the current merger test, in that a significant impediment may be harder to judge than a dominant position. These concerns were resolved by incorporating the SIEC test into the original dominance test.

6. International cooperation

Although it would be useful for all authorities to converge on one of the generic merger tests, this remains a sovereign matter and may be culturally determined. We have no examples of where differences in substantive tests for mergers have had any relevance in the context of international cooperation in a merger case.

In any case, even if each jurisdiction were to apply the same merger test world-wide, this will not and cannot ensure uniform results in the examination of merger projects by different authorities. The theory that both tests apply the same criteria underlines that the theoretical considerations and practical experiences of each jurisdiction will continue to influence the way in which concentrations are decided. International convergence is therefore perhaps better sought through more intense cooperation between authorities, not just at a management, but also at case-handler level. Undertakings can assist such co-operation by consenting to the exchange of confidential data between the authorities to which they have notified their concentrations.

7. Conclusion

In conclusion, it would seem that the same tensions between the use of a traditional market share analysis and a more effects-based approach exist under the new SIEC test, as they did under the formerly used dominance test. The broader phrase used in the new test would seem expressly to allow for a more economics, effects-based approach. Future mergers decisions and court judgments will indicate more clearly if this is indeed the case.

NEW ZEALAND

1. New Zealand's merger regime

The role of the Commerce Commission (the Commission) is to promote dynamic and responsive markets so that New Zealanders benefit from competitive prices, better quality and greater choice.

Mergers perform an important role in the market and can bring benefits to the economy such as enabling businesses to achieve economies of scale and scope. Many are subject to commercial time constraints. However, some mergers may alter the structure of markets in such a way as to lessen competition. The Commission balances the desire for quick decisions against the need to ensure that it has the best information, in order to make sound decisions that will ultimately benefit consumers in New Zealand.

The Commission is responsible for assessing applications for clearance from businesses seeking to acquire or merge with competitors. These applications are voluntary. If clearance is given, the merger is protected from proceedings for breach of sections 27 or 47 initiated by the Commission and/or any other parties under the Commerce Act 1986 (the Act) provided it occurs within one year of the clearance being granted (or confirmed by a court), and proceeds in accordance with the clearance.

2. New Zealand's substantive test for merger review

Section 66(3) of the Act requires the Commission either to clear or to decline to clear the acquisition referred to in a s 66(1) notice within 10 working days, unless the Commission and the person who gave notice agree to a longer period. However, because of the increased complexity of analysis that is now required, including that associated with increased concentration levels and increased globalisation, the Commission has extended its standard time frame to provide a target of declining or clearing applications within 40 working days. (Agreement by each applicant is required for these extensions.)

The Commission's approach to analysing the proposed acquisition is based on principles set out in the Commission's *Mergers and Acquisitions Guidelines*.[1]

Under s 66 of the Act, the Commission is required to consider whether the proposal will have, or would be likely to have the effect of substantially lessening competition in the market. If the Commission is satisfied that the proposal is not likely to substantially lessen competition (SLC) then it is required to grant clearance to the application. Conversely if the Commission is not satisfied it must decline. The standard of proof that the Commission must apply in making its determination is the civil standard of the balance of probabilities.[2]

The substantial lessening of competition test was considered in *Air New Zealand & Qantas v Commerce Commission*, where the Court held;

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1 Commerce Commission, *Mergers and Acquisitions Guidelines, January 2004*. http://www.comcom.govt.nz/BusinessCompetition/Publications/mergersandacquisitionsguidelines.aspx

2 *Foodstuffs (Wellington) Cooperative Society Limited v Commerce Commission* (1992) 4 TCLR 713-722.

> *We accept that an absence of market power would suggest there had been no substantial lessening of competition in a market but do not see this as a reason to forsake an analysis of the counterfactual as well as the factual. A comparative judgment is implied by the statutory test which now focuses on a possible change along the spectrum of market power rather than on whether or not a particular position on that spectrum, i.e. dominance has been attained. We consider, therefore, that a study of likely outcomes, with and without the proposed Alliance, provides a more rigorous framework for the comparative analysis required and is likely to lead to a more informed assessment of competitive conditions than would be permitted if the inquiry were limited to the existence or otherwise of market power in the factual.*[3]

In determining whether there is a change along the spectrum which is significant the Commission must identify a real lessening of competition that is not minimal.[4] Competition must be lessened in a considerable and sustainable way. For the purposes of its analysis the Commission is of the view that a lessening of competition and creation, enhancement or facilitation of the exercise of market power may be taken as being equivalent.

When the impact of market power is expected to be predominantly upon price, for the lessening, or likely lessening, of competition to be regarded as substantial, the anticipated price increase relative to what would otherwise have occurred in the market has to be both material, and ordinarily able to be sustained for a period of at least two years or such other time frame as may be appropriate in any given case.

Similarly, when the impact of market power is felt in terms of the non-price dimensions of competition such as reduced services, quality or innovation, for there to be a substantial lessening, or likely substantial lessening of competition, these also have to be both material and ordinarily sustainable for at least two years or such other time frame as may be appropriate.

The Commission applies a consistent analytical framework to all its clearance decisions. The first step the Commission takes is to determine the relevant market or markets. As acquisitions considered under s 66 are prospective, the Commission uses a forward-looking type of analysis to assess whether a lessening of competition is likely in the defined market(s). Hence, an important subsequent step is to establish the appropriate hypothetical future with and without scenarios, defined as the situations expected:

- with the acquisition in question (the factual); and
- in the absence of the acquisition (the counterfactual).

The impact of the acquisition on competition is then viewed as the prospective difference in the extent of competition in the market between those two scenarios. The Commission analyses the extent of competition in each relevant market for both the factual and the counterfactual, in terms of:

- Existing competition;
- Potential competition; and
- Other competition factors, such as the countervailing market power of buyers or suppliers and coordinated effects.

3 *Air New Zealand & Qantas Airways Ltd v Commerce Commission*, unreported HC Auckland, CIV 2003 404 6590, Hansen J and K M Vautier, Para 42.

4 *Fisher & Paykel Limited v Commerce Commission* (1996) 2 NZLR 731, 758 and also *Port Nelson Limited v Commerce Commission* (1996) 3 NZLR 554.

3. Legislative changes in the standard of review of mergers

Prior to 2001, s 47 of the Act prohibited mergers that would result in the acquisition or strengthening of a dominant position in a market.

On 26 May 2001, following the enactment of the Commerce Amendment Act 2001, the new merger test of substantial lessening of competition was introduced. The new legislation prohibits business acquisitions that have, or are likely to have, the result of substantially lessening competition in a market.

4. Policy rationale & aims of change of the new SLC test

In April 1999, the Ministry of Commerce conducted a review of the Act and released a discussion document, *Review of the Competition Thresholds in the Commerce Act 1986 and Related Issues* (Discussion Document). The discussion document highlighted specific concerns in respect of the dominance test under s 47.

The discussion document noted that New Zealand's dominance threshold was being narrowly interpreted by the Courts as being that of "high degree of market control".[5] The Courts appeared to be moving away from economic theory to a dictionary definition assessment of dominance. The discussion document highlighted that this Court formulated definition may be excluding from full scrutiny mergers that fall short of creating single firm dominance, but may nevertheless raise competition concerns. In particular, it did not allow the Commission to assess potentially harmful coordinated effects when it determined applications for clearance.

The Commission's decision on 12 February 1999 that gave *Transalta* a clearance for its proposed acquisition of 40% of Contact Energy illustrates the Commission's limited ability to assess coordinated effects under the Dominance test.[6] The Commission, noted in its decision that: 'the incentives for collusive behaviour may be strengthened by the proposed acquisition'. But, nevertheless states at paragraph 117:

> *…this exhibition of enhanced market power by a group of oligopolists would not be evidence of a dominant position having been acquired or strengthened…dominance under the Act refers to single firm dominance, and a dominant position in a market refers to a firm being able to exercise a "high degree of market control.*

The Commission also cited the fact that the dominance test limited its ability to consider coordinated effects:

> *Clearly, a merger between Contact and TransAlta would be very likely to trigger antitrust concern in the United States. However, the threshold …in that country under the Clayton Act is a "substantially lessening of competition", which is a lower threshold than the dominance threshold under the Commerce Act…The Commission is bound by the Commerce Act and by court precedents on dominance set under that Act.*

In March 2000, the Office of the Minister of Commerce Cabinet Paper ("Cabinet Paper") made a number of recommendations to the Cabinet Finance Infrastructure and Environment Committee with

5 *Commerce Commission v Port Nelson Ltd* (1995) 6 TCLR 406 (HC)

6 Decision 340, Transalta Corporation of Canada & Contact Energy Limited, 12 February 1999. http://www.comcom.govt.nz//PublicRegisters/ContentFiles/Documents/340.pdf

regard to s 47 of the Act.[7] The Cabinet Paper considered that the then merger control regime in New Zealand did not allow "the Commerce Commission or the courts to consider the full range of potentially anti-competitive mergers". In particular, the Cabinet Paper noted that as a result of case law, the Commission's safe harbours were much higher than that of other jurisdictions as illustrated in Table 1.

Table 1

Country	Safe harbour
New Zealand	The merged entity has less than a: – 40% market share; or – 60% market share where one other market participant has at least a 15% market share.
Australia	– The merged entity has less than a 40% market share; or – The combined market shares of the four largest market participants is less than 75% and the market share of the merged entity is less than 15%.
Canada	– The merged entity has less than a 35% market share; or – The combined market shares of the four largest market participants is less than 65% and the market share of the merged entity is less than 10%.

The Cabinet Paper stated that this "approach has been treated with derision by some overseas commentators". For example, Dr Douglas Greer had described New Zealand's merger law as the "Antipodean alternative" in which only "bone-crushing dominance" is prohibited".[8]

As a result, it was felt that New Zealand's merger regime was not capturing potentially anti-competitive mergers due to the high safe harbour market share tests. The Cabinet Paper recommended adopting the SLC test in order to allow the Commission to assess:

- harmful unilateral effects where merging parties do not have high market share under dominance; and

- harmful coordinated effects.

In addition, it was thought that the SLC test would also:

- provide clearer guidance to businesses on the types of behaviour that are likely to cause economic detriment; and

- ensure greater harmonisation in relation to merger tests with Australia and major trading partners with the ability to draw upon Australian precedent.

The Cabinet Paper noted, however, that the new SLC test might result in increased compliance costs and an initial period of uncertainty. In particular:

- more applications were expected; and

7 *Commerce Act 1986: Strengthening Merger Control*", Office of the Acting Minister of Commerce, Cabinet Finance, Infrastructure and Environment Committee Paper, March 2000.

8 *Commerce Act 1986: Strengthening Merger Control*", Office of the Acting Minister of Commerce, Cabinet Finance, Infrastructure and Environment Committee Paper, March 2000 at page 3, paragraph 11.

- there was some concern that the SLC test might deter efficiency enhancing mergers from occurring.

On balance, the Cabinet Paper considered that the benefits of the new SLC test and its ability to review more potentially anti-competitive mergers, and harmonisation with Australia, outweighed these concerns.

In a letter from Sara Lipanovic, Ministry of Economic Development, to the OECD dated 8 August 2002, the above policy reasons were confirmed.[9] The letter summarised the policy rationale for introducing the SLC test as follows:

- The SLC test recognises that high market share is not necessary for high market power;
- The SLC test allows consideration of co-ordinated market power; and
- The SLC test aligns New Zealand merger law with Australian and international best practice.

The letter also reasserted the concern over the way "dominance" had been narrowly interpreted by New Zealand courts, which had imposed a threshold based on a dictionary definition of a "high degree of market control". As discussed above, it was thought that this definition could be excluding from full scrutiny mergers that fall short of creating single firm dominance, but may nevertheless raise competition concerns.

The threshold change might be viewed as a solution to an old and undesirable Court interpretation of dominance. However, in *Southern Cross*, the Court of Appeal retracted the old interpretation of dominance. *Southern Cross* related to a Commerce Commission decision in September 2000 (i.e. before the 2001 amendments) to decline a merger of two medical insurance companies. While the case was heard after the 2001 amendments were enacted, the Court considered the merger under the former dominance test. The Court commented:[10]

> *…Dominance is the statutory concept which represents the economic concept of market power without sufficient constraint. … [M]arket participants will almost always possess some degree of market power as perfectly competitive markets are seldom, if ever, encountered except in textbooks.*
>
> *The crucial question is therefore not whether a particular firm has market power but whether such power as it has … is likely to or will enable it to act in an insufficiently constrained manner in the sense that it will have the ability to set prices or conditions without significant constraint from competitors or consumers. …. In practical terms, if market power is insufficiently constrained the firm possessing such power has the ability to increase its prices above marginal costs both sustainably and profitably.*

The Courts have continued to apply the above principles. The Commission's *Mergers & Acquisitions Guidelines* (issued in January 2004) echo the Court's approach. The Guidelines state that a lessening in competition is the same as an increase in market power and an increase in market power is only ever a concern if it is substantial enough to allow a party to raise prices and/or reduce quality to a substantial

9 Letter to Mr G. Hewitt, Competition Division, OECD (RCP 2/10/1/3).

10 *Southern Cross v Commerce Commission* (2001) 10 TCLR 269 p291, paras 67 - 68.

degree. It is therefore arguable that, in principle, there appears to be very little difference as to how the Courts approach both tests with regard to unilateral market power.

5. Effects & outcomes of new SLC test

5.1 Overview

Before the 2001 amendment the test was whether or not an acquisition would result in the acquisition or strengthening of dominance. ‘Dominance' was a certain high level of market power. On a market power spectrum with perfect competition at the left end, and total monopoly at the right end, 'dominance' was a particular point on the spectrum tending towards the total monopoly end. A merger which led to market aggregation, and therefore had the effect of reducing competition, would have the effect of moving the firm to the right on the spectrum. The size of the movement was not usually relevant, in itself, to the decision on whether or not to approve the merger - rather the issue was whether the movement took the firm from the left side of the 'dominance' point on the spectrum to the right side (i.e. was dominance acquired?). If the firm was already to the right of the 'dominance' point before the merger, the issue was whether the merger moved it further right (i.e. was dominance strengthened?).

Consequently before the 2001 change to the Act, a merger may have resulted in a market going from very competitive to only mildly competitive resulting in the potential for quite a big increase in market power and, therefore, prices. However the merged firm's significant move rightwards on the spectrum would not have been a reason for declining the merger if the firm remained to the left of the 'dominance' point.

With the change to the Act to the SLC test, a merger which results in a significant increase in market power will be declined a clearance, irrespective of where on the spectrum the firm starts or finishes.

5.2 The number of applications

Following the introduction of the SLC test in 2001, it was expected that the Commission would initially receive more applications for clearance, at least while the way the Commission and the Courts interpreted the new test became clear.

Table 2 below shows the number of application received from 1998 to 2008.

Table 2

Year	Number of applications
1998/1999	22
1999/2000	25
2000/2001	38[1]
2001/2002	22
2002/2003	25
2003/2004	19
2004/2005	18
2005/2006	20
2006/2007	18
2007/2008	24

After 2001, the Commission did not experience an increase in the number of applications for clearance. In fact, on average, a small reduction occurred. Under the post-2001 test, the number of applications has remained fairly steady with an average of about 21 per year.

It is considered that initial uncertainty about the new SLC test has been greatly reduced. The Commission continues to publish comprehensive written reasons for each of its decisions. This has occurred under both the old dominance test and the new SLC test. This has resulted in an extensive precedent database which not only outlines market definitions for a large number of industries, but also clearly sets out the Commission's analytical approach. The Commission published the *Merger & Acquisition Guidelines* in 2004 which also provides a detailed outline of the Commission's analytical approach to assessing applications for clearance.

As a result, businesses and their legal advisers are more able to self-assess whether a merger should be notified to the Commission, or whether the merger had little chance of receiving a clearance and would likely be in breach of the Act. [2]

The depth and length of the Commission's written reasons has increased since 2001. This reflects the fact that the Commission's analysis has become more sophisticated. It may also be due to the fact that the Commission considers more factors under the SLC test than under the dominance test. The most obvious change being that co-ordinated effects have become part of the Commission's analytical framework under the SLC test (discussed below).

1 The Commission received 10 applications for clearance in May 2001. The spike in applications is most likely due to businesses wanting their application determined under the dominance test, rather than the new SLC test which was introduced in June 2001.

2 There is no legislative requirement that businesses notify the Commission of a proposed merger. Acquirers have the option of proceeding with a merger without applying for an application for clearance.

5.3 Capturing more potentially anti-competitive mergers

The introduction of the SLC test was designed to capture more potentially anti-competitive mergers. This appears to be the initial view of applicants based on the surge of applications one month before the introduction of the SLC test. However the number of "problematic" mergers for which the parties may seek the comfort of a clearance does not appear to have increased after 2001.

Since the introduction of the SLC test, from 2001 to 2008, the Commission has declined 18 applications for clearance, an average of 12.4% overall. From 1998 to 2001, the Commission declined 14 applications for clearance under the dominance threshold, an average of 16.4% overall. Of the 18 applications declined under the SLC test, four would not have breached the dominance test safe harbours. It is possible that these four applications may have been cleared under the old dominance test.

It is difficult to come to any firm conclusions as to why the Commission's decline rate has slightly decreased since the introduction of the SLC test. For example, it may be the case that the Commission's large database of publically available decisions has lead to businesses simply not pursuing potential mergers because they anticipated a decline under the SLC test.

5.4 Coordinated effects

The SLC test was designed to allow for the consideration of the scope for coordinated effects. Of the 145 applications for clearance received under the SLC test, 53 (36.5%) have included some analysis of coordinated effects. Five of the 18 declines (27%) under the SLC test included analysis of coordinated effects.

The Commission's *Mergers & Acquisition Guidelines* provide a detailed summary of the Commission's approach to assessing coordinated effects. For almost all applications for clearance (excluding mergers leading to monopoly or near monopoly) coordinated effects would be considered as part of the analysis. The extent to which it is applicable will vary from case to case. Overall, co-ordinated effects are now part of the Commission's analytical framework for assessing mergers.

5.5 Unilateral effects & new safe harbours

The SLC test was also implemented to capture harmful unilateral effects in situations that may not have high market share under dominance test. The Commission's *Merger & Acquisitions Guidelines* contained new safe harbours to potentially capture such mergers. The *Guidelines* also discuss the possibility of non-coordinated market power resulting from a merger.

Under the SLC test, a business acquisition is considered unlikely to substantially lessen competition in a market where, after the proposed acquisition, either of the following situations exist:

- The three-firm concentration ratio (with individual firms' market shares including any interconnected or associated persons) in the relevant market is below 70%, the combined entity (including any interconnected persons or associated persons) has less than in order of a 40% share; or

- The three-firm concentration ratio (with individual firms' market shares including any interconnected or associated persons) in the relevant market is above 70%, the market share of the combined entity is less than in the order of 20%.

Unilateral effects were assessed under the old dominance test, and continue to be assessed under the new SLC test. Perhaps the largest change has been the focus on market shares. Under the dominance test, if the market shares were within the dominance safe harbours, other unilateral effects may not necessarily have been considered. Under the SLC test, market shares are a starting point in analysing existing competition. The Commission will almost always also consider conditions of entry, countervailing power and coordinated effects.

With the safe harbours lowered, one might expect there to be an increase in the number of applications received by the Commission. As discussed above, this has not eventuated. The Commission continues to assess the unilateral effects of a merger under the SLC test.

Both New Zealand and Australia have maintained the SLC test which reflects both countries' desire to harmonise commercial laws to create certainty for businesses. Both New Zealand and Australia actively participate in ICN merger working groups, which also facilitates consistency in each country's analytical approach to reviewing mergers.

6. Changes in the substantive assessment of mergers under the SLC test

The new SLC test introduced a different approach to the assessment of the market power threshold question under section 47. While the dominance test meant that the Commission was required to assess the market power of the proposed merged entity against a fixed level of market power ("dominance"), the new SLC threshold introduced a comparative assessment of the factual and counterfactual. The counterfactual is the Commissions pragmatic and commercial assessment of what is likely to occur in the absence of the proposed arrangement. The factual is the assessment of what would occur if the proposed arrangement was implemented.

6.1 The supermarkets case

In examining the Commission's changed approach to the assessment of mergers, the Supermarkets cases considered in 2001 provides a unique comparison of analysis under dominance and SLC. The first supermarkets application was assessed under the dominance threshold, while the second application was assessed under the new SLC test.

In 2002, the Ministry of Economic Development (MED) produced a paper titled "The New Section 47 Threshold, A Test of Substantially Lessening Competition: A Closer Look at how the Changed Merger Threshold is being Applied in Practice" (MED Paper). The MED paper provides detailed factual background and examination on the supermarkets case with regard to the Commission's changed analysis. The MED paper's analysis of the supermarket's case is attached as Appendix 1. The major changes to the Commission's analysis cited in the MED paper with regard to the supermarkets case are summarised below:

- The application of new safe harbours for the SLC test meant that the supermarkets case fell well outside the Commission's new 3 firm concentration ratios. Under the old dominance market share thresholds, the supermarkets were well within these limits.

- The new SLC analysis specifically included analysis of the potential scope for co-ordinated market power and collusion. The Commission's analysis concluded that that the merger would enhance this scope due to the elimination of a key competitor in the market increasing market concentration. Reducing the number of firms in the supermarkets market from three to two, in combination with other market characteristics, was seen to facilitate collusion and discipline. This was further supported by their conclusions that the retail supermarket industry is subject to high barriers to entry.

- Under the new SLC test, the Commission also assessed the scope for unilateral market power and applied the Bertrand Oligopoly Pricing Model, where the markets determine quantity. This model predicts that a merger of two significant-sized firms can lead to raised prices due to the loss of competition between these firms.

6.2 Changes to the Commission's basic competition analysis

Under both the dominance test and the SLC test, the Commission's basic analysis with regard to market definition, existing competition and barriers to entry has remained under both tests. Under the SLC test, the Commission takes a more holistic approach to assessing mergers under the SLC test. Along with detailed analysis of existing competition, barriers to entry and potential entry, the analysis often includes analysis of coordinated effects and economic modelling.

Since the introduction of the SLC test, the Commission's decisions have become more sophisticated in their analysis. The average length of the Commission's written reasons has steadily increased from 27 pages in 2001 to 43 pages in 2006/2007. The increased length of written reasons in the 2000s may reflect the fact the Commission was conscious of establishing a public accessible precedent database of SLC decisions.

In 2007/2008, the length of written reasons decreased due to the Commission introducing short form written reasons for some cases. Short form reasons reflect the fact that there is now a large database of SLC decisions available to potential applicants.

6.3 Coordinated effects

The analysis of coordinated effects used in the supermarkets case has continued. The Commission's *Merger & Acquisition Guidelines* contains a detailed description of the Commission's approach to assessing coordinated effects.

The Commission continues to assess coordinated effects, as appropriate. As stated above, since the introduction of the SLC test, 37% of the Commission's decisions have included analysis of coordinated effects. In some cases, the Commission has undertaken detailed analysis of coordinated effects.

As an example, the *Brambles* application considered the scope for coordinated effects.[3] The Commission declined to give clearance in the Brambles case. However, the High Court overturned the Commission's decision and directly considered coordinated effects.[4] The Brambles case is outlined below.

On 22 November 2002, Brambles New Zealand Ltd (Brambles), which owns CHEP (New Zealand) (CHEP), sought clearance to acquire the business and assets of GE Capital Returnable Packaging Systems Ltd (GECRPS). GECRPS trades in New Zealand under the name GE Weck-Pack (Weck).

Of relevance to this application, is CHEP's involvement in the supply, by way of a pooling system, of a range of stackable and nestable plastic crates, which are used in the fresh produce industry for the storage and transportation of fresh fruit and vegetables.

Until the merger of Progressive and Woolworths in 2002, CHEP was the preferred crate supplier to the Woolworths supermarket chain. CHEP now supplies crates to some growers supplying Foodstuffs

3 Decision 495, Brambles New Zealand Limited & GE Capital Returnable Packaging Systems Limited, 21 March 2003. http://www.comcom.govt.nz//PublicRegisters/ContentFiles/Documents/495.pdf

4 *Brambles New Zealand Limited v Commerce Commission* (2003) 10 TCLR 868

(Wellington) and Foodstuffs (South Island) supermarkets, and some growers supplying independent retailers. CHEP is the smallest of the three crate hire companies.

Weck also supplies reusable plastic crates for hire by way of its pooling system. Weck has a limited number of pallets; however, these pallets are solely used for transportation of its own crates and boxes. They are not available for general hire.

Prior to the merger of the Progressive and Woolworths supermarket chains in 2002, Weck was the preferred supplier of crates into Progressive stores. Weck has since become the preferred supplier to the merged entity. In addition, Weck has crates going to some Foodstuffs stores and also to independent retailers.

Fruit Case Company ("FCC") is a wholly owned subsidiary of Turners and Growers ("T&G") a produce wholesale and distribution company. FCC is the largest competitor in the reusable plastic crate hire market. FCC is the major supplier of plastic crates to growers supplying Foodstuffs supermarkets, and also to independent retailers.

The Commission was of the view that the lack of price transparency and large volume sales could undermine attempts by the crate firms, post acquisition, to successfully engage in coordinated behaviour. However, the ability to set clearly the boundaries for market sharing would offset the lack of price transparency. Therefore, the Commission considered the acquisition was likely to enhance the scope for co-ordinated market power via a potential tacit market sharing arrangement.

The Brambles decision was appealed to the High Court, which overturned the Commission's decision. Amongst other factors, the High Court disagreed with the Commission's conclusion that the acquisition would enhance the scope for coordinated market power. The High Court stated that:[5]

> *Collusion, whether explicit or tacit, is underpinned by some form of arrangement or understanding as to a desired outcome and some common perception of its terms. The effectiveness of any arrangement necessarily involves a monitoring/detection/disciplinary component, as a safeguard for the alignment of interest. Otherwise, the behaviour is unilateral (non-co-ordinated) and subject to whatever market disciplines prevail, absent collusion.*

The Court considered that the Commission's finding that a market sharing arrangement would be facilitated by the merger did not take full account of the complexity of market. The Court considered that even if a market sharing arrangement were reached, the conditions would exist for effective monitoring of such an arrangement and for disciplining any party in breach.

While the High Court did not agree with the Commission's analysis, it undertook similarly detailed analysis of coordinated effects to reach its conclusion. Overall, the Court recognised the implications of the change from dominance to the SLC test:[6]

> *The change in the Act's competition test for business acquisitions means that where markets are concentrated or will become so the Commission will consider both coordinated market power and unilateral market power. This contrasts with the approach under the previous dominance test where the analysis was, by definition, confined to questions of unilateral market power.*

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5 Ibid, at page 61.

6 Ibid, at page 53, paragraph 189.

Consequently, the assessment of the scope for coordinated effects has become a regular feature of merger analysis in New Zealand.

More recently, the Commission has undertaken significant analysis of the scope for coordinated effects in the following cases:

- New Zealand Diagnostic;[7]
- Sumitomo[8]; and
- Tegel.[9]

6.4 The counterfactual

As stated above, the new SLC test requires a comparative analysis, "What will be the competitive state of the market both with and without the merger?" Under dominance, a simple assessment of allowable market power post acquisition was undertaken. The counterfactual enables the Commission to better identify the market changes that result from the merger to see if there is a material change of circumstances that could lead to a reduction in the competitive constraints

The counterfactual test is applied in all of the Commission's analysis under the SLC test. The Courts similarly recognise the necessity of a comparative assessment for the SLC analysis:[10]

> *A comparative judgment is implied by the statutory test which now focuses on a possible change along the spectrum of market power rather on whether or not a particular position on that spectrum, i.e. dominance has been attained. We consider, therefore, that a study of likely outcomes, with and without the proposed Alliance, provides a more rigorous framework for the comparative analysis required and is likely to lead to a more informed assessment of competitive conditions than would be permitted if the inquiry were limited to the existence or otherwise of market power in the factual.*

The recent High Court decision in the High Court in *Woolworths & Foodstuffs v Commerce Commission* introduced a new multi-counterfactual approach where more than one likely counterfactual could be recognised.[11] The High Court stated:

7 Decision 559, *New Zealand Diagnostic Group Limited & Sonic Healthcare (New Zealand) Limited*, 29 September 2005. http://www.comcom.govt.nz//PublicRegisters/ContentFiles/Documents/PUBLIC%20NZDG%20Sonic%20Decision%20559_1.pdf

8 Decision 637, *Sumitomo Forestry Co Ltd & cater Holt Harvey Ltd (Building Supplies Division)*, 20 March 2008. http://www.comcom.govt.nz//PublicRegisters/ContentFiles/Documents/PUBLIC%20-%20Decision%20637%20-%20Sumitomo_CHH.pdf

9 Decision 658, *Tegel Food Limited & Brinks Group of Companies*, 22 October 2008. http://www.comcom.govt.nz//PublicRegisters/ContentFiles/Documents/Tegel%20-%20Decision%20No.%20658.pdf

10 *Air NZ Ltd and Qantas Ltd v Commerce Commission*, High Court, Auckland, CIV 2003 404 6500, 17 September 2007.

11 *Commerce Commission v Woolworths Limited & Ors* [2008] NZCA 276.

> *We consider that the correct approach is that we must assess what are the possibilities. We are to discard those possibilities that have only remote prospects of occurring. We are to consider each of the possibilities that are real and substantial possibilities. Each of these real and substantial possibilities become counterfactuals against which the factual is to be assessed. If in the factual as compared with any of the relevant counterfactuals competition is substantially lessened then the acquisition has a 'likely' effect of substantially lessening competition in a market.*

The change in the Court's approach to assessing the counterfactual reinforces the principle that the SLC is a comparative analysis. The analysis now seeks to identify all likely counterfactuals. It may include an assessment of the least favourable counterfactual, even if it may not be the most likely counterfactual.[12]

The multiple counterfactual test formulated by the Court raises a number of potential issues for the Commission to consider under the SLC test. Dr Mark Berry highlights a number of potential difficulties with the multiple counterfactual in his paper *Merger Analysis of Failing Firms or Exiting Firms* (20 February 2009) including:

- There is the risk that supporters and opponents of mergers may make flawed predictions, or engage in gaming in the views that they express, and the reliability of this evidence may be difficult to assess;
- The multi-counterfactual approach does not focus on the most likely counterfactual - so there may be cases where an unfavourable counterfactual which is less likely to occur than a more likely counterfactual, leads to false negatives (i.e., the possibility of the Commission wrongly declining an application); and
- There may be the potential incentive for decision-makers who wish to block a merger to utilise and embellish upon the least favourable counterfactual.

6.5 Efficiencies

Under the former dominance test, the Commission rarely considered the scope for efficiencies in its analysis of mergers. Similarly, when considering mergers under the SLC test, the Commission has rarely focussed on the scope for efficiencies. New Zealand does not have a two-stage clearance as some jurisdictions do, and the analysis of claims for efficiencies that would result from mergers might more appropriately be undertaken under the authorisation process (section 67 of the Commerce Act).

However, the Commission's *Mergers & Acquisitions Guidelines* contain a brief section on when the Commission will consider efficiencies, and the recently revised clearance application form contains a new section that allows applicants to identify efficiencies if appropriate.

6.6 Divestments

Under both the old dominance threshold and the new SLC test, the Commission may accept a written undertaking by the applicant to dispose of assets or shares. If an undertaking is accepted, it is deemed to form part of an application for clearance. Under the Act, the Commission is only able to consider structural undertakings, and not behavioural undertakings such as price caps. The Commission receives an average of 1 application for a clearance per year that includes divestments.

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12 Dr Mark Berry, *Merger Analysis of Failing Firms or Exiting Firms* (20 February 2009) at page 13.

The Commission will publish divestment guidelines in 2009 which will outline the Commission analytical framework and processes for assessing divestment undertakings.

6.7 Economic analysis and modelling

The 2001 change to the merger test in the Act from dominance to substantial lessening of competition has required the Commission to undertake a more complex analysis of market power in an oligopolistic setting. Accordingly since that time the Commission has increasingly applied modelling and quantitative techniques in its merger analysis. These techniques include merger simulation.

The Commission initially developed its merger simulation capacity by building a Bertrand model (BERT) devised by Epstein and Rubinfeld which uses a technique called PCAIDS (Proportionately Calibrated Almost Ideal Demand System). In using the model the Commission seeks to predict post-merger price increases using brand market shares, market price elasticity of demand, and the own-price elasticity of one of the brands in the market.

The Commission has also developed and used a simple Cournot merger simulation model in cases where the market was characterised by Cournot-type competition (assuming, among other things, that the market demand function is linear, firms have constant marginal costs, and so on).

The Commission has used the output of its merger simulation as a complement (rather than as a substitute) to its fact-based competition analysis of the case before it. The Commission considers that merger simulation can enhance the understanding of the problem at hand, it can provide a robust framework to enable a discussion of the possible consequences of various possible decisions, it can make transparent the values of the key parameters and assumptions used, and it can provide a base for helpful sensitivity analysis.

However, on the down side the simplifying assumptions inherent in the merger simulation can raise doubts about its realism, and the value (and limitation) of the simulation have not always been fully understood by New Zealand Courts.

Examples of merger cases where merger simulation modelling have been used by the Commission include:

- *Progressive Enterprises/Woolworths* (Decision 448 of 14 December 2001);
- *Cedant/Budget* (Decision 482 of 7 November 2002);
- *Hancock/Carter Holt Harvey* (Decision 588 of 27 September 2006);
- *Carter Holt Harvey/Lakesawn Lumber* (Decision 602 of (May 2007); and
- *Sumitomo Forestry/Carter Holt Harvey* (Decision 637 of 26 November 2007).

7. Broader policy considerations under the new SLC test.

7.1 The risk of over enforcement

Based on the Commission's experience, it appears unlikely that the change to the SLC test has led to over-enforcement. This is based on:

- applications having remained fairly steady under both tests;
- the rate of declines having slightly decreased;
- the low number of merger decisions being appealed; and
- The Commission only pro-actively investigating around 1-2 completed mergers per year for which applications for clearance had not been received.

7.2 Legal certainty & the SLC test

As discussed above, the Commission's large body of accessible decisions has led to businesses having a high degree of certainty with regard to the Commission's approach to assessing mergers.

In addition, the Commission ensures certainty and transparency by encouraging:

- merger parties to contact the Commission via the Manager of the Market Structure Group as early as possible to inform the Commission about potential applications for clearance. This enables Commission staff to plan ahead and assign staff, which can help to expedite the assessment of an application for clearance; and
- applicants to engage in pre-notification discussions with Commission staff with the aim expediting the assessment of an application for clearance when it is filed with the Commission.

8. International Cooperation

The Commission is an active member of the International Competition Network (ICN). The ICN is moving toward convergence of merger review for all of its members. The Commission supports this initiative.

APPENDIX

[Excerpt Only]

April 2002

Rory McLeod

Manager, Competition Policy Team

<u>THE NEW SECTION 47 THRESHOLD – A TEST OF SUBSTANTIALLY LESSENING COMPETITION:</u> A CLOSER LOOK AT HOW THE CHANGED MERGER THRESHOLD IS BEING APPLIED IN PRACTICE

…

The Progressive Saga

Background/Summary of the Application

On 25 May 2001, immediately prior to the new threshold coming into effect, the Commerce Commission registered a notice pursuant to Section 66(1) of the Commerce Act 1986 in which clearance was sought by Progressive Enterprises Limited for the acquisition of all of the shares in Woolworths (New Zealand) Limited and/or its immediate holding company Denstree Corporation Limited.

Progressive Enterprises Limited is one of five major players in the New Zealand supermarket industry, owning about 105 stores (24%) under the Foodtown, Countdown and 3 Guys labels. The others include Woolworths, with 81(18%), and the three Foodstuffs companies, Foodstuffs (Auckland) Limited, Foodstuffs (Wellington) Limited, and Foodstuffs (South Island) Limited, with about 163 (58%)[1].

The Commerce Commission, on the basis of what they considered was the correct reading of sections 17 and 18 of the Interpretation Act 1999, applied the old section 47 threshold of dominance, which was in force the day the application was lodged. They cleared the application on 13 July 2001 subject to the divestment of two supermarkets in areas where the Commission considered there would otherwise not be sufficient levels of competition[2].

1 Woolworths operates Woolworths, Big Fresh and Price Chopper Groups; Foodstuffs operates under New World, Pak 'N' Save, 4 Square and Write Price banners.

2 Te Awamutu and Birkenhead, Auckland.

Foodstuffs (Auckland) Limited, Progressives major competitor, appealed this decision. The High Court upheld this decision, but the Court of Appeal, by a majority of four to one, subsequently ruled that the new "substantial lessening of competition" test should have been applied by the Commission[3].

On 24 October 2001 the Commission registered Progressive's new application. The Commission then declined Progressives application to acquire Woolworths on December 13 2001 on the grounds that they could not be satisfied that the acquisition would not lead to a substantial lessening of competition in the retail supermarket market.

What changed?

The basis of this finding was the Commerce Commissions concern regarding the new section of their analysis on the potential scope for co-ordinated market power and collusion. They were concerned that the merger would enhance this scope due to the elimination of a key competitor in the market (Woolworths) increasing market concentration. Reducing the number of firms in the supermarkets market from three to two, in combination with other market characteristics of the aforementioned checklists, was seen to facilitate collusion and discipline. This was further supported by their conclusions that the retail supermarket industry is subject to high barriers to entry, and the market mature.

A closer look at the analysis

In both decisions, the Commerce Commission adopted the same market definitions for consideration. It broke the supermarket industry down into wholesale and retail. While the national market for the wholesale supply of groceries was not a concern largely due to current competitors providing "important alternative outlets for wholesale suppliers of groceries"[4], the "market for the retailing of grocery items in supermarkets, incorporating regional markets not less than 5km in radius" was of concern. The acquisition would have involved Progressive controlling 42% of national retail supermarket shopping compared to the Foodstuffs company's combined 58%. The Commission considered the case using the status quo as the counterfactual (Woolworth's operating as an independent player).

Under the dominance threshold the Commission assessed that Foodstuffs would have provided a real competitive constraint for Progressive, including its ability to expand, making sure that Progressive would not, or would not be likely to, acquire or strengthen a dominant position in the relevant markets. They conducted their analysis for the key geographic markets of concern (those outside safe harbours) considering market shares, constraints on existing competition, non-supermarket competition, and potential competitors. In the few areas where Foodstuffs did not have a significant market presence, divestment undertakings offered somewhat alleviated concerns, or it was considered that the scope for potential "cross-border competition" addressed these concerns satisfactorily.

[3] In fact 11 applications were lodged with the Commerce Commission before the law change but decided after. It was the Governments intention that such applications would be considered under the old merger threshold. The Parliamentary Counsel Office, the Ministry of Economic Development, and the Commerce Commission all thought the Interpretation Act would accomplish this, and so no explicit transitional provisions were required in the legislation. In order to avoid further problems of this nature an Urgent Bill, the Commerce (Clearance Validation) Amendment Act 2001, was introduced to Parliament by Government deeming the old law to apply to all affected applications except Progressive. The exemption was to acknowledge the constitutional principle that "litigants should be able to benefit from the fruits of their actions", and the undesirable precedent to go against a Court of Appeal ruling.

[4] Also, but to a lesser extent, the influence some large manufacturers have over suppliers. Co-ordination is not a concern following the checklists, for example there is lack of price transparency and larger and less frequent sales compared to retail, some vertical integration, and different firm sizes.

Notably, the Commission assessed high barriers to entry on consideration of the difficulties associated with accessing suitable supermarket sites, obtaining resource consents, and the significant economies of scale and critical mass involved in providing retail supermarket outlets. This, in combination with the lack of prospects for new entry, resulted in the Commissions resolve that they could not rely on potential competition to constrain market power obtained should the entity merge. It placed limited weight on the ability of specialist and convenience stores to provide a competitive constraint.

Under the new test the assessment of a material increase in the potential for co-ordinated market power was sufficient grounds to decline the application. Unilateral market power was assessed to be enhanced, but ambiguous as to whether this was sufficient enough to substantially lessen competition. The Commission noted that there was no need to make this decision in order to decline.

The Commission's analysis focussed on the oligopolistic nature of the supermarket industry and the largely undifferentiated range of products and services they provide. In assessing the scope for unilateral market power they applied the Bertrand Oligopoly Pricing Model, where the markets determine quantity. This model predicts that a merger of two significant-sized firms can lead to raised prices due to the loss of competition between these firms. Firm losses due to rises in price are smaller since some of the switches in brand are now internalised. The assumption of undifferentiated products increases the impact of the increase in market power. When products are more standardised it is easier to come to agreements on price. The Commission considered this probable in the case of Progressive, where the number of players reduces from 3 to 2[5].

In considering the scope for the exercise of co-ordinated market power, as aforementioned, the Commission looked at both explicit and tacit collusion as a means to substantially lessen competition. The Commission concluded that the merger would materially enhance the potential for collusion, having considered the collusion and discipline checklists in turn.

The acquisition lead to higher seller concentration, well outside safe harbours (with a 100% 3 firm concentration-ratio!). This was particularly weighty given the market shares would become significantly more evenly balanced; making it more likely firms would be able to recognise mutual gains. Reducing the number of players from 3 to 2 makes it easier to monitor each other's behaviour, including pricing. High barriers to entry indicated that profits from collusion would be able to be sustained for some time before entry ate them away. Taken together, grocery items were considered price inelastic in demand. The high level of price transparency and already close monitoring of each other indicated the strong potential for tacit collusion. The Commission noted that firms seem to be more concerned with maintaining relative prices with one another as opposed to pricing according to marginal costs.

Discipline in the industry was considered to be facilitated by high seller concentration, mature markets, the lack of vertical integration, similar costs, and price transparency. The Commission concluded discipline to be likely post-merger, and even already exist to a certain extent in the supermarket industry - Prices are monitored and set on a weekly basis and deviations can be identified and reacted to easily. The market appears to be conducive to "leader-follower" tacit collusion, the divestments not relieving this concern. Further, the Commissions evaluation of the presence of high barriers to market entry and application of the 'let test', as before, meant that there was little potential for new competitors. This was confirmed on consultation of possible de novo entrants.

In terms of other competition factors, they did not consider Woolworths as a vigorous or maverick competitor, and recognised some efficiency gains, but placed limited weight on them.

5 Especially when take into account the Commission views supermarkets as one of those sectors where a lower threshold for price increases (than 5%) may be more appropriate.

POLAND

1. The substantive test for merger review

In compliance with the Act of 16 February 2007 on Competition and Consumer Protection the concentration test is included in art. 18. Pursuant to this provision: *"The President of the Office shall, by way of decision, issue consent to implement a concentration, which shall not result in significant impediments to competition in the market, in particular by the creation or strengthening of a dominant position in the market"*. Upon analyzing this provision it is possible to conclude that it is the test of significant impediment to competition. It is a two-step test. In the first step the influence of concentration on the market is analyzed. The Office analyzes the extent of the impediment to competition by the merger. In the second step it is examined whether an entrepreneur will achieve a dominant position or whether it will be strengthened. The introduction of the SIEC test constitutes an important process change in the merger analysis. It is no longer necessary to prove the dominant position for the purpose of possible blocking of concentration. In the new test the whole market environment of the entrepreneur and also influence on competitors, contractors and consumers is being analyzed to a much greater extent. In the dominance test, the central point was the entrepreneur and the aim of the analysis was to prove his dominant position. In the course of the examination of the merger the Polish competition authority analyses possible efficiencies connected with the studied concentration. In concentration cases hitherto entrepreneurs very rarely resorted to efficiency defence. The policy of the Polish competition authority within the scope of accepting the existence of such efficiencies is very cautious.

Analysis of judicial decisions provides arguments that for the purpose of interpretation of the concept of significant impediment competition test the following circumstances are taken into consideration (the list is not exhaustive):

- Market structure – market shares of an entrepreneur and his competitors, changes of market shares over time,
- Concentration of suppliers, the existence of significant purchasing power on the part of the contractors,
- Entrance and exit barriers, possible new entrances and exits of the market,
- The value and changes of market concentration ratio and HHI,
- Market maturity, the role of innovativeness and market transparency,
- Symmetry between competitors,
- Homogeneity of the sold goods and services,
- Links between competitors and other mechanisms conducive to cooperation (collusion).

The evidence of growing economization of the SIEC test is the acceptance and regulation of the specific efficiency defence problems. Apart from the usual analysis of the effects of concentration and possible related efficiencies, the Polish competition authority may take into consideration some special effects of the qualified efficiency gains of entrepreneurs. Pursuant to art. 20 section 2 point 1 even when concentration leads to the significant impediment to competition it may be implemented (cleared) *if it contributes to economic development or technical progress*. Therefore during merger review a party may try to prove the existence of these special efficiencies. The burden of proof lies upon the entrepreneur. The standard of proof in such a case is exceptionally high and is connected with the need to prove beyond any doubt the increase of consumer welfare. Obviously efficiencies of this type will only relate to special markets while the achieved benefits should relate to the widest possible group of consumers. It is justifiable to assume that possible significant impediment to competition should be of temporary nature and the entrepreneur should prove the existence of possible conditions for the market to come back to the equilibrium in the future. Despite the fact that this provision has been in force for many years it has never been the basis for examining a single case.

Furthermore, it is worthwhile to point out that the significant impediment competition test is supplemented by the public interest test. Pursuant to art. 20 section 2 point 2 of the Competition Act: *"The President of the Office shall issue, by way of a decision, consent for the implementation of the concentration as a result of which competition in the market will be significantly impeded, in particular by the creation or strengthening of a dominant position, in any case that the desistance from banning concentration is justifiable, and in particular it may exert a positive impact on the national economy".* It is necessary to stress however that this test is extremely rarely used. Not even one case has been examined on the basis of this test in the years 2008 and 2009. In the previous period the total number of cases did not exceed 5[1]. With the public interest test the burden of proof rests entirely on the entrepreneur while the standard of proof is exceptionally high.

The test used at present is fully adequate to the needs of counteracting anticompetitive concentrations of entrepreneurs and for achieving goals of the Competition Act. It comprises both the situation when concentration results in unilateral and coordinated effects. It means that there is a possibility of counteracting the creation of both single and collective dominant position. It is worthwhile to stress at this point that in any of the cases examined so far, the possibility of creating a collective dominant position as a result of the implementation of the concentration and the existence of coordinated effects has not been established. Therefore, in Polish competition law, the concept of a collective dominant position is still a theoretical concept and there is no case law in that scope. Similarly no guidelines related to how this concept might be understood by the Polish competition authority have been issued.

2. Legislative changes

The history of antimonopoly law in Poland is relatively short. The first antimonopoly act adjusted to the principles of free market economy was the Act of 24 February 1990 on counteracting monopolistic practices[2]. The Act is an example of an initial stage of development of competition legislation. Even its name suggested that the main focus was shifted on counteracting the anti-competitive practices of entrepreneurs and in a lesser degree on the full protection of competition. It was confirmed in the preamble to the Act, where it was indicated that *it had been passed for the purpose of ensuring the development of competition, protection of business entities exposed to the use of monopolistic practices and the protection of consumer interest.* It meant that the basic function of the Act was *to counteract monopolistic practices of business entities and their unions* (art. 1). Despite that in the Act there were some provisions related to

1 These cases concerned exclusively state-owned enterprises from the sectors having strict links with national security, i.e. energy, fuel and military.

2 Journal of Laws No. 14, item 88.

merger control. Chapter 3 of the Act which regulated the administrative influence on the creation of organizational structures of business entities was devoted to this problem. The key provision was art. 11 section 1, which provided that *the intention to merge and restructure business entities is subject to notification of the Antimonopoly Office. The intention to establish a business entity is subject to notification in the case this entity could achieve a dominant position on the market or one of the parties constituting the new entity holds such a position.* The structure of this provision is interesting because alongside the introduction of the concentration test it simultaneously determined the scope of obligation related to concentration notification.

The concentration test included in art. 11 was a dominance test. What is important this test consisted of only one part and did not contain any additional provisions. In its shape it reflected the state of antimonopoly law development of the time. It principally concentrated on the market structure focusing on the premise of dominance. Simultaneously it is necessary to emphasize that the Act had its own definition of a dominant position and its qualified form - the monopolistic position. Pursuant to art. 2 point 7 the Act adopted that *an entrepreneur has a dominant position if this entity has no essential competitors on the domestic or local markets; it is assumed that a business entity has a dominant position if its market share exceeds 30%.* It has a monopolistic position when an entrepreneur *has no competitors on the domestic or local markets*[2]. Discussing the dominance test in the Act of 1990 it is necessary to remember about the social and economic environment. At that period Poland was undergoing an economic transformation from monopolized to free market economy. In that situation the main task of the antimonopoly office was to demonopolize the economy and change its structure. And in these circumstances adopting a simple dominance test and concentrating in the analysis on ensuring competitive market structure is not surprising.

It is worthwhile to point out that the dominance test was not the only test used in the Competition Act. The act contained also the special significant impediment competition test. In compliance with the adopted solution some forms of entrepreneur concentration were treated as monopolistic practices. Pursuant to art. 4 section 1 point 3 of the Competition Act *the acquisition of shares in companies or assets of business entities was deemed monopolistic practice if such acquisition could result in significant weakening of competition.* What is more the act also prohibited certain so called personal concentrations specifying that *performing by the same person a function of a director, member of management board, supervisory board or audit committee in competing business entities of which at least one has market share of over 10%* (art. 4 section 1 point 4) was a prohibited monopolistic practice. These provisions were amended in 1995 and all entrepreneur concentration activities were evaluated under the provisions concerning the control of concentration.

In spite of the changes introduced in 1995 the concentration assessment tests have remained dualistic. In compliance with the new provision of the Competition Act, i.e. art. 11a section 4 the Polish competition authority could give a decision:

(c) prohibiting mergers of business entities if as a result of such mergers the entities would obtain or strengthen a dominant position on the market,

(d) prohibiting the assuming by the same person of the functions enumerated in art. 11 section 2 point 5 if it were to result in significant weakening of competition; it is assumed that significant weakening of competition takes place if combined market share of these entities exceeds 10.

Nevertheless, despite this dualism the basic concentration test used in the practice was the dominance test.

2 Both presumptions were rebuttable.

Another change took place together with the passing of another act on competition and consumer protection, i.e. the Act of 15 December 2000 on competition and consumer protection[3]. Pursuant to art. 17 of this Act *the President of the Office shall, by way of decision, issue consent to implement a concentration, which shall not result in the creation or strengthening of a dominant position in the market and which shall not result in significant impediments to competition in the market.* Formulating the test in this way meant its modification. It was no longer a simple dominance test but became a two-step dominance test patterned on the solutions included in the Regulation 4064/89. It was a consequence of the desire to make the test more flexible and create place for the extended economic analysis based on the effect based approach. What is important, due to the fact that the Act was passed in the pre-accession period an important argument in favour of changing the test was the tendency towards the unification of concentration assessment tests in Poland and the European Union.

Similar motivation accompanied the change introduced in 2004. As a result of amending the Competition Act the dominance test was replaced with the significant impediment competition test in a version which is obligatory at present. As indicated in the narrative memorandum for the draft of amending act the reason for introducing the SIEC test was the need to reverse the order of the conducted analysis of the assessment of concentration effects. Influence of concentration on competition is to be examined first and only then it is possible to examine if an entrepreneur will achieve a dominant position. Thanks to this method of analysing concentration it is possible to extend the analysis and make it more flexible. As mentioned above an important reason for the introduction of changes was the desire to unify the concentration assessment test in Poland and the European Union.

At present there are no plans for the introduction of any other legislative changes within the scope of the concentration assessment test.

3. Enforcement issues

Changing the test means more flexible application of provisions governing merger control. On the one hand it is possible to say that the introduction of the SIEC test may make it easier to block concentration because it is no longer necessary to prove full independence of an entrepreneur from competitors and consumers. Still it is rather a theoretical possibility. Empirical data shows that the policy of OCCP has not become stricter and the number of blocked concentrations has not increased and remained at the same low level. On the other hand the introduction of the SIEC test imposes more obligations on the Polish competition authority. Namely because the new test compels to conduct more detailed market analysis as well as an extensive economic analysis in many cases which previously would have been quickly closed.

Taking into consideration OCCP practice before 2004 it is possible to draw a conclusion that despite the two-step test in reality only the first part related to dominance was important. Analysing the decisions of the Polish competition authority it is possible to notice that if in the course of the analysis it had been established that an entrepreneur would obtain or strengthen his dominant position other aspects of the case had not been examined. The situation changed only after the introduction of the significant impediment competition test. Having said that it is necessary to point out that this change does not mean that the decision output related to the dominance test has become outdated. On the contrary it has preserved its topicality and is still used. In the case of horizontal mergers, analysis usually leads to the question of dominance. While the influence of the new test is to be seen in such a way that new areas for analysis have been opened for the Polish competition authority which in an essential way supplemented the analysis of the effects of concentration and gave them a new form.

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[3] Journal of Laws No. 122, item 1319.

What is interesting the adjustment of decisions to the changed test took some time. It is very well visible on the example of two decisions related to mergers between chains of supermarkets. Comparing the decision Ahold/Careffour issued in 2007 and JMD/Plus Discount issued in 2008, each relating to the same market and raising similar competition concerns, the analysis was different. While in the first of the above mentioned decisions the reasoning concentrated on proving the dominant position in the case of the second one the reasoning mainly concentrated on the degree of threats towards competitors on local markets. These cases show that even when adopting the SIEC test a change of practice in giving decisions takes quite a lot of time and that skilful use of the dominance test does not have to bring other effects than the significant impediment competition test.

The introduction of the new test has had no special impact on the issuing of conditional decisions and the way of designing remedies. Both before and after 2004 OCCP tried to impose mainly behavioural conditions and only in justified cases it decided to impose structural conditions. It is also possible to indicate that imposing the type of conditions depends rather on the branch than on the test used. For instance in the case of mergers of the chains of supermarkets Carrefour/Ahold or Jeronimo Martins/Plus Discount structural conditions were applied, i.e. the order to sell a certain number of shops. In the case of the merger of vodka manufacturers, CEDC/Polmos Białystok, behavioural conditions were accepted.

4. Policy issues

Changing of the test did not have a significant impact on the formal scope of concentration control in Poland. On the one hand it was possible to eliminate simple issues which did not create any market problems, on the other hand thanks to the new test it was also possible to review new forms of threats which may result from concentrations. In particular it relates to some forms of oligopolies (non-collusive oligopolies). It is possible to observe that from the point of view of the course of antimonopoly proceedings the scope of proceedings to take evidence has been extended. Empirical research and in particular consumer and contractor research is used in a greater scope. It is necessary because of the need to conduct full market analysis and go beyond simple market share. A good example is the concentration of two Polish beer manufacturers Kompania Piwowarska/Browar Belgia. In this case the Polish competition authority had to go beyond as it could not focus exclusively on market shares and market structure. The nature of threat lied in the significant strengthening of Kompania Piwowarska's market strength in relation to contractors and competitors. Wide-scale market research revealed that the concentration would have mixed effects for the consumers. On the one hand the choice of beer would become smaller in particular as far as the cheapest beer is concerned; on the other hand the availability of the Kompania Piwowarska main brands would improve. In the end, the OCCP decided to clear the transaction.

However there is no simple correlation between changing the concentration test and the antitrust policy. These issues remain autonomous in relation to each other and it is difficult to indicate in this case any significant dependencies. Similarly it is difficult to unambiguously evaluate the influence of the concentration test on legal certainty and possibility of predicting the result of the proceedings. On the one hand the formalism of the simple dominance test made possible a relatively simple assessment of the effects of a given concentration and its influence on market structure. However, on the other hand the SIEC test gives entrepreneurs a better chance to prove that they are right and obtain a favourable decision. Nevertheless it is necessary to admit that the need to expand the proceedings to take evidence might lead to greater difficulties in predicting the outcome of the proceedings, which in particular relates to new markets and collecting data unavailable to the participants of the concentration.

5. International cooperation

According to OCCP, the unification of concentration assessment tests depends exclusively on the decision of national competition protection authorities. OCCP decided to introduce such a change wishing to make its policy more flexible and aiming at full harmonization of the test used in Poland and by the Commission. In the opinion of OCCP the choice of the test *per se* should not have a significant influence on international cooperation regarding the matters of concentration. It is worthwhile to point out that even in the case of using different tests; results of analyses are as a rule convergent. Besides, the fact that a given test has been formed differently does not need to mean a different use of the test itself and different interpretation of the used concepts. Skilful use and proper interpretation of the dominance test cause that there are no indicative differences between this test and the significant impediment competition test. While it is necessary to point out that using the public interest test might lead to indicative differences in the course of examining the same concentrations by different national competition protection authorities. The public interest test gives administration bodies a wide scope for interpretation and introduces political elements to economic analysis. Deciding a case on the basis of this test might lead to cross-border concentration effects. That is why it is necessary to adopt an exceptionally careful approach to the use of the public interest test in relation to concentration as it might cause such effects. The policy adopted by OCCP might be an example of such a skillfully devised method of finding balance between the values of competition and public interest.

SPAIN

1. Introduction

Since merger review was first introduced in the Spain under the 1989 Competition Act[1], mergers have been assessed taking into account whether the transaction may hinder the maintenance of effective competition in the market. Therefore, **from the beginning, the test applied in Spain has been closer to the SLC test than to de dominance test**, since the analysis is not solely based on the creation or reinforcement of a dominant position.

It is true, however, that most of the prohibited or conditioned mergers in the past were cases where dominance was the issue. Nevertheless, through the years, the standard for merger review in Spain has evolved to a more economic-based approach, more coherent with the flexible test provided in the 1989 Competition Act and especially with the trend which is being followed by most developed countries.

Recently, the Spanish competition regime has undergone an ambitious reform which culminated in the adoption of a **new Competition Act**[2] that came into force in **September 2007**. As far as the standard for merger review is concerned, the same substantive test is applied under the new Act although two relevant changes have been introduced. First, the new legal framework **limits the government's role in merger review**, which is foreseen only under exceptional circumstances. Second, it **specifies the criteria of substantive assessment** that will guide the decisions of both bodies (the new National Competition Commission –CNC- and the government). In effect, the 2007 Competition Act clearly separates those factors that will guide decision-making by the CNC, focused on the maintenance of effective competition in the markets in line with the previous Act, from those on which government's intervention may be based, related to the protection of public interest. In this respect, the new legal framework provides a non-exhaustive list of specific criteria which may guide the decision of the Council of Ministers, different from those based on competition concerns.

Consequently, the recent legislative changes have contributed to clarify the elements that the Spanish Competition Authority takes into account in merger review, with the systematisation of, among others, those that have been considered to date in the reports of the extinct Competition Service and of the Competition Court[3]. At the same time, some aspects of the substantive test have been particularly highlighted, such as the treatment of business efficiencies and the assessment of cooperative aspects.

The purpose of this paper is to put forward the **key elements of the substantive test** for merger review in Spain and to describe its application with a very recent example, the **Gas Natural/Unión Fenosa Merger Case**, where the test was carefully applied not only to identify the competition concerns resulting from the merger but also the suitability of the proposed commitments.

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1 Ley 16/1989, de 17 de septiembre, de Defensa de la Competencia.

2 Ley 15/2007, de 3 de julio, de Defensa de la Competencia (B.O.E. de 4 de julio de 2007).

3 The application of the 1989 Competition Act was entrusted to two administrative bodies: the Competition Service (*Servicio de Defensa de la Competencia*), in charge of handling the proceedings, and the Competition Court (*Tribunal de Defensa de la Competencia*), with the functions of legal ruling in antitrust cases and of forwarding its report and proposal to the Minister of Economy in merger control.

2. The substantive test for merger review in Spain

2.1 Merger review under the 1989 Competition Act

The 1989 Competition Act introduced a preventive merger control system purported to **avoid that mergers may hinder the maintenance of effective competition** in the market and foster practices resulting in a diminished consumer welfare or competitiveness of the Spanish economy and, thus, damaging public interest[4].

The substantive test therefore focused on the way a merger would possibly affect the market structure and hinder effective competition, and not just whether a merger would create or strengthen a dominant position. Yet, unlike the SIEC or SLC tests which explicitly refer to "substantial" effects, the Spanish test did not make reference to the extent of such harm nor to the concept of "effective competition". However, it is clear that what it was pursued was that the merger did not give rise to the exertion of market power by the merging parties in detriment of competition in the affected market. Therefore, the assessment required more than just looking at market shares and dominant positions. In fact, from the beginning, the test has been applied in a restrictive manner, limiting prohibitions and conditional approvals to situations in which the merger "*could mean a significant obstacle for effective competition according to the principle of proportionality*"[5].

Indeed, the 1989 legal framework stated that the decision as to whether a merger could hinder the maintenance of effective competition on the market should be made by **analysing its potential or actual restrictive effects**, paying special attention to several circumstances: definition and structure of the relevant market, the possibilities of choice offered to suppliers, distributors and consumers or users, the economic and financial power of the companies involved, the evolution of the supply and the demand and external competition.

Moreover, it foresaw that the Court could also consider the contribution that a merger could make to improve the production and marketing systems, promote technical or economic progress, boost international competitiveness of the national industry or ensure the interests of consumers and users, and if such contribution compensated for its restrictive effects on competition. In the case of joint ventures, the Court had to carry out a special analysis of the possible restrictive effects on competition derived from the presence of the participated undertaking and of the parent undertakings in the same market or in vertically integrated or close markets.

2.2 Legislative changes in merger review introduced by the 2007 Competition Act

As it has already been mentioned, the recent 2007 Competition Act has allowed a clarification of the test without changing the criteria of substantive assessment, which is still in line with the SLC and SIEC tests. The new legal framework provides in section 10 that "*the National Competition Commission shall assess the economic concentrations in light of the* ***possible impediment to the maintenance of effective competition in all or part of the national market***".

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4 Section 15b. of the 1989 Competition Act states: *"The Ministry of Economy, upon request from the Competition Service, shall forward the Court any proceedings related to the concentration projects or transactions notified by the interested parties that it deems may hinder the maintenance of effective competition in the market, so that the latter may issue its judgement on the matter, after hearing the interested parties, if needs be."*

5 See case C-76/02 Endesa/Hidroflamicell.

Specifically, the CNC shall adopt its decision taking into account, among others, several elements which include, in addition to those mentioned in the 1989 Act, the real or potential competition of undertakings located either within or without the national territory, any barriers to entry in the relevant markets, the countervailing power of the demand or of the supply and their capacity to offset the position in the market of the affected undertakings, the economic efficiencies derived from the merger and, in particular, the extent to which these efficiencies are transferred to the intermediate and ultimate consumers, specifically, in the form of a bigger or better supply and of lower prices.

Besides this clarification of criteria, the new Act provides that the Council of Ministers, on an exceptional basis, may assess economic concentrations in light of criteria of general interest other than protecting competition. In particular, it puts forward some examples: defence and national security, protection of public security or public health, free movement of goods and services within the national territory, environment protection, promotion of technological research and development and guarantee of adequate maintenance of the objectives of sector regulation. It is, however, a non exhaustive list.

2.3 Brief summary of some key features of merger review in Spain

In order to give some practical guidance on the key elements of the substantive test which has just been explained, this section focuses on the most relevant factors which are taken into account in merger review, giving a brief summary of the factors assessed in each case, on the basis of illustrative cases where such factors were considered.

2.3.1 Market shares

Even though the test applied in Spain is not a dominance test, the creation or strengthening of a dominant position is one of the competition concerns which must be assessed by the Spanish Competition Authorities, thus benefiting from the broad jurisprudence on this issue.

On a general basis, and according to the practice of the Spanish Competition Authorities since 1989, market shares around 10% are not considered to be harmful for competition[6]. Likewise, combined shares below the notification threshold (25% under the 1989 Competition Act and 30% under the new Competition Act) are considered to be acceptable. Even high market shares may be acceptable if there are no horizontal or vertical overlaps[7] or if those overlaps are small in comparison with the market share of the acquiring company in the affected markets[8].

In the analysis of market shares, it is also important to assess whether the parties' market shares have been increasing or decreasing in the last years or if there is a high degree of volatility. This is especially relevant in markets where innovation plays a key role[9] or where liberalisation is taking place[10].

Moreover, in line with EU practice, HHI indexes are sometimes considered to assess the degree of concentration in the affected markets[11].

6 See Case N-06108 Astroc Mediterráneo/Rayet.

7 See Case C-0072/08 Solvay/Innogenetics, with market shares of the acquired undertaking between [60-80]% in the affected markets.

8 See Case C-0111/08 Vega Mayor/Tallo Verde, where Vega Mayor strengthened its already leading position in the affected markets with horizontal overlaps under 10%.

9 See cases N-07048 Imation/TDK or C-0094/08 Essilor/Satisloh.

10 See Case C-022/07 Repsol/BP Oil.

2.3.2 Real and potential competition and barriers to entry

Even if the horizontal overlap resulting form a merger is small, competition concerns may arise if the transaction eliminates a competition restraint on the merged entity (i.e. with the acquisition of the maverick firm on the market[12] or of a company which exerts a high degree of competition on the market[13]).

At the same time, coordinated effects are assessed according, in general terms, to the same elements of assessment identified by the Commission in its Guidelines for horizontal mergers[14].

Besides real competition, potential competition must be taken into account in order to get the real picture of the foreseeable post-merger scenario. The possibility of new competitors accessing the relevant market and their ability to discipline the behaviour of the incumbents are two of the main aspects taken into account when assessing the risk of hindering effective competition. The threat of entry may effectively limit the behaviour of the incumbents, if it is probable, it may take place in the short term and has significant impact on competition.

In this sense, it is useful to focus on factors such as imports or recent successful entries to the market[15].

In any event, entry of new competitors will depend substantially on the assessment of entry barriers to the market which may influence their decision to enter the market to the extent of eliminating the discipline they may exercise on the incumbents.

Many barriers to entry have been identified in past cases: economic barriers[16], legal barriers[17], technological barriers[18], barriers from intellectual property rights[19] or barriers arising from brands or investments on advertising[20].

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11 See Case C-101/06 Adeslas/Global Consulting/Lince.

12 See Case N-05082 Gas Natural/Endesa.

13 See Case C-103/07 Mahou San Miguel/Alhambra.

14 Some of the most relevant cases where coordinated effects have been assessed are the transactions between brewers (see Cases C-58/00 Mahou/San Miguel, C-44/99 Heineken/Cruzcampo, C-103/07 Mahou San Miguel/Alhambra) or between transport companies (see Cases C-104/07 Balearia/Buquebus, C-105/07 Air Berlin/LTU).

15 See Case N-04026 Beaujon Finance/Diana Ingrediénts, where several competitors had entered the market recently, or Case C-131/09 Essilor/Signet where Asian competitors had increased their sales in Spain by 140% since 2000.

16 See for example Case N-05073 Sorea/Aterca, where a minimum efficient scale was necessary to achieve a successful entry to the market. Also, access to raw materials, other inputs and essential facilities, either of tangible or intangible nature, may also be considered as economic entry barriers (See case C-0002/07 Dow/UPPC).

17 Legal barriers may arise from current legislation (i.e.: tariffs), sector regulations (i.e. market access conditions or assignment of essential facilities), or technical regulations which are mandatory in certain economic sectors or may arise from regulatory risk. For example, in Case N-04088 Shell/Cepsa, the compulsory authorisation to develop into-plane services in Spanish airports was considered as a legal barrier.

18 See Case C-74/02 Sogecable /Via Digital.

19 See Case N-06011 Lehman Brothers/Patentes Talgo.

2.3.3 Vertical considerations: possibilities to switch suppliers and customers

Another crucial factor in merger review is the possibility to choose between alternative suppliers so that the considered merger does not result in the expulsion of a competitor due to the lack of access to suppliers.

Likewise, vertical effects in downstream markets must be assessed taking into account if the merger will harm a competitor chose sole customer is the acquired company which will be vertically integrated after the merger.

Again, these vertical considerations have a lot to do with the degree of concentration in upstream (suppliers) and downstream (customers) markets[21].

2.3.4 Countervailing power of demand or supply

The possible impact of a given merger on the supply structure of the affected market may be counterbalanced by demand negotiating power capable of preventing the appearance of anticompetitive practices. Countervailing power depends on the relative strength of demand when setting the price and other contractual conditions and is basically determined by the nature of clients, their concentration degree, demand-price elasticity, the importance of brand loyalty, the distribution characteristics, the negotiating procedure to determine the contractual conditions and the foreseeable evolution of demand.

Countervailing power is especially important in markets with a monopsony structure or where demand is concentrated in big customers such as the Administration[22].

This analysis will refer to the countervailing power of supply when the concentration basically affects the demand of goods and services.

2.3.5 Efficiencies

In line with the trend followed by most competition authorities, the assessment of efficiencies has been highlighted under the new Competition Act. This does not mean that under the 1989 Act efficiencies were not taken into account to clear a merger. Quite on the contrary, the Spanish Competition Authorities have reflected in the reports of several relevant mergers the assessment of the alleged efficiencies by the notifying party, following the criteria set out in the Commission's Guidelines on horizontal mergers[23].

Yet, the advantage introduced by the new framework is the clarification of the legal and economic test which must be applied in order to assess such efficiencies: (i) efficiencies must derive from the merger which is being assessed, (ii) they must compensate the identified competition concerns, (iii) they must contribute to the improvement of the production or commercialisation systems and to business competitiveness, (iv) and they must be transferred to the final consumer in the form of more or better supply and of lower prices.

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20 See Case C-58/00 Mahou/San Miguel.

21 See Case C-0094/08 Essilor/Satisloh.

22 For example, in Case C-0086/08 Astorg/Photonis, market shares were very high (80-90%) but since the affected market was the market for night vision systems where the only customer in Spain is the Public Administration through the Minister of Defence.

23 See for example Cases C-58/00 Mahou/San Miguel, N-05082 Gas Natural/Endesa or C-104/07 Balearia/Buquebus.

2.3.6 Others

There are many other relevant factors which the Spanish Competition Authorities have taken into consideration in merger control in the past: structural links with competitors resulting form the merger, coordination between parent companies through the creation of joint ventures, portfolio effects and network externalities, etc.

3. The Gas Natural/Unión Fenosa case

This section describes the recent merger between two of the main Spanish energy groups, Gas Natural and Unión Fenosa, which was cleared last February, subject to commitments offered by Gas Natural. It is both a most recent and interesting case to illustrate the substantive test described above from the enforcement angle, not only because of the number of competition concerns identified in the markets involved, but also for the implications in the assessment of the commitments which were finally adopted.

The Gas Natural/Unión Fenosa merger started with the formal notification by Gas Natural on the 3rd September 2008 of its proposed acquisition of Unión Fenosa.

Gas Natural and Unión Fenosa are the respective parent groups of two vertically integrated energy groups, operating in nearly all gas and electricity markets in Spain and worldwide.

Gas Natural, jointly controlled by Repsol and La Caixa, is the main Spanish operator in the gas sector. It is the biggest gas supplier to Spain (60% of total gas supply in 2007), retail supplier to end customers (more than 50% of gas consumption in 2007) and the main gas distributor. Furthermore, despite being a newcomer in the electricity sector, Gas Natural ranks fourth in generation due to its combined-cycle gas turbine (CCGT) power plants and has a big growth potential in retail supply due to its experience and commercial network in the gas market. Repsol, the leading company in the Spanish oil markets, is also active in gas production and supply as well as in electricity generation.

As for Unión Fenosa, it is primarily active in the electricity sector, where it is ranked third behind Iberdrola and Endesa in generation, distribution and retail supply. In recent years, Unión Fenosa entered successfully the gas markets, mainly through Unión Fenosa Gas, S.A. (UFG), a vertically integrated company active in all gas markets which Unión Fenosa jointly controls with the Italian ENI, S.P.A.

On the 7th November 2008, the CNC Council decided to initiate phase two of proceedings in order to carry out a more detailed analysis of the transaction. The main competition concerns raised by the takeover which were identified by the Spanish Competition Authority following the substantive test described in section II of this paper were the following:

- The **increased market power** of the merged entity in the Spanish gas markets, mainly in supply and retail distribution, due to its greater size and vertical integration, lessening the supply-side choices for its rivals and resulting in the **disappearance of Unión Fenosa as an independent competitor** which had been acting as a **maverick** in the last few years.

- A decrease in competition in the wholesale electricity market (or *pool*) as a result of the strengthened position of the merged entity, its increased symmetry with main rivals Iberdrola and Endesa and the higher level of concentration in the markets, fostering the **incentives and capacity both for unilateral and coordinated effects**.

- The integration of two close competitors in the gas and electricity retail supply markets. Gas Natural's strong simultaneous presence in gas and electricity, together with the resulting overlap in the gas and electricity distribution networks of the two undertakings, could place the merged entity in a highly advantageous position to strengthen its market power in the supply to small customers due to **vertical integration** between distribution and retail supply as well as **portfolio effects**.

- The creation or strengthening of **structural links with competitors** in the gas end electricity markets through joint-ventures and financial participations.

In addition, the CNC report highlighted the fact that one of the most relevant entry barriers in the gas sector is the need to achieve a **minimum efficient scale** in terms of customers (CCGTs, large industrial consumers and domestic consumers) in order to ensure stable gas contracts in the upstream markets.

Under the current Competition Act, and in case a merger gives rise to obstacles to the maintenance of effective competition, the notifying parties, at their own initiative or at the request of the CNC, may propose commitments to remove those obstacles, without prejudice to the CNC's authority to establish further conditions if it believes the proposed commitments are insufficient or inadequate to solve the problems detected. It is also foreseen the possibility of launching a market test among competitors and other undertakings in order to test their opinion as regards the sufficiency and adequacy of the proposed commitments, in line with the procedure followed by the European Commission.

Therefore, on 21st January 2009, Gas Natural submitted a first proposal of commitments to solve the competition problems identified by the CNC. That proposal was followed by intense negotiations with the CNC which led to the filing of its final proposal on the 10th February. Commitments were subject to public consultation twice during this negotiation phase, and all submissions were assessed and taken into account by the CNC, leading to subsequent reviews of the first proposal.

At its meeting of 11 February 2009, the Council of the CNC cleared the way for the merger between Gas Natural and Unión Fenosa, subject to the commitments presented by Gas Natural, having found that those commitments could solve the competition problems that were previously identified.

The **commitments finally accepted by the CNC's Council** were assessed under the principles of **adequacy** (the commitments must eliminate the anti-competitive risks generated by the merger), **proportionality** (their aim is not to offset all competition problems that may exist in the market, but only those arising from the specific transaction) and **least intervention** (in case there are several options, the one that is easiest to implement should be chosen).

A key feature of this operation was that it affected a great number of vertically and horizontally interrelated markets. Therefore, the adequacy of the commitments presented by Gas Natural was analysed considering them as a whole, with all **simultaneous effects** that each commitment could have in other affected markets in order to mitigate one or more of the detected potential risks for effective competition. What is more, the assessment of commitments had to bear in mind all the elements considered under the substantive test and not just horizontal or vertical overlaps, but also including the abovementioned entry barrier to gas markets and the structural links with competitors.

Accordingly, the final solution designed included divestitures that would favour the entry or strengthening of operators so as to counteract the disappearance of Unión Fenosa as an effective competitor and contribute to ease the barriers which would otherwise hinder the entry of the acquirer of the divested assets.

As a result, the CNC Council Resolution accepted the following commitments proposed by GAS NATURAL, considering they were adequate and proportionate to solve the competition concerns detected:

- To sell complete gas distribution networks accounting **600,000 distribution points** (equivalent to 9% market share at a national level).
- To sell the **attached portfolio** to those distribution points (accounting approximately 600,000 small and domestic consumers).
- To sell **2,000 MW** of combined-cycle gas turbine (CCGT) power plants.
- To implement measures in order to ensure that **Unión Fenosa Gas** (jointly controlled with ENI) may continue **operating independently** as a gas supplier in Spain.
- To sell its stake in **Enagás** (the gas transmission network operator) and to reduce its ties with **Cepsa**, the main competitor of Repsol in oil markets.

The sale of 600,000 distribution points more than offset the size of the distribution network acquired by Gas Natural and the shedding of the attached 600,000 customers far exceeded the acquired market share of gas consumers (94,000 customers aprox.). Furthermore, the divestitures entail complete networks, which will facilitate their autonomous management and make them more attractive to prospective buyers. The CNC concluded that this divestiture would boost the buyer's competitiveness vis-à-vis the Gas Natural group in carrying out the gasification of new areas and the development of new distribution networks. In addition, the commitment included supply of gas by the merged company to the buyer during a transitory period which was estimated to be enough to permit the latter negotiate supply arrangements with other suppliers on the basis of the assets acquired.

With regard to the power plants divestiture, the commitments implied the release of 2,000 MW of CCGT plants, which would offset not only the horizontal overlap in generation but also the vertical strengthening between gas supply and electricity production. CCGT plants are the ones where the parties to the merger overlapped, and have a strategic relevance given that they set the wholesale (marginal) market price and cover eventual shortfalls of renewable plants. The divestiture was therefore considered adequate because it reduced the strategic position of the new entity in this technology.

The commitments also reduced significantly any post-merger risks of coordinated effects with Endesa and Iberdrola (main players in electricity in Spain). In particular, divestiture of combined-cycle assets would help to maintain an asymmetry in generation portfolios of the new company compared to those of its rivals.

Finally, Gas Natural presented three commitments aimed at mitigating the possible risks arising from the creation or strengthening of certain structural links that the CNC found that could hinder effective competition in the markets. First, the sale of Gas Natural’s stake in Enagás (the gas system operator in Spain) prevented any interference by the merged company in infrastructure planning and management and strengthened the independence of the system operator. Second, the withdrawal from Cepsa's Board of Directors and the commitment to build Chinese walls for sensitive commercial information of Cepsa were also considered adequate for avoiding any intrusion by Repsol, Cepsa's main competitor and the biggest operator in the liquid hydrocarbons market.

The merger was finally cleared subject to these commitments on 17th February 2009, once the Government rejected to intervene on the basis of public interest criteria other than protecting competition.

To sum up, the assessment of competition concerns in the different affected markets of the Gas Natural/Unión Fenosa Case carefully followed the substantive test which has been described in section II of this paper, taking into consideration a great deal of key features far beyond horizontal overlaps and successfully providing a rigorous assessment of the commitments adopted.

4. Final remarks

The experience in Spain with the substantive test for merger review introduced in 1989 and recently clarified under the new framework, has been **very positive**, allowing the Spanish Competition Authority to apply a **flexible test more coherent with the increasing importance of economic analysis**.

It seems important to recall that during the discussion meetings prior to the adoption of **Regulation 139/2004**, Spain, together with France, were the two **leading supporters of the change** to a closer SLC test at EU level. The French-Spanish proposal, which was formally presented in September 2003, was finally taken into consideration by the Commission and therefore served as basis for the final wording of the current substantive test under Regulation 139/2004. Thus being a much more similar test to the one already applied in Spain since 1989.

SWITZERLAND

1. Introduction

The test in use for the assessment of mergers in Switzerland is the dominance test. A merger may be prohibited or authorized subject to conditions or obligations if it creates or strengthens a dominant position liable to eliminate effective competition.

Under the revised Cartels Act of 2003, the Federal Council had to arrange for an evaluation of the effectiveness of competition law measures and of the enforcement of the Cartels Act and submit a report on this to Parliament by spring 2009, making proposals on further. The evaluation indicated that Switzerland's merger control shows certain deficiencies and provides a relatively weak arsenal to effectively enhance competition. A risk exists that mergers having a strong negative effect on competition, and consequently on the economy and consumer welfare in Switzerland, might be approved.. Based on these results, proposals will be elaborated in the coming months for the adjustment of merger control, in particular concerning the standard for merger review and the criteria for intervention.

This contribution starts with an overview of the legal framework regarding merger control in Switzerland (1). Then it illustrates some significant decisions taken by the Competition Commission and its interpretation of the Federal Tribunal (2), which is followed by showing the results of the evaluation of the Swiss Cartel Act (3) and an outlook regarding a possible revision of the Swiss merger control provisions (4).

2. Merger control provisions by the Swiss Competition Law

The laws governing merger control in Switzerland are the Federal Law on Cartels and Other Restrictions of Competition (Cartel Act, LCart) and the Swiss Merger Control Regulation (the LCart and the Merger Control Regulation are hereinafter jointly referred to as "the Competition Law"). The Competition Law came into effect on 1 July 1996 and was revised in 2003. The revised Competition Law entered into force on 1 April 2004. The authority that enforces the merger control provisions of the Competition Law is the Competition Commission.

Subject to the Swiss merger control are statutory mergers and takeovers ('transactions as a result of which one or more enterprises directly or indirectly gain control over one or more previously independent enterprises or parts of it'), as well as corporate joint ventures if the company exercises all the functions of an independent business entity on a permanent basis. The Competition Law contains a mandatory pre-merger filing, i.e. filing prior to completion of the transaction. The jurisdictional thresholds applied to mergers are based on turnover. Irrespective of its actual effects in Switzerland, a merger is considered as having an effect on the Swiss market when the turnover thresholds of the Competition Law are met.

The substantive test for clearance in Switzerland is the test of market dominance, i.e. a merger is cleared based on one of the following two tests:

- the enterprises involved do not create or strengthen a dominant position eliminating effective competition in the relevant market; or

- competition in another market is enhanced by the merger and such improvement outweighs the detriment of the creation or strengthening of a dominant position in the relevant market.

According to the interpretation of the Federal Tribunal the sole creation or strengthening of a dominant position is not sufficient to prohibit a merger in Switzerland. The dominant position must be liable to eliminate effective competition. Therefore, the authority has to provide evidence that effective competition is indeed eliminated. Economically, this required approval raises difficulties, since the criteria for assessing whether effective competition is eliminated overlap with the test of dominance. Applying the test of market dominance, the Competition Commission also investigates coordinated effects in case of oligopolies and unilateral effects. However, according to the current merger control provisions it is not possible to prohibit a merger due to unilateral effects below the thresholds of a single dominant position.

3. Significant cases

3.1 BZ/20 Minuten and Swissgrid

The first prohibition in a merger proceeding was resulting from the *BZ/20 Minuten*[1] decision. The Competition Commission prohibited Berner Zeitung AG from taking a shareholding in 20 Minuten (Switzerland) AG, as this would have given the Espace Media Group a dominant position in the print media and advertising market in the Bern area, which would have effectively eliminated any competition.

In *Swissgrid*[2], the merging of the transmission networks of seven electricity companies has been authorized subject to various conditions. The detailed examination revealed that the project created a dominant position in the market for the transmission of electricity in various regions of Switzerland. The Competition Commission imposed a variety of conditions on the establishment of the concentration in order to guarantee that the improvement in competitive conditions in the market for the supply of electricity arising from the concentration takes effect to a sufficient extent. These conditions are aimed at facilitating the transit of electricity, permitting the effective supervision effective of Swissgrid tariffs, and avoiding potential conflicts of interest within Swissgrid itself.

In both cases (*BZ/20 Minuten, Swissgrid*) the parties appealed against the rulings and in both cases the Competition Commission was overruled. The Federal Court interpreted that the sole creation or strengthening of a dominant position is not sufficient to prohibit a merger. According to the Court, a prohibition is only possible if the dominant position is in addition liable to eliminate effective competition.[3]

3.2 Merger cases in the retail sector

In 2007/2008, the competition authorities concluded three substantial merger cases in the retail sector (*Migros/Denner*[4], *Coop/Fust*[5], *Coop/Carrefour*[6]), imposing requirements to ensure that competition is maintained. In all three cases the two major supermarket chains were involved.

1 LPC 2004/2, p. 529 et seq.

2 LPC 2005/2, p. 347 et seq.

3 Decision of the Swiss Federal Court 133 II 104.

4 LPC 2008/1, p. 129 et seq.

5 LPC 2008/3, p. 475 et seq.

6 LPC 2008/4, p. 593 et seq.

In the *Migros/Denner* case, the Competition Commission decided that the merger strengthens Migros' position in the short term and establishes a joint dominant position of Migros and Coop. At the same time, however, it was noted that on the discount sector this effect will be diluted in the long-term due to market entrances of foreign competitors. The Competition Commission stipulated that strict requirements be complied with for a period of up to seven years, in order to reduce the negative effects of the merger. These requirements have the aim of safeguarding Denner's operational independence, especially with regard to pricing, stock and location policy. In addition, the use of the Denner brand must be maintained in the market and Denner outlets must also mainly offer brand products in their range. This means that consumers also have an alternative to Migros and Coop, the two major Swiss supermarket chains. Brand product manufacturers can still turn to Denner as an additional sales channel. Moreover, Migros will not be permitted to take over any other companies in the retail market for foodstuffs. In the interest of competition between retailers, Migros must refrain from entering into any exclusive agreements with product suppliers.

Having conducted a detailed examination of the merger between Migros and Denner (number one and three of the Swiss supermarket chains), in the *Coop/Carrefour* case the Competition Commission had to examine the merger of number two and four of the Swiss supermarket chains. The takeover of the twelve Carrefour hypermarkets by Coop in particular raised the issue of whether the joint dominant position held by Migros and Coop that was established in the Migros/Denner proceedings would be strengthened. In certain local markets, the takeover of the Carrefour hypermarkets has also led to major increases in market share. However, the merger finally was permitted subject to conditions. The Competition Commission concluded that the takeover, as far as turnover was concerned, led to a strengthening of the joint market dominance of Migros and Coop, but that this would be weakened in the medium to long-term by the expansion of foreign competitors. The repeated analysis of the expansion plans of German discounters thus confirmed the prognoses reached in the *Migros/Denner* procedure. The requirements imposed by the Competition Commission were that Coop may not take over any other food retailer in the next six years and that competitors with less than a 25 % market share in particularly problematic regions must be offered sales floor areas amounting to a total of 20'000m2 for takeover.

In the supply markets, the takeover of Carrefour strengthened the strong position Coop holds in relations with manufacturers and suppliers. In order to take account of these concerns, the Competition Commission ordered – in analogous terms to the Migros/Denner procedure – that Coop must permanently forgo exclusivity agreements with suppliers. This means that a prohibition of exclusivity agreements with suppliers now applies to both Migros and Coop.

3.3 Other recent cases

Following a detailed examination (second phase), the Competition Commission approved the merger case *Eichhof/Heineken*[7]. Special attention was given to the extent to which there may be joint dominance of the market by the two large multinational brewery groups Heineken/Eichhof and Carlsberg/Feldschlösschen following the merger. The examination, however, failed to confirm indications that any joint dominant position would be stable and sustainable. In particular, breweries with a strong regional presence have clearly not been restricted in their competitiveness by the merger. Furthermore, large retail companies can significantly limit the influence of the two brewery groups.

The merger case *Steffen-Ris/Fenaco*[8] led to the establishment of the strongest agricultural trading company in Switzerland. In the markets for the wholesale of ware and processing potatoes as for the whole-sale of seed potatoes, there were significant increases in market share. Furthermore, the fact that the Swiss agricultural market, at least in the case of ware and processing potatoes, is not completely open had

7 LPC 2008/3, p. 422 et seq.

8 LPC 2008/2, p. 290 et seq.

to be considered. And the strong position in the potato markets resulting from the merger had to be considered in relation to the counter position of the processing firms. In order to ensure that competition in the agricultural market is maintained in general as well as in the markets concerned, the Competition Commission decided that Fenaco must not impose or enforce any obligations to purchase or supply on farmers. This should especially keep access to producers open to all market participants (commercial and processing firms).

4. The evaluation of the Swiss Cartel Act of 2007/2008

In 2003, at the occasion of the last revision of the Swiss Cartel Act, Article 59a was introduced in the Cartel Act, providing for an evaluation of the implementation of the Act and the effectiveness of measures taken under it. Article 59a also instructs the Federal Council – upon completion of the evaluation – to report to the Parliament at the latest five years after the entry into force of the revision, i.e. per end of March 2009, making proposals on how to follow up on the evaluation.

An evaluation was thus launched in 2007 and conducted in 2007/2008 by an Evaluation Group under the direction of a Steering Group composed of independent experts and representatives of the Competition Commission (Comco), its Secretariat and the SECO (State Secretariat for Economic Affairs). The provisions of the Cartel Act concerning mergers were part of the evaluation. The results of the evaluation and the recommendations of the evaluation group were compiled in a report that was presented to the FDEA on December 5th, 2008.

The report underlines that the "creation or strengthening of dominant position" (CSDP)-test that is currently applied under Article 10 (2) of the Cartel Act is very permissive. The interpretation given by the Federal Court in the cases *Swissgrid*[9] and *BZ/20 Minuten*[10] confirmed this permissiveness. Thus, the sole creation or strengthening of a dominant position is not sufficient to prohibit a merger in Switzerland (see (2)). In addition, the dominant position must be liable to *eliminate* effective competition. It is thus virtually impossible for the Comco to prohibit mergers that do not reach the dominance threshold on the basis of unilateral effects (i.e. based on incentives for the enterprises participating in the merger to raise prices), which is unsatisfactory in view of the increasing concentration trend witnessed in several economic sectors.

The report of the Evaluation Group also refers to the recent merger cases (see under (2)) in which the Comco was confronted with signs of anti-competitive effects due to high market concentration. In those cases, the Comco approved the merger, subject to conditions and obligations. However, it remained controversial whether the mergers fulfilled the material criteria to be considered admissible and whether the conditions and obligations were adequate to solve the problems identified.

Based on these observations, the Evaluation Group stresses the need to modify the test for merger review and outlines two alternative solutions. The first option would be to modify the current CSDP-test and to abandon the condition that the dominant position be liable to *eliminate* effective competition, which would strengthen the control. The second option identified by the Evaluation Group is to replace the CSDP-test with the "substantial lessening of competition"(SLC)-test, respectively with the "significant impediment to effective competition"(SIEC)-test. Both options would make it possible to take unilateral effects into account. However, the second option would in addition give an opportunity to harmonize the Swiss system for merger control with that of the European Union. This would notably enable the competition authority to benefit from the experience of other authorities as well as from the findings of international jurisprudence. Therefore, in its final recommendations, the Evaluation Group advocates for a

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9 Decision of the Swiss Federal Court 133 II 104.

10 2A.327/2006, Decision of 22 February 2007.

change of standard for merger review from the CSDP-test to the SIEC-test. For the evaluation group, the adjustment of the standard for merger review should be a priority in a possible revision of merger control regulations.

In addition, the Evaluation Group recommends to introduce an efficiency defense based on a dynamic consumer welfare standard, in order to make it possible take into account the fact that a merger might lead to a decrease of costs. The dynamic consumer welfare standard would represent a middle way between the total welfare standard – which would be difficult to apply in practice – and the pure consumer welfare standard applied in the EU. Maximization of consumer surplus in the medium to long term could thus be taken into account.

The Evaluation Group also makes recommendations concerning the criteria for intervention. Considering that the current thresholds (see Art. 9 of the Cartel Act) for notification are relatively high in comparison with those applied in other European countries, the Evaluation Group recommends to lower them, so that mergers involving SMEs in concentrated and oligopolistic markets can in future also be reviewed. Alternatively – or as a complement – the Evaluation Group proposes to introduce a presumption that mergers that are not subject to notification are not anti-competitive. The competition authority should however have a possibility to intervene concerning mergers that are not subject to notification and to rebut this presumption. The report also mentions that a cooperation agreement with the EU – and possibly with important industrialized countries – on cross-border mergers might also be useful, even though cooperation is already possible today based on a waiver granted by the parties.

5. The report of the Federal Council of March 25th, 2009, and next steps

Based on the findings and recommendations of the Evaluation Group, the Federal Council adopted a report on March 25th, 2009, concerning the next steps. As to merger control, the Federal Council mandated the FDEA to elaborate a concrete proposal – on the basis of the recommendations of the Evaluation Group – for the adjustment of merger control, in particular concerning the standard for merger review and the criteria for intervention. These proposals will be part of a package that the FDEA will have to elaborate by spring 2010. Other topics to be dealt with in that package include the strengthening of the Competition Commission, the treatment of vertical agreements and measures to quicken the procedure. Based on concrete proposals and clarifications, the Federal Council will then decide whether to open a public consultation process on a partial revision of the Cartel Act.

TURKEY

First paragraph of Article 7 of the Act No 4054 on the Protection of Competition (the Competition Act) provides for the basic framework of the merger control rules in Turkey and is as follows;

> *"Merger by one or more undertakings, or acquisition by any undertaking or person from another undertaking – except by way of inheritance – of its assets or all or a part of its partnership shares, or of means which confer thereon the power to hold a managerial right, with a view to creating a dominant position or strengthening its/their dominant position, which would result in significant lessening of competition in a market for goods or services within the whole or a part of the country, is illegal and prohibited."*[1]

As is seen from the wording of the first paragraph of Article 7, dominance test is the standard for merger review under the Competition Act. Therefore, the basic concern is whether one or more undertakings in a particular market will gain the power to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers post-merger as a result of which competition is significantly decreased.[2] The Turkish Competition Authority (TCA) is of the view that Article 7 prohibits both single dominance as well as collective dominance as a result of which competition is significantly decreased.

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1 According to second paragraph of Article 7, the Competition Board, the decision making body of the Turkish Competition Authority shall declare, via communiqués to be issued by it, the types of mergers and acquisitions which have to be notified to the Competition Board and for which permission has to be obtained, in order them to become legally valid. In line with this provision, Communiqué on the Mergers and Acquisitions Calling for the Authorization of the Competition Board (Communiqué No 1997/1) has been issued. Moreover, regarding privatisation transactions, Communiqué on the Procedures and Principles to be pursued in Pre-Notifications and Authorization Applications to be Filed with the Competition Authority in order for Acquisitions via Privatization to Become Legally Valid (Communiqué No 1998/4) has been adopted. However, it should be said that provisions of Communiqué No 1997/1 are also applicable to privatisation transactions provided that they are not contrary to Communiqué No 1998/4. According to the Communiqué No 1997/1, "*... the structure of the relevant market, and the need to maintain and develop effective competition within the country in respect of actual and potential competition of undertakings based in or outside the country, the market position of the undertakings concerned, their economic and financial powers, their alternatives for finding suppliers and users, their opportunities for being able to access sources of supply or for entering into markets; any legal or other barriers to market entry; supply and demand trends for the relevant goods and services, interests of intermediaries and end consumers, developments in the technical and economic process, which are not in the form a barrier to competition and ensure advantages to a consumer, and the other factors ...*" are to be taken into consideration while assessing mergers. It should be noted that these criteria to assess mergers are not exhaustive and they are complemented by evaluations in the case law of the Turkish Competition Authority.

2 Based on the definition of dominant position in Article 3 of the Competition Act as "*The power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers*".

The TCA uses HHI levels to determine possible competition concerns that could arise post-merger. For instance, in one case concerning the *Privatisation of Gaziantep Cement Factory*[3], the TCA cited the European Commission's approach found in *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings*[4] and provided that it would be necessary to give weight to analyses of possible anti-competitive effects the horizontal merger might lead to where the HHI was above 2000 and the change in the HHI (the delta) was above 150. In this case, as HHI was far above 2000 (4068 and 3882 in 2003 and 2004 respectively) and the delta was around ten times 150 (1605 and 1441 in 2003 and 2004 respectively), the TCA was of the opinion that the transaction would lead to anti-competitive impact at such a level that detailed dominance analysis was required. Moreover, the same decision has also cited *Horizontal Merger Guidelines*[5] of Department of Justice (DOJ) and the Federal Trade Commission (FTC) where the market is deemed highly concentrated if HHI is above 1800 and "*... where the post-merger HHI exceeds 1800, it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise*". Based on the criteria in *Horizontal Merger Guidelines* of DOJ and the FTC, as the average HHI of the last three years was above 4052 (more than two times 1800) and the average delta of the last three years was above 1588 (fifteen-sixteen times 100 points), it was confirmed that the transaction would cause anti-competitive impact at a level requiring detailed dominance analysis.

In this decision, it was decided that the acquiring undertaking would have a high market share which would cause negative impact on the competitive conditions in the market when positions of the rival cement companies were taken into account. Moreover, the acquiring undertaking would acquire a dominant position in the market as a result of which competition in the market would significantly decrease due to homogenous nature of the product, limited sales area because of high transport costs, high entry barriers (the need for high amount of capital, economies of scale, vertical integration, need for comprehensive distribution network), transparency in the market, low price elasticity of demand, technological maturity in the relevant market, and lack of third party undertakings that could exert competitive pressure in the relevant geographic market. In the end, the TCA did not authorise the transaction.

The case mentioned above was a single dominance case. To provide an example for a collective dominance case, another decision of the TCA in the same market, namely *Privatisation of Ladik Cement Factory*[6] will be provided.[7]

In *Privatisation of Ladik Cement Factory*, the CR4, which was 97% before the merger, would rise to around 99% post-merger requiring detailed analyses on competitive structure of the market. Again, the TCA cited the criteria in *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* of the European Commission. Although the post-merger HHI was 3814 for the year 2004, well above 2000, the delta was 107 for the same year, below 150, in this case. However, the TCA mentioned that *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* of the European

3 Dated 20.12.2005 and numbered 05-86/1190-342. Information on this case is limited to three cities, namely Gaziantep, Adıyaman and Şanlıurfa that are defined as the relevant geographic market following Elzinga-Hogarty test.

4 OJ C 31, 5.2.2004, p. 5–18.

5 Issued on April 2nd of 1992.

6 Dated 20.12.2005 and numbered 05-86/1188-340.

7 See also *Privatisation of Şanlıurfa Cement Factory*, dated 20.12.2005 and numbered 05-86/1191-343, where the second highest bidder was not permitted to take over the company due to collective dominance concerns.

Commission required detailed dominance assessment under certain circumstances even where the delta was below 150, but the HHI was above 1000 or 2000. One of these circumstances is where one of the parties to the merger is a rival undertaking operating in the same market with a small market share or a potential rival undertaking that could enter the market.[8] In line with this, one of the parties to the merger (SABANCI) was operating in the relevant geographic market, albeit with small presence. Moreover, that party was operating in many other geographic markets of the relevant market and holding a position that could enter other geographic markets with new investments or mergers. Therefore, HHI values and the delta seemed to indicate a market with possible anti-competitive structure post-merger. Similarly, the TCA also cited that the possible merger also indicated a highly concentrated market where anti-competitive effects could occur according to *Horizontal Merger Guidelines* of the DOJ and the FTC.

However, the TCA also mentioned that apart from market shares the analysis to prove dominance required assessments of other criteria such as number of players in the relevant market, entry barriers, characteristics of the relevant product market, structural links among undertakings in the relevant market, risk of contact in more than one market, history of the anti-competitive behaviours among undertakings in the relevant market and some other factors.

As to number of players in the relevant market, existence of few undertakings in the relevant market facilitates tacit understanding or collusion and its stability for a long period of time. Moreover, this makes it easy for the others to detect the party that does not comply with the anti-competitive agreement. A market structure composed of three or four undertakings at the most is prone to collective dominance whereas collective dominance becomes harder in markets where number of undertakings exceeds five. In this case, although the number of undertakings would decrease from six to five post-merger, number of main players was three (SABANCI, OYAK and YLOAÇ) as their combined market share was 96%. Therefore, the TCA took into account only those three undertakings in its analyses of dominance.

The entry barriers in the market was high when need for capital, sunk costs, economies of scale, excess capacity and vertical integration were considered.

When the characteristics of the market were considered, the TCA was of the opinion that homogenous nature of cement, low price elasticity of demand, maturity of the technology used, transparency of prices in the cement market, absence of third party undertakings that could exert competitive pressure on the undertakings deemed to be collectively dominant, stable increase in demand, absence of buyer power were features of the market facilitating emergence of a tacit collusion on parameters of price and quantity. An additional factor important for tacit collusion is whether undertakings encounter each other frequently. Fragmented and frequent nature of demand in the cement market facilitates undertakings to learn market behaviours of each other and punish the relevant undertakings when the tacit collusion is broken. In sum, the structure of demand increases the risk of tacit collusion in the cement market.

Regarding structural links among undertakings in the relevant market, the acquiring party (SABANCI) exercised joint control over a JV (OYSA) with one of its competitors (OYAK) and there were interlocking directors between the JV (OYSA) and the two competing undertakings (SABANCI and OYAK). Moreover, the TCA, in one of its earlier decisions, found existence of coordination distorting

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8 See paragraph 20 of *Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings* of the European Commission:

"*The Commission is also unlikely to identify horizontal competition concerns in a merger with a post-merger HHI between 1000 and 2000 and a delta below 250, or a merger with a post-merger HHI above 2000 and a delta below 150, except where special circumstances such as, for instance, one or more of the following factors are present:*

(a) a merger involves a potential entrant or a recent entrant with a small market share; …"

competition between the two competing undertakings (SABANCI and OYAK) in the cement market via the JV (OYSA). Within this framework, the TCA thought that the existence of the JV (OYSA) could lead to coordination and harmonisation of competitive behaviours of the two competing undertakings (SABANCI and OYAK) and their acting as if they were a single undertaking and therefore involved the risk of tacit collusion (between SABANCI and OYAK) in the relevant market.

As to risk of contact in more than one market, contact in terms of especially different product groups may have facilitating impact for tacit collusion among undertakings. Contact in more than one market enables the undertakings to gather more information on their competitors and gives the opportunity to punish those that do not comply with an anti-competitive agreement. Moreover, contact in more than one market is seen as one of the greatest evidence for the existence of a punishment mechanism in an oligopoly which is regarded as one of the most important factors of collective dominance and which ensures continuity of the tacit collusion. Within this framework, two competing undertakings, SABANCI and OYAK, had overlapping activities in more than eleven markets. Moreover, the risk of contact in more than one market was realised in relevant product markets of cement and ready-mixed concrete in Central Anatolia, Marmara and Mediterranean geographic regions between SABANCI and OYAK. Furthermore, the risk was also present for OYAK, SABANCI and YLOAÇ in Central Anatolia and Marmara geographic regions for cement and ready-mixed concrete.

In terms of history of the anti-competitive behaviours among undertakings in the relevant market, the TCA considers that history of anti-competitive behaviours even in different geographic markets increases the risk of tacit collusion in the future. The TCA considered the anti-competitive activities of the three undertakings (SABANCI, OYAK, YLOAÇ) in other geographic markets and concluded that Ladik Cement Factory, the factory to be privatised, might have had a competition increasing role against those three in the relevant geographic market as no anti-competitive conduct was investigated previously in this geographic market. Therefore, the TCA decided that there was the risk that acquisition of Ladik Cement Factory by one of those three undertakings (SABANCI, OYAK, YLOAÇ), which previously conducted anti-competitive practices in other geographic markets, could lead to loss of the former's role of increasing competition and cause negative changes in parameters of price and quantity.

Apart from those, the TCA considered existence of identical market shares as a factor that could facilitate coordination of competitive behaviours. Accordingly, the TCA took into account that SABANCI and YLOAÇ would have similar market shares post-merger and this could increase the risk of tacit collusion. Assuming that SABANCI and OYAK would act as if they were a single undertaking, the relevant market would be a duopoly (of OYAK-SABANCI and YLOAÇ) with market shares close to each other. The fact that the undertakings in the relevant market had similar capacities and symmetrical features in terms of vertical integration also proved existence of collective dominance. Moreover, according to the TCA the existence of very high excess production capacity also indicated that the relevant undertakings had the ability to punish and could use it whenever they wanted.

Based on the analysis above, the TCA decided that SABANCI would not become dominant in the market post-merger when market shares belonging to it and the rivals were taken into account. However, SABANCI, OYAK and YLOAÇ would hold collective dominant position which could be defined as emergence of risk of anti-competitive tacit collusion among two or more undertakings and their collective holding of the power granting the ability to determine parameters such as price and quantity independent of their competitors and customers in the relevant market as a result of the effect of changing structure of the market and structural and behavioural factors. Therefore, the takeover of Ladik Cement Factory by SABANCI, the highest bidder, was blocked by the TCA.

As is mentioned above, the TCA is of the view that Article 7 of the Competition Act prohibits both single dominance as well as collective dominance as a result of which competition is significantly decreased. However, when an appeal was made before the Council of State, the supreme administrative court, against the decision of the TCA, the Council of State ruled that the Competition Act prohibited only single dominance and therefore stayed the execution of the decision by the TCA which was based on collective dominance.[9] As a result, it may be said that the decision by the Council of State indicated that collective dominance was not subject to the prohibition under Article 7 of the Competition Act.

Currently, according to a bill sent to the Parliament on July 31st, 2008, the standard test for merger review would be the one applicable in the EU, which is significant impediment to effective competition (*SIEC*). The general reasoning of the bill mentions that changes in the *acquis communautaire* and especially those in the *Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings* (the EC Merger Regulation) should be taken into account for a more modern competition law as well as from the perspective of negotiations with the EU. The reasoning for the particular article in the bill to adopt the new standard test for merger review provides that it would be possible to assess unilateral as well as coordinated effects more soundly via economic analyses following adoption of the new test. Moreover, the fact that the new test cites "creation of dominant position or strengthening an existing dominant position" among the principal examples where competition is significantly decreased will enable the use of previous experience gained by the TCA so far and ensure legal certainty. Furthermore, in addition to "creation of dominant position or strengthening an existing dominant position", the new test is to prohibit transactions in case competition is significantly decreased via unilateral effects in oligopolistic markets. Finally, the bill overtly cites collective dominance in addition to single dominance under Article 7 of the Competition Act following the decision by the Council of State against the decision of the TCA, namely *Privatisation of Ladik Cement Factory*.

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9 Decision of the 13th Chamber of the Council of State, dated 1.3.2006 and numbered 2005/10038. The Council of State also dismissed reasoning by the TCA that the history of past anti-competitive conduct in cement sector could be used as a presumption that such conduct would also happen post-merger. Moreover, it also argued that existence of risk of contact in other geographic markets was contradictory as those markets did not match the relevant geographic market defined by the TCA in this case.

UNITED KINGDOM

1. Executive Summary

This is a joint submission of the Competition Commission (CC) and Office of Fair Trading (OFT) to the OECD. For the purposes of this paper we refer to the OFT and the CC as 'the Authorities'. In this submission we set out the UK substantive test for merger review and note that whilst the official role of the Authorities has changed under the Enterprise Act 2002, in reality it has not resulted in significant changes in the way mergers are assessed in the UK.

The submission goes on to consider whether the differences between the UK substantial lessening of competition (SLC) test and the European Community Merger Regulation (ECMR) significant impediment to effective competition (SIEC) test give the UK Authorities greater flexibility on whether or not to conclude on market definition in certain cases. For example, in analyzing the hypothetical 'gap' case between the Bank of Investment and the Bank of Commerce under the SLC test, the Authorities may not have found it necessary to conclude on market definition, instead considering several possible market definitions.

Finally, we briefly consider whether other 'gaps' may exist, with reference to sequential mergers and minority shareholdings, and note that the flexibility of an SLC/SIEC test makes the Authorities better placed to deal with these issues as they arise than a dominance test.

2. Objective of UK merger control

The objective of the UK merger control regime is to ensure that a merger does not substantially lessen competition. The Authorities' joint draft Merger Guidelines[1] explain that competition is viewed as a process of rivalry between suppliers (i.e. firms) seeking to win customers' business over time. Rivalry may take various forms. For example, firms may seek to undercut each other on price, increase output more than rivals, or outperform each other on quality, productivity or innovation to create new or improved products or markets. For customers, rivalry can therefore have many beneficial effects, for instance by driving down prices and improving quality and variety. Any merger will be considered by the Authorities in terms of how rivalry is likely to be affected over time. A merger giving rise to an SLC will reduce the beneficial effects of rivalry, creating one or more 'adverse effects' for consumers.

1 On 30 April 2009, the OFT and CC issued draft joint guidelines on how they assess the competitive impact of mergers - http://www.oft.gov.uk/shared_oft/consultations/OFT1078con.pdf . The publication revises and expands guidance material currently contained in several publications issued separately by the two authorities after the introduction of the Enterprise Act 2002; in particular it will replace the following OFT publications: Mergers-substantive assessment guidance (OFT516), Guidance note revising Mergers-substantive assessment guidance (OFT516a) and Revision to Mergers: substantive assessment guidance-exceptions to the duty to refer markets of insufficient importance (OFT 516b); and the CC publication: Merger References: Competition Commission Guidelines, CC2.

3. The application of the UK substantive test

In 2002, with the passage of the Enterprise Act (the Act), important changes were made to the assessment of mergers in the UK. The status of the OFT and CC as independent decision-making authorities was confirmed and the broader 'public interest' test was abandoned in favour of a new competition test, namely a 'substantial lessening of competition' test. Decisions are taken by the Authorities, with a provision for a public interest test retained for certain circumstances.

3.1 The UK substantive test

The assessment of mergers in the UK is conducted as a two-phase process, giving distinct but interrelated roles to the OFT and the CC. At Phase 1 the OFT assesses whether the merger has resulted or may be expected to result in an SLC. If it considers this is the case it must refer the merger to the CC[2]; otherwise the merger is cleared. At Phase 2, the CC decides whether a merger has resulted, or may be expected to result in an SLC. If it finds this is the case, the CC may prohibit the merger, order divestiture in a completed merger or apply other remedies. Otherwise, once again, the merger may be cleared. In exceptional cases (see below) it is the Secretary of State (SoS)[3] who decides.

3.2 Theories of harm

'SLC' is not defined in the Act, but a merger which is considered to substantially lessen competition over time may be expected to reduce the beneficial effects of rivalry, creating one or more 'adverse effects' for consumers. The Authorities would not find an SLC without an expectation of adverse effects for consumers.

The Authorities base the central analytical framework for an inquiry upon identified 'theories of harm'[4]. Theories of harm are the hypotheses that are tested during an inquiry: the ways in which a merger (or the features of a market) could give rise to consumer detriment typically fall into the following categories:

- *Unilateral effects:* a worsening of the competitive offer by the merged firm or other firms in the market without the need for coordination, due to the loss of an independent competitive constraint. In order to assess the extent to which a merger may give rise to unilateral effects, the Authorities will consider a wide range of factors including the number of firms in the market and their market shares, the closeness of competition between the merging parties, the choice of alternative suppliers and evidence of potential competition[5].

- *Coordinated effects*: a worsening of the offer by a number of firms within the market, because the merger creates or strengthens the conditions under which they might collude tacitly (or

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2 There are a limited number of cases where the OFT has discretion not to refer a case to the CC, including where the OFT believes that the merger delivers countervailing customer benefits that outweigh the expected SLC, where the OFT accepts undertakings from one or more of the parties in lieu of a reference to the CC that the OFT believes will remedy the expected SLC or where the OFT believes the market(s) concerned is (are) not of sufficient importance to justify making a reference (the 'de minimis' exception)

3 Secretary of State at the Department for Business, Enterprise and Regulatory Reform (BERR)

4 The use of the term 'theories of harm' does not imply that the Authorities presume that harm will arise at the outset of the inquiry.

5 See Draft Joint Merger Guidance: http://www.oft.gov.uk/shared_oft/consultations/OFT1078con.pdf.

explicitly[6]). The Authorities will consider evidence of pre-existing coordination as well as how the merger affects the ability to reach and monitor terms of coordination and the internal and external stability of coordination.

- *Vertical or conglomerate effects*: a lessening of competition that harms consumers, resulting from a merger of suppliers of products or services which are not substitutes for one another. These may be inputs to one another (a vertical merger) or complements for, or unrelated to, one another (a conglomerate merger). In vertical merger cases, the Authorities will consider how the merger affects the merging parties' incentives and ability to foreclose customers and/or inputs. Similarly, for conglomerate mergers the Authorities will consider how the merger affects the parties' ability and incentive to foreclose the market through tying and bundling.

In some cases, the Authorities may consider several concurrent theories of harm[7]. The Authorities do not carry out their analysis against these generic theories of harm but develop and apply them on a case by case basis based on the evidence available to identify specifically how consumer harm may arise.

3.3 The 'public interest' test

Before 2003, merger control under section 69 of the Fair Trading Act 1973 (FTA) was based on a 'public interest' test allowing the Authorities to take into account, in addition to competition matters, certain non-competition matters such as public security, regulatory concerns and environmental considerations, although in practice most mergers were decided on competition grounds, with the final decision taken by Ministers.

A mechanism was retained under the Act for dealing with special public interest cases, involving a principal role for Ministers and an advisory role for the Authorities. In each case the role is specific and closely delineated. For certain specified and limited areas of public interest, Ministers may intervene in mergers to require that investigations cover issues other than competition matters. In such cases, whilst the Authorities will investigate and report on the effects of the merger on competition, Ministers retain ultimate decision-making power after taking into account both competition and public interest considerations. Until 2008 this power to intervene was limited to cases concerning national security (which includes public security) and certain media issues—freedom of speech, accuracy of presentation of news in newspapers, and media plurality. In 2008 the interest of maintaining the stability of the UK financial system was added to the list of public interest considerations.[8] Ministers may add further public interest criteria, but only by passing secondary legislation subject to approval by Parliament.

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6 Both "tacit" and "explicit" collusion may involve actions that are illegal under general competition law.

7 These may include different effects on the same competitive parameter (for example, unilateral and coordinated effects on price), the same effects on different competitive parameters (for example, unilateral effects on price and on quality), or different effects on different competitive parameters (for example, unilateral effects on price and coordinated effects on capacity).

8 Added to the Act by Order 2008 No 2645: The Enterprise Act 2002 (Specification of Additional Section 58 Consideration) Order 2008; for text, see www.opsi.gov.uk/si/si2008/uksi_20082645_en_1. The Secretary of State issued an intervention notice specifying this consideration in the context of the proposed merger between Lloyds TSB Group plc and HBOS plc. On 31 October 2008, the Secretary of State exercised his discretion not to refer the merger to the CC on the basis that the merger would result in significant benefits to the public interest as it relates to ensuring the stability of the UK financial system and that these benefits outweighed the potential for the merger to result in anti-competitive outcomes identified by the OFT. See www.berr.gov.uk/files/file48745.pdf.

These powers to intervene to protect the public interest have most often been used in mergers involving the defence industry, although the powers have recently been used in relation to issues of media plurality in the case of *BSkyB/ITV*[9] and in relation to the stability of the UK financial system in the case of *Lloyds/HBOS*[10].

3.4 Effect of the change of test

The change from a 'public interest' test to an 'SLC' test has not resulted in significant changes in the way mergers are assessed in the UK. This is due to the way the public interest test was implemented. In 1984, Norman Tebbit, then Secretary of State for Trade and Industry[11], stated, in what subsequently became known as 'the Tebbit doctrine', that his policy would be to make merger references primarily on competition grounds. This was reconfirmed by subsequent Ministers and final decisions were similarly based.

4. Enforcement issues connected to the dominance and the SLC test

4.1 Structural versus economic analysis

Under both a dominance test and a SIEC or SLC test a wide range of similar factors will be taken into consideration before an adverse finding is made, such as choice of alternative suppliers, switching costs and the importance of the competitive constraint being removed. However, the choice of test makes a difference in the roles played by market definition and concentration data in merger assessment.

The identification of a dominant position within a defined market is an essential part of the dominance test. The SIEC test used in the ECMR moves away from focussing solely on market definition to focussing on the actual loss of competitive constraint and the resulting effect on consumers. This enables the ECMR to capture those mergers which may result in consumer harm as a result of a reduction in competition, but where the market share of the merged firm does not reach the threshold for dominance – the so called 'gap' cases. However, the SIEC test under the ECMR continues to refer specifically to the creation or strengthening of a dominant position as a particular example of how competition may be impeded as a result of the merger, indicating that a structural analysis may still carry significant weight in the final SIEC decision.

The UK SLC test and the ECMR SIEC test are framed differently in that the UK SLC test makes no reference to the creation or strengthening of a dominant position as a specific way in which the reduction in competition may arise. The UK's new draft joint Merger Guidelines indicate that defining the relevant market is intended to provide a helpful framework for assessing the relevance of different constraints, but that it is not an end in itself and unilateral effects do not necessarily turn on a particular market definition. As such the Authorities may decide not to conclude on market definition and may instead consider several alternative markets as part of the investigation.

Specifically, in differentiated goods markets, drawing precise market boundaries runs the risk of either overstating or understating the degree of competitive constraint between specific suppliers. Instead the Guidelines state that the emphasis should be on loss of rivalry, focussing on closeness of competition. The analytical process of considering market definition may help to identify the closeness of competition

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9 *BSkyB/ITV*. CC, *Report on the acquisition by British Sky Broadcasting plc of 17.9 per cent of the shares in ITV plc*, December 2007.

10 *Op.cit.*

11 BERR is the successor department to the Department for Trade and Industry (DTI).

between the merging parties, but the Authorities will also consider all the available evidence to assess the loss of competitive constraint resulting from the merger.

Whilst most UK merger cases still do define a relevant market, there are a number of recent UK examples where the Authorities have not concluded on market definition, focusing instead on the direct rivalry between the merging parties. In *Lovefilm/Amazon*[12] (proposed acquisition of Amazon's online DVD rental subscription business), the OFT cleared the acquisition noting that the relevant frame of reference may be wider than only on-line DVD rental, but given the various alternative means of accessing video content it was not necessary to conclude on a precise definition. More recently, in a merger that has been referred to the CC (*NBYT Europe/Julian Graves*[13]), the OFT considered that whilst the evidence available to them, including critical loss analysis, pointed to a narrow market definition of nuts, seeds and fruit from specialist retailers, it was not necessary to conclude on market definition given the closeness of competition between the merging parties. Instead the OFT placed particular importance on evidence of consumer behaviour, including estimates of diversion ratios, and assessed whether the alternative choices of customers would be sufficient to constrain the merged entity such that it would be unable to raise prices or reduce non-price factors (quality, range and/or service). This case is currently being investigated by the CC.

In *Hamsard/Academy Music*[14] the CC did not conclude on the precise product or geographical market for live music venues in London but looked at the competitive constraints from other venues on each of the venues owned by the parties. Similarly, in *Vue / A3 Cinema*[15] the CC did not conclude on whether multiplex and non-multiplex cinemas were in the same market or on the precise boundary of the geographic market and considered the competitive constraint faced by individual cinemas on a case by case basis.

Although it may not be necessary to decide on the precise boundaries of the relevant market when the Authorities would reach the same conclusions as to the effects of the merger under different market definitions, this is less likely to be the case when the CC concludes that a merger has resulted or may be expected to result in an SLC and remedial action is required.

5. 'Gap' cases

The Authorities consider that the focus of the dominance test on single firm conduct or groups of firms acting collectively to imitate the policy of a monopolist makes it unsuitable for dealing with non-collusive oligopoly mergers, in particular where the full anti-competitive effects are not confined to the merging parties. For example, where two producers of close substitutes in a differentiated product market merge and the loss of this competitive constraint results in the merged entity being able to increase prices. Other firms in the market respond by increasing their prices and this process or reaction and counter-reaction by the merged entity results in a new equilibrium price which exceeds the direct effect on the

12 ME/3534/08 Anticipated acquisition by LOVEFiLM International Limited of the online DVD rental subscription business of Amazon, Inc. May 2008. http://www.oft.gov.uk/shared_oft/mergers_ea02/2008/lovefilm.pdf

13 ME/3887/09 Completed acquisition by NBTY Europe Limited of Julian Graves Limited. March 2009. http://www.oft.gov.uk/shared_oft/mergers_ea02/2009/NBTY-Julian_Graves.pdf

14 Hamsard 2786 Ltd / Academy Music Holdings Ltd - 23.01.07. http://www.competition-commission.org.uk/rep_pub/reports/2007/fulltext/522.pdf.

15 Vue Entertainment Holdings (UK) Limited / A3 Cinema Limited - 24.02.06. http://www.competition-commission.org.uk/rep_pub/reports/2006/508vue.htm.

merging parties. Such cases may be considered to result in consumer harm, despite the merging firms only having relatively small shares of supply on the wider market. These are considered to be 'gap' cases[16].

5.1 Examples of 'gap' cases

In its 2002 submission to the OECD the UK identified the *Lloyds/Abbey* banking merger as a case which would not have met a single firm dominance test but would have been caught under the SLC test. The merger[17] was prohibited by the SoS on the recommendation of the CC on grounds of a reduction in competition in the personal current account market which was expected to result in adverse consequences for consumers. It would not have met a single firm dominance test[18]; however, the CC noted that the four leading banks would have had a combined market share of 77 per cent following the merger, that competition in the market was lacking and that the merger would have removed one of the main sources of competition to them. The CC did not consider the issue of collective dominance.

The Authorities have not observed any other clear 'gap' cases since, but note that these cases may be considered to be less observable, as 'gap' cases involve Type II errors (an anti-competitive deal being let through) where there may be fewer protests, compared to Type I errors (a deal wrongly prohibited) where the merging parties would have clear incentives to protest.

5.2 A hypothetical 'gap' case for discussion – A bank merger

The hypothetical bank merger outlined in the Issues Paper[19] between Bank of Investment (BoI) and Bank of Commerce (BoC) displays strong similarities to the prohibited UK merger between Lloyds TSB and Abbey National in 2001 and the permitted merger between Lloyds TSB and HBOS in 2008[20].

In the hypothetical BoC/BoI merger, BoC and BoI would cease to be distinct and the estimated market shares for the provision of banking services is in excess of 25 per cent. As such, the share of supply test in section 23(4) of the Act would be satisfied.

The UK Authorities would be likely to consider unilateral effects arising from the elimination of actual and potential competition as well as potential coordinated effects. Market definition would be analyzed, but it may be the case that the Authorities would not conclude on the precise market boundaries. In this case the findings would be unlikely to turn on market definition and the Authorities would most likely consider a range of possible market definitions. The framework for analysis of competitive effects would be unlikely to differ substantially whether individual banking services are considered or whether the Authorities consider a wider 'banking services' market.

In assessing horizontal unilateral effects, factors likely to be considered include the number of firms in the market, market share (potentially across a range of markets), the closeness of competition between

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16 *'Mind The Gap: Reforming the EU Merger Regulation'* John Fingleton and Dermot Nolan, Competition Authority of Ireland. May 2003.

17 *Lloyds TSB Group plc and Abbey National plc: A report on the proposed merger*. CC July 2001.

18 The combined share was around 27 per cent with an increment of five per cent.

19 *'Changing the Standard for Merger Review – Issues Paper'* OECD 9 June 2009.

20 On 31 October, the OFT advised that the Lloyds TSB and HBOS merger could be expected to lead to a substantial lessening of competition in relation to personal current accounts (PCAs), SME banking and mortgages and recommended reference to the CC for full consideration. Nonetheless the Secretary of State for BERR decided that the public interest in ensuring the stability of the UK financial system justified allowing the merger to proceed.

players in the market including rivals' reactions to past events, the competitive strength of the target firm, customers' choices of alternative suppliers, and the scope for potential future competition. In particular, estimations of diversion ratios, either through econometric analysis or consumer surveys, combined with gross margins would give a strong indication of closeness of competition. The Authorities would also consider evidence of customer switching and competitor monitoring by the merging parties.

In assessing coordinated effects, the Authorities would consider whether, following the merger, conditions in the market would be such as to create or increase the ability and/or incentive for firms in the market to coordinate their behaviour.

We foresee three potential issues in relation to the so called 'maverick' reputation of BoI which would require further consideration. Firstly, BoI's current market share may underestimate the competitive constraint it exerts on BoC and other players in the market which would also feed into the potential competition assessment. Secondly, the merger may make coordination more likely by removing a maverick that would otherwise disrupt it.[21] Finally, however, the relatively recent entry and strong growth of BoI may also indicate that barriers to entry and expansion are relatively low. The Authorities may therefore also want to look at whether the entry and growth path of BoI could be easily replicated in the relevant timeframe.

6. Broader policy considerations

There remain a number of areas where it is difficult to ensure that all mergers which in the long-run may be harmful to consumers are captured; however, we consider an SIEC or SLC test is better placed to capture these cases as it offers a greater degree of flexibility than a dominance test. Two broad issues are discussed below.

6.1 Dynamic merger review

Merger proposals are endogenous and occur over time. Approving a currently proposed merger will affect the profitability and welfare effects of potential future mergers, the characteristics of which may not yet be known.

Under the SLC test mergers are typically considered on an incremental basis. There are questions about how Authorities should consider waves of mergers, especially in the current economic climate, as a stream of small mergers may at least in principle result in an overall detriment to consumers. It will usually be possible to identify a particular transaction within a series which results in an SLC. However, a situation might arise where a series of small consolidations, each only causing a limited lessening of competition, gives rise to a substantial detriment to consumers without any particular transaction in the series resulting in an SLC.

To date there has not been any need for the Authorities to address the issue head on as the Authorities' processes have been sufficiently flexible to adapt appropriately to all circumstances that have arisen. However, where markets are evolving and changing rapidly and transactional activity is high, it may be appropriate for competition authorities to take a more dynamic approach to merger review – although we note the results in *Nocke and Whinston* (2008)[22] which suggest pairwise comparisons may be sufficient.

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21 In the *Lloyds/HBOS* merger the OFT noted that HBOS could be seen as a 'maverick' firm likely to disrupt any attempt at coordination by the four leading banks and post-merger.

22 Volker Nocke & Michael D. Whinston, 2008. "Dynamic Merger Review," NBER Working Papers 14526, National Bureau of Economic Research, Inc.

6.2 Minority shareholding[23]

The UK merger jurisdiction recognises three levels of ownership interest: (i) a controlling interest, understood as *de jure* control by acquisition of greater than 50 per cent of the voting rights; (ii) the ability to control policy, understood as *de facto* control with shareholdings below 50 per cent; and (iii) the ability to materially influence policy of the target firm (material influence) including the strategic direction of a company and its ability to define and achieve its commercial objectives.

The threshold for material influence is flexible, with no specific threshold for determining whether a shareholding would confer material influence or not. For minority shareholdings below 25 per cent, the Authorities consider other factors such as interlocking directorships, cross-shareholdings and asymmetries in shareholdings.

For example in BSkyB/ITV[24], the CC considered whether the absolute and relative size of BSkyB's shareholding would give BSkyB the ability to block special resolutions and whether the industry knowledge and standing of BSkyB, combined with the absolute and relative size of its shareholding, might give it the ability materially to influence the strategy of the ITV board.

Under the SLC test, the UK Authorities have indentified unilateral, coordinated and vertical theories of harm arising as a result of the acquisition of less than full control. Unilateral effects have arisen where the acquisition results in a direct loss of an independent competitive constraint, reducing the acquirer's incentives to compete; where the shareholding prevents or influences the strategic decisions of the target firm ('strategic' unilateral effects); and where the shareholding prevents a full acquisition by a rival firm. It would generally be expected that any efficiency gains that may be obtained through a full acquisition are unlikely to be realised by a minority shareholding.

The potential for unilateral effects to arise through the frustration of rival bids or by reducing the ability of the target firm to act independently in deciding its short- or long-term strategy may indicate that small minority shareholdings may still have the potential to result in consumer harm and may not require the acquiring firm to hold a dominant position in an overlap market. This may support a tougher assessment of the criteria considered in reaching a finding of material influence under an SIEC/SLC test.

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23 See also UK submission to OECD Working Party No. 3 on Co-operation and Enforcement. '*Antitrust issues involving minority shareholding and interlocking directorates'*. DAF/COMP/WP3/WD(2008)12. February 2008

24 *Op.cit.*

UNITED STATES

In the United States, mergers have been challenged under two laws. Section 7 of the Clayton Act of 1914, described in detail below, specifically addresses anticompetitive acquisitions and has long been the primary basis for merger challenges. Section 1 of the Sherman Act of 1890 prohibits certain agreements and also can be used to challenge mergers. We address Section 1 as part of a discussion of changes to the U.S. substantive merger standard over time, later in this submission.

1. The substantive merger standard in the United States

Section 7 of the Clayton Act currently provides that:

> *No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.*[1]

Section 7 was intended to serve as "an effective tool for preventing" anticompetitive mergers.[2] The federal agencies that share merger enforcement responsibilities—the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) (collectively referred to as the Agencies)—believe that Section 7 can and does serve as intended. Section 7 covers "the entire range of corporate amalgamations"[3] as well as all anticompetitive effects flowing from them.

The substantial lessening of competition (SLC) standard in Section 7 prohibits mergers and acquisition reasonably likely to produce significant anticompetitive effects.[4] All mergers and acquisitions are "tested by the same standard, whether they are classified as horizontal, vertical, conglomerate or other."[5] "Merger enforcement, like other areas of antitrust, is directed at market power."[6] "The lawfulness

1 15 U.S.C. § 18 (emphasis added).

2 *Brown Shoe Co. v. United States*, 370 U.S. 294, 319 (1962).

3 *United States v. Philadelphia National Bank*, 374 U.S. 321, 342 (1963). Since 1980, Section 7 also covers non-corporate amalgamations. *See infra* note 29.

4 The Supreme Court has never held that any particular form of anticompetitive effect, or any particular form of acquisition causing such effect, falls outside the scope of the current version of Section 7. The Court held that it reaches mergers that eliminate only potential competition. *See United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973). The Court also indicated that a merger could violate Section 7 by leading to unlawful exclusionary conduct. *See Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986).

5 *Federal Trade Commission v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967).

6 *Federal Trade Commission v. H.J. Heinz Co.*, 246 F.3d 708, 713 (D.C. Cir. 2001) (quoting Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust* 511 (2000)).

of an acquisition turns on the purchaser's potential for creating, enhancing, or facilitating the exercise of market power . . . ."[7]

"Section 7 itself creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need prove only that its effect '*may be* substantially to lessen competition.'"[8] "Section 7 does not require proof that a merger or other acquisition has caused higher prices in the affected market. All that is necessary is that the merger create an appreciable danger of such consequence in the future. A predictive judgment, necessarily probabilistic and judgmental rather than demonstrable, is called for."[9] The words "may be" indicate that Section 7 is concerned with "probabilities," not with "certainties" nor with mere "ephemeral possibilities."[10]

In challenging an acquisition, the Agencies (or other plaintiff) must identify "some mechanism by which the challenged acquisition causes anticompetitive effects."[11] The linchpin of that mechanism normally is the change in control over the operation of the acquired assets or company, but Section 7 also reaches anticompetitive effects that do not result from a change in control.[12] Such an effect can arise if one competitor acquires stock in another, causing the first competitor to share in the profits of the second.

2. Overview of merger assessment in the United States

The Agencies' general approach to assessing horizontal mergers—those that eliminate direct competition between the merging firms—is set out in the *Horizontal Merger Guidelines* (Guidelines)[13] and the *Commentary on the Horizontal Merger Guidelines* (Commentary) issued in 2006.[14] The Commentary explains that: "The core concern of the antitrust laws, including as they pertain to mergers between rivals, is the creation or enhancement of market power."[15] Consequently, "the Agencies focus their horizontal merger analysis on whether the transactions under review are likely to create or enhance market power."[16] "The unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise."[17]

The Commentary observes that the "Guidelines' five-part organizational structure has become deeply embedded in mainstream merger analysis. These parts are: (1) market definition and concentration; (2) potential adverse competitive effects; (3) entry analysis; (4) efficiencies; and (5) failing and exiting

7 *United States v. Archer-Daniels-Midland Co.*, 866 F.2d 242, 246 (8th Cir. 1988).

8 *California v. American Stores Co.*, 495 U.S. 271, 284 (1990).

9 *Hospital Corp. of America v. Federal Trade Commission*, 807 F.2d 1381, 1389 (7th Cir. 1986) (citing *United States v. Philadelphia National Bank*, 374 U.S. 321, 362 (1963) (holding that Section 7 calls for "a prediction of [a merger's] impact upon competitive conditions in the future")).

10 *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962).

11 *United States v. Dairy Farmers of America, Inc.*, 426 F.3d 850, 858 (6th Cir. 2005).

12 *See Denver & Rio Grande Western Railroad Co. v. United States*, 387 U.S. 485, 501 (1967) ("A company need not acquire control of another company in order to violate the Clayton Act.").

13 The Guidelines are available on the Agencies' websites at http://www.usdoj.gov/atr/guidelines/hmg.pdf and http://www.ftc.gov/bc/docs/hmg080617.pdf.

14 The Commentary is available on the Agencies' websites at http://www.usdoj.gov/atr/guidelines/215247.pdf and http://www.ftc.gov/os/2006/03/CommentaryontheHorizontalMergerGuidelinesMarch2006.pdf.

15 *Commentary on the Horizontal Merger Guidelines* at 1.

16 *Id.*

17 Horizontal Merger Guidelines § 0.1.

assets."[18] The Commentary also explains that the Agencies "do not apply the Guidelines as a linear, step-by-step progression that invariably starts with market definition and ends with efficiencies or failing assets."[19] Rather, they take "an integrated approach to merger review" that may not follow the "ordering of these elements in the Guidelines."[20]

> *Using numerous illustrations from actual investigations, the Commentary illustrates how the Guidelines' integrated process is "a tool that allows the Agency to answer the ultimate inquiry in merger analysis: whether the merger is likely to create or enhance market power or facilitate its exercise." At the center of the Agencies' application of the Guidelines, therefore, is competitive effects analysis. That inquiry directly addresses the key question that the Agencies must answer: Is the merger under review likely substantially to lessen competition? To this end, the Agencies examine whether the merger of two particular rivals matters, that is, whether the merger is likely to affect adversely the competitive process, resulting in higher prices, lower quality, or reduced innovation.*
>
> *The Guidelines identify two broad analytical frameworks for assessing whether a merger between competing firms may substantially lessen competition. These frameworks require that the Agencies ask whether the merger may increase market power by facilitating coordinated interaction among rival firms and whether the merger may enable the merged firm unilaterally to raise price or otherwise exercise market power. Together, these two frameworks are intended to embrace every competitive effect of any form of horizontal merger.*[21]

3. Changes in the substantive merger standard over time

The United States adopted the SLC standard for mergers in 1914. Prior to that time, mergers were subject to challenge under Section 2 of the Sherman Act, which prohibits monopolization,[22] and especially under Section 1 of the Act, which prohibits unreasonable restraints of trade.[23] Before 1914, the Supreme Court declared that several railroad mergers violated Section 1.[24] From 1914 until 1980, some merger challenges continued to be based on Section 1 as a result of jurisdictional limitations within Section 7 that eventually were eliminated.

The most important of these limitations was called the "asset loophole." As originally enacted, Section 7 did not contain the clause now in the law referring to acquisitions of assets.[25] Consequently, the Supreme Court held that Section 7 gave the FTC no power to order relief following an asset acquisition,[26]

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18 *Commentary on the Horizontal Merger Guidelines* at 2.

19 *Id.*

20 *Id.*

21 *Id.* at 2–3 (quoting Horizontal Merger Guidelines § 0.2) (citation omitted).

22 The monopolization offense has two elements: "the possession of monopoly power in the relevant market" and "the acquisition or maintenance of that power" through anticompetitive conduct. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

23 *See State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

24 *See United States v. Union Pacific Railroad Co.*, 226 U.S. 61 (1912); *Northern Securities Co. v. United States*, 193 U.S. 197 (1903).

25 *See* ch. 323, 38 Stat. 730, 731–32 (1914).

26 *See Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission*, 291 U.S. 587 (1934); *Federal Trade Commission v. Western Meat Co.*, 272 U.S. 554 (1926).

and mergers effectuated through the acquisition of assets therefore were challenged under the Sherman Act. The original Section 7 also contained a clause referring to the elimination of competition between the parties to the transaction, which generally was understood to preclude a Section 7 challenge to a non-horizontal merger.[27] Both limitations were eliminated in 1950,[28] and others were eliminated in 1980.[29]

For quite some time, it was understood that the substantive standards for mergers were materially different under Section 1 of the Sherman Act and Section 7 of the Clayton Act. Section 7 was originally enacted because Congress concluded that the Sherman Act was inadequate to prevent various anticompetitive practices, including acquisitions.[30] In amending Section 7 in 1950, Congress indicated that the amended Section 7 would prohibit mergers not prohibited by the Sherman Act,[31] and a major impetus for the legislation was a recent Supreme Court decision rejecting a merger challenge under Section 1.[32]

Nevertheless, the Supreme Court decisions applying Section 1 to mergers after World War II did not evidence a discernable difference in standards. Modern competitive effects analysis began to emerge in a 1948 decision rendered under Section 1, which was the first antitrust decision to use the term "relevant market" and to focus on market shares as an indicator of competitive significance.[33] A 1964 bank merger decision under Section 1 analyzed the transaction just as contemporaneous bank decisions decided under Section 7.[34]

In 1980, Professors Areeda and Turner argued that "no difference in result is mandated by the § 1 concept of unreasonable restraint as compared with § 7's concept of a probable substantial lessening of

27 *See Brown Shoe Co. v. United States*, 370 U.S. 294, 313 & n.21 (1962). After Section 7 was amended to correct this apparent defect, the Supreme Court construed the original language so as not to preclude challenges to non-horizontal mergers. *See United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 590–92 (1957).

28 Celler-Kefauver Act, ch. 1184, 64 Stat. 1125.

29 Until 1980, Section 7 applied only to acquisitions by corporations engaged in commerce. Thus, it did not apply to acquisitions by individuals, partnerships, and unincorporated associations, nor did it apply to acquisitions of firms that did not participate directly in the sale, purchase, or distribution of goods and services in interstate commerce. *United States v. American Building Maintenance Industries*, 422 U.S. 271 (1975). Both limitations were eliminated by section 6 of the Antitrust Procedural Improvements Act of 1980, 94 Stat. 1154, 1157–58.

30 *See United States v. Penn-Olin Chemical Corp.*, 378 U.S. 158, 170–71 (1964) ("The grand design of the original § 7 . . . was to arrest incipient threats to competition which the Sherman Act did not ordinarily reach."); David Dale Martin, *Mergers and the Clayton Act* 43–49 (1959); Senate Committee on the Judiciary, Senate Report No. 698, 63rd Congress, 2d session, at 1 (1914) (the purpose of the Clayton Act in general was "to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the" Sherman Act).

31 *See* House Committee on the Judiciary, H.R. Report No. 1191, 81st Congress, 1st session, at 8 (1949) (the legislation prohibits mergers even if their "effect is not so far-reaching as to amount to" Sherman Act violations); Senate Committee on the Judiciary, Senate Report No. 1775, 81st Congress, 2d session, at 6 (1950) (the legislation "seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act.").

32 The case was *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948). The DOJ alleged that the acquisition of a steel fabricator by the largest U.S. steel producer would eliminate competition in the sale of fabricated steel products and in supplying the acquired company.

33 *United States v. Columbia Steel Co*, 334 U.S. 495 (1948).

34 *United States v. First National Bank & Trust Co. of Lexington*, 376 U.S. 65 (1964).

competition."[35] In 1982, the DOJ took the position that the substantive standards under Section 1 and Section 7 were identical.[36] A few years later, an important court of appeals decision adopted this view, explaining how the law under both Section 1 and Section 7 had evolved over time.[37] It is now widely agreed that a showing of likely anticompetitive effects suffices to establish a violation of Section 1, just as it does under the SLC standard.

4. Alternative Standards

The SLC standard carries with it no special risk of overenforcement or underenforcement. The standard is flexible, leaving initially to the Agencies, and ultimately to the courts, the task of determining whether the standard is met in each particular case in the light of the available evidence. There is a general consensus today that the Agencies and courts were overly restrictive in the 1960s. The flexibility of the SLC standard, however, allowed merger policy to incorporate enforcement experience and developments in economics. The SLC standard appropriately invites a highly fact-intensive investigation in which the evidence is carefully examined through the lens of modern economics.

The precise wording of the SLC standard has not been important to agency or judicial decision-making. What has mattered, and continues to be critical, is Section 7's explicit focus on competition. In the first important decision following the 1950 amendments to Section 7, the Supreme Court observed that the law was designed for "the protection of *competition*, not *competitors*" and reflects "the desire to restrain mergers only to the extent that such combinations may tend to lessen competition."[38] Also critical is the insight that focusing on competition implies focusing on market power. That same focus, however, could be achieved without the precise SLC formulation.

The Agencies often cooperate in merger investigations with agencies in other jurisdictions, many of which employ a dominance standard. The Agencies have not encountered a case in which a difference in substantive merger standards was an impediment to successful cooperation.

35 4 Philip Areeda & Donald Turner, *Antitrust Law* ¶ 906, at 22 (1980).

36 This position was announced in the Merger Guidelines issued by the Department on June 14, 1982.

37 *United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1282 (7th Cir. 1990).

38 *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

EUROPEAN COMMISSION

1. Introduction

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

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.

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.

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

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

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*".

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 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.

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

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).

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

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.

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]

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 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]

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]

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

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.

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7 Paragraphs 18 to 20 of the Horizontal Merger Guidelines.

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".

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 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.

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]

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]

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

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

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.

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.

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

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

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).

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]

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

18 Paragraph 32 of the Non-Horizontal Merger Guidelines.

19 Paragraph 78 of the Non-Horizontal Merger Guidelines.

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.

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

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.

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.

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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 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

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. 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.).

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

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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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 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.

3.3 Recent Commission decisional practice under the SIEC test

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*).

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.

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

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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.

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.

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.

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 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.

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%).

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.

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

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43 See above footnote 39.

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,

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.

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 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.

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.

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]

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

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.

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.

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]

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

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]

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.

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.

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-*

51 Paragraph 23 of the Non-Horizontal Merger Guidelines.

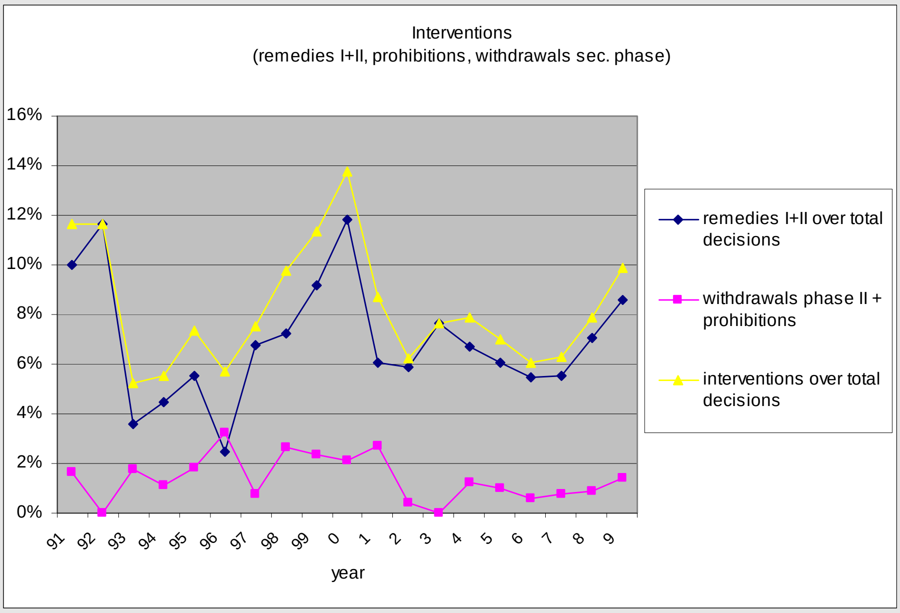
52 When considering the profitability of an input foreclosure strategy, the merged entities face a trade-off between the profit lost in the upstream market due to a reduction of input sales and the profit gained on their respective downstream markets by raising their rivals' costs. The Commission conducted 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.

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

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 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]



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],

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.

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]).

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

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]

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.

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.

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.

4. Conclusion

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.

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.

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

CHILE

1. Pre-2004 amendments scenario

At least until the mid-1980s, Chile's competition institutions considered a variety of goals in their assessment of mergers, as sometimes decisive weight was given to non-efficiency goals not mentioned in the law. For example, the military government's unilateral tariff reductions in 1974 and the economic crisis of 1982 both created widespread concern about unemployment, and particularly in merger cases the competition institutions considered the prevention of unemployment, local hardship, bankruptcy, and "the public interest" to be factors that might justify an anticompetitive merger. On some occasions, the law's exemption provision that existed at the time was used, which considered an executive decree and an Antitrust Commission report finding that an otherwise illegal merger was necessary for the stability or development of domestic investments.

Over the last fifteen years, the competition institutions have gradually moved away from the non efficiency, non-competition goals, implying that economic efficiency is the principal priority of the law. However, up until the 2004 amendments to the Competition Act and the creation of the Competition Tribunal, non-efficiency goals had continued to play a role. For example, in 1994 the former Antitrust Commission considered an appeal by Chile's two largest airlines of a Preventative Commission decision that their merger would be anticompetitive. The combined firm would reach about 85% of all domestic passenger traffic. The airlines did not offer a conventional failing firm defence, with claims or evidence of imminent bankruptcy or even of unprofitability. Rather, they claimed that their long run sustainability was in danger because they could not achieve scale economies, without offering evidence concerning these economies. The Antitrust Commission's decision said that the merger would produce efficiencies, but did not consider whether such efficiencies would offset deadweight loss. Instead, the Commission permitted the merger on the ground that the market was contestable and that potential entry would be sufficient to prevent the merged firm from exercising market power. Nevertheless, the fact that the Commission ordered the firm to set up a "self-regulatory" pricing system that tied its tariffs on non-competitive routes to those on competitive ones, suggests that the Commission was not confident that potential competition would keep pricing competitive. This case may be indicative that other policies overweighed competition policy at the time. Three years later, the Antitrust Commission fined the merged firm and one other for engaging in predatory pricing to drive out a small airline by offering large discounts on the one route on which the small airline was competing with them.

2. Post-2004 amendments scenario

In general, the amendments introduced in 2004 to the Competition Act are a strong indication of a change from a more legalistic approach to a more economic one. For instance, in the current Competition Tribunal (or TDLC) created by those amendments, two of its five members are economists. Since the TDLC is part of the judiciary, competition case handling and procedures have also had to become more rigorous in order to match judiciary standards. The result of the new institutional framework is the application of more sophisticated economic analysis and more rigorous procedures than previously found in the administrative procedures and decisions by the former (administrative) Commissions.

With regard to merger analyses, the current Chilean Competition system states a voluntary review process in which parties are encouraged to consult the TDLC on an intended merger. These consultations are non-adversarial proceedings in which the *Fiscalía Nacional Económica* (or FNE) is requested to submit a technical report on the operation. This voluntary system has proved effective so far, and enjoys of wide support within the country. Therefore, a pre-merger notification and review requirements has not been considered to be necessary for the efficient functioning of the system. When a merger operation is not consulted before the TDLC, it can be challenged by any interested person, as well as by the FNE, before the TDLC, in a contested procedure. While the contested proceeding is ongoing the TDLC may issue an injunction to prohibit the progress or the closing of the operation.

The wording of the substantive law (DL 211 of 1973, the Competition Act) is broad enough to allow an anticompetitive merger to be approached under either the commonly applied substantive tests (substantially lessen competition) or under the analysis of whether it "creates or maintains a dominant position". A merger or acquisition can be considered an infringement if it tends to prevent, restrict or hinder free competition, in which case the transaction may be blocked or authorised with divestiture measures.

Moreover, the Competition Act does not encompass general procedures for defining markets or rules for identifying and measuring factors of economic-based analysis, such as market share presumptions as an indicator of dominance, thresholds for evaluating market concentration, references to entry barriers or indications of the scope of an efficiency defence.

Although there is no description in the law, or in any regulation, on the kind of test that the TDLC may perform while examining a merger, or on the way in which factors considered are going to be weighted, there are three instruments that shed lights on the substantive analyses the TDLC may undertake when assessing mergers: the 2006 FNE's Internal Guide for the Analysis of Horizontal Concentration Operations, the 2009 TDLC Instruction on the information that must be provided in merger consultation proceedings, and the substantive analysis underlying the TDLC's decisions found in the existing case law.

2.1 FNE's Internal Guide for the Analysis of Horizontal Concentration Operations

In 2006, the FNE issued its Internal Guide for the Analysis of Horizontal Concentration Operations, to provide guidance on the way it performs merger analysis. The guideline states that merger analysis is aimed at preventing the risks of increased concentration in the relevant market as result of the merger, which may make anticompetitive conduct more likely. Anticompetitive risks include unilateral behaviour by the merging company and post-merger coordination in the market. The Guide balances these risks against pro-competitive efficiencies.

The substantive standards of analysis set forth in the FNE's Guide include a review of the relevant market, market concentration, entry barriers, competition dynamics, efficiency considerations and failing firm considerations.

The methodology begins with the definition of the relevant market, following the SSNIP test. Concentration is assessed according to the Herfindahl-Hirschmann index. Market shares are usually based on revenues; however, market shares may be based on sales volume; production output; installed capacity or reserves (for example, in industries linked to the exploitation of natural resources).

In addition to market structure the Guide also takes into account other economically relevant features of the industry, particularly entry barriers. Firms that produce below minimum efficient scale or that target only niche markets will be regarded as unlikely to discipline incumbents. In addition to legal barriers, the guidelines particularly emphasise sunk costs. Examples listed include start-up costs, such as collection of market information, development and testing of product design, installation of equipment, staff recruitment, establishment of distribution systems, and investment in specific assets, advertising and marketing, branding and after sales services, research and development, innovation and technology and facilities, infrastructure or essential inputs.

Ease of entry will depend on entry being likely, timely and sufficient. The FNE will take into consideration any delays or losses that potential entrants should expect in order to enter. Factors to be considered are costs of transforming the technology, costs of increasing productive capacity, costs of adapting their commercial practices, scale of operations (that is, the size of plants, the costs of shifting production and the maturity of the market), the time needed to learn how to optimize specific assets and the development of a distribution network.

Strategic behaviour is another factor relevant to establishing the capacity of potential entrants to enter into the market. Examples include (over) investment in installed capacity, (over) investments in advertising, pricing policies such as limit pricing and regular price wars, proliferation of products and brands to fill the market, political loyalty, and business reputation, long-term contracts with automatically renewable exclusivity clauses and exclusionary conduct, as well as acts aimed at raising rivals' costs.

The Guide includes provisions dealing with failing firm situations and the analysis of overseas mergers with impact on the Chilean market.

It is important to point out that the Competition Tribunal is not bound in any way by the FNE's Internal Guide.

2.2 Competition Tribunal's Instruction Nr. 12 on the information that must be provided in merger consultation proceedings

In March 2009 the Tribunal issued an instruction on the information that must be provided in merger consultation proceedings. This instruction requires that the parties to a merger provide the following information: a) identification of the parties to the merger; b) description of the proposed merger transaction; c) identification of the relevant market (description of the services or products supplied by each party; identification of the products or services that could substitute those offered by the merging parties, size estimation of the affected markets, description of the structure and characteristics of the current and potential offer of services or products involved, cost estimation of production, imports, exports, distribution and commercialization, description of the distribution and commercialization systems that exist in the market; description of the product or service demand structure and characteristics; price information; market entry and exit conditions; information on exclusive agreements with suppliers or clients; cooperation agreements between the parties to the merger or between them an third parties; and information about trade unions to which the parties, their clients or suppliers belong to); d) objectives sought to be achieved by the merger transaction and expected results; expected effects of the merger on the market.

Although the information requested in the Tribunal's Instruction does not exhaust the range of evidence that the Tribunal will be reviewing, or the precise weight each piece of information will be given, the Instructions serve the purpose of providing direction as to what kind of data the Tribunal will be assessing in a merger review process, thus allowing parties that come forward to clear their transactions preparing beforehand the required data and to be more aware of the likely outcome. Even though the Tribunal's Instruction does not expressly state the way this information will be used, it is clear that sole structural data will be not conclusive.

2.3 *Substantive analysis of the Competition Tribunal Decision's on merger transactions and acquisitions*

In all of its main decisions, the Tribunal first defines the relevant market (product market and geographic market), which is afterwards measured in terms of its participants and its concentration levels. The Tribunal then examines the potential efficiencies that the merger may generate and the likely effects on competition that the merger would bring about.

At this point it is worth noting that in the entire merger transactions reviewed, the Tribunal has expressly stated that the concentration levels are not by themselves conclusive in order to determine the effects these levels would have on the markets involved. Indeed, this is very indicative of the fact that the Tribunal does not rely on market shares and concentration levels as the sole basis to block a proposed merger. On the contrary, since its creation in May 2004 its decisions so far suggest that the Tribunal will consider market share and concentration data only as the starting point for analyzing the competitive impact of a merger. In this context, it is important to indicate that of all the transactions reviewed by the Tribunal, only one has ever been blocked, despite the fact that in several of them, the Tribunal had established that high market share and market concentration levels would result from the merger transaction.

One of the best examples of this is found in the Tribunal's decision of a merger of two telecom companies, which would have an impact on three different markets. The first was the paid TV service, where one of the merging companies had a market share of 68% and the other 32%. The second market was that of the Internet Broadband service, in which one of the merging companies had 35% of the market, the other a 12,62%, while the rest of the market participation was divided between two companies with 15% each, and various other smaller operators. The third market was the local landline telephone service, in which only one of the merging companies had presence with a 6,7% market share, and where the dominant firm had a 78,2%. Despite the fact that in the first market the merger would imply a merger to monopoly, and that in the second it would result in a post-merger HHI of 3006 (the pre-merger HHI was 2047) which could be considered as likely to create or enhance market power or facilitate its exercise, the Tribunal did clear the merger, though imposed several conditions. In doing this, the Tribunal gave decisive weight to the technological aspects that affected the structure of the telecommunication markets, stating that the constant development of new technologies and their convergence created highly dynamic conditions in the markets which in turn would open up competition. The Tribunal also indicated that the merger would be positive for the market as a whole as it would create efficiencies by allowing a better utilization of existing assets; this would enable the merger to achieve lower investment costs to provide the three services involved, which in turn would permit that telephone and broadband internet services reach an important number of Chilean households that at the time were served by only one provider. Thus, in a majority ruling, the Tribunal considered that the competition expected to arise in such essential services for the country development, outweighed the costs of having, for a period of time, a company with such dominant position in the paid TV market.

The Tribunal's decision that better articulates the guiding principles and the analytical framework it applies when examining merger transactions, is found in the only case in which the Tribunal has blocked a merger[1]. In this case, the Tribunal, when commencing its analysis stated that: *"The merger transactions control is based on the fact that these* ***transactions create a new entity that may have a higher market***

[1] The largest Chilean retail company, Falabella, and the largest supermarket chain, D&S, agreed in 2007 on a merger. A new entity would be formed, in which Falabella would own 77% of the shares and D&S would own 23%. With combined annual sales of approximately US$ 8 billion, it would have become the second largest firm traded on local stock markets, and the second largest retailer in Latin America, after Wal-Mart México.

power than that previously held by the firms individually, thus reducing the number of competitors, facilitating collusive practices or abuses of dominant positions*... The Tribunal has to analyse the structure of the markets in which the relevant economic agents participate, ...but this analysis has to be referred to concrete situations, taking into account the specific peculiarities, carrying out, in each case, an assessment of the benefits or damages that a given transaction may bring about to the competition in an industry or market. This assessment will be determined, mostly, by the market power that may be attained by one or more economic agents as a result of the merger, and by the actual or potential effects that the said market power may produce on the competition... In merger transactions reviews, the Tribunal, together with the intrinsically prospective analysis to determine whether a given transaction has the aptitude to likely provoke anticompetitive effects, will consider those elements and factors that may counterbalance the economic power that the merger may generate or increase, in order to determine if those elements or factors are able to eliminate or at least minimise the risks of creating adverse effects on competition."*

In blocking the merger, the Tribunal states the transaction would produce an enormous change in the market structure, creating a dominant firm in the integrated retail market and in virtually all of this market' segments. The Tribunal finds that the merged firm would have the ability to leverage its market power onto other areas of the retail industry in which it may decide to participate in the future. Moreover, given the size of the Chilean economy and the relevance of the entry barriers that exist in the various businesses of which the integrated retail market is structured, it is very unlikely that a new entrant be able to counteract the competitive effects of concern. Furthermore, the Tribunal declares that if the transaction were to be cleared, it would result in a substantial and lasting decrease of competition in a market that involves a "very relevant part of the consumption decisions of Chilean people", with adverse effects, in welfare terms, on prices, output quantity and quality of the products involved. The Tribunal also asserts that the efficiencies that may derive from the merger do not countervail the anticompetitive risks that it may cause and that there are no remedies that could sufficiently and effectively mitigate the risks to competition that the merger would bring about.

3. Conclusions

The Competition Act does not encompass general procedures for defining markets or rules for identifying and measuring factors of economics-based analysis. However, it is apparent from the commitment and consistency of both the FNE, in the rigorous application of its first guideline, and the TDLC, in its decisions, that despite the absence of a binding regulation detailing the substantive analysis that the Tribunal may undertake when assessing merger transactions, that the underlying guiding principles and factors that will be taken into consideration can be ascertained.

Moreover, it may be said that the substantive analysis performed by the Chilean Competition Authorities, although probably not strictly fitting within the traditional tests (i.e., SLC and Dominance), encompasses elements of both, which make it sufficiently sound and efficient as a tool to perform merger reviews.

The legislative changes to the Competition Act, the last of which took place in 2004, and although none of these changes specifically affected the merger review procedures, are a strong indication of the shift towards a more sophisticated economic approach, which has clearly influenced the way merger reviews are performed.

Merger control is based mainly on voluntary consultations by the merging parties. Therefore, there are no big risks of over enforcement.

ROMANIA

1. Introduction : Background considerations on Merger Control in Romania

Romanian merger control is regulated by Law No. 21/1996 (the Competition Law). The merger control rules contained in the Competition Law are given detail and expanded upon through secondary legislation.

The statutory provisions dealing with merger control were introduced in 1996, but in 2003 significant amendments followed in order to bring Romanian competition law in line with EU competition rules. Nevertheless, the amendments brought to the Competition Law happened to take effect in 2004 before the enactment of the Modernization Regulation on the control of economic concentrations and this explains why Romanian Competition Council (RCC) continues to apply the dominance test as per the former EC Merger Regulation 4064/89.

2. Substantive test for clearance

According to Article 12, "Economic concentrations are illegal when, having the effect of creating or consolidating a dominant position, lead to or are likely to lead to a significant restriction, prevention or distortion of competition on the Romanian market or on a part of it.''

That means that after completing the investigation the Romanian competition authority can either prohibit the merger or authorise it, laying down the necessary measures to prevent or remedy the identified anticompetitive effects otherwise arising from the proposed transaction.

Article 12 does not specifically mention the concept of joint dominance. However, based on Community case law, the substantive test has been interpreted into the Romanian Competition Law so as to include both single firm and collective dominance.

In order to establish their compatibility with a normal competitive environment, economic concentration operations are analyzed according to the following criteria, as article 13(1) of the Competition Law provides:

- necessity to maintain and develop competition on the Romanian market, taking into account the structure of all markets in question and the existing or potential competition among undertakings from Romania or abroad;
- market share held by the undertakings, their economic and financial power;
- available alternatives for suppliers and users, their access to markets and supplies, as well as any legal or other types of barriers to entry on the market;
- supply and demand trends for the relevant goods and services;
- extent to which end-users' and consumers' interests are harmed;

- contribution to technical and economic progress.

3. "Theories of harm" that the Romanian Competition Council investigates

The competition test applied by the RCC is therefore a two-fold test consisting in the identification of dominance and a further balancing exercise of gains/disadvantages in order to decide whether the parties would significantly impede competition or not. That means that the RCC's analysis is not solely based on whether a dominant position is created or reinforced, but rather considers a wide range of elements in order to assess if the merger will lead to a significant restriction, prevention or distortion of competition such as existing competition, potential competition, barriers to entry and demand or supply countervailing power.

Although it is clear that the gains-disadvantages balancing exercise is not of equal weight to the identification of dominance, efficiency gains are although taken into consideration by RCC in the context of the second step of the analysis as long as the parties to the planned concentration can show benefits that might counterbalance the disadvantages stemming from the creation or reinforcement of the dominant position.

4. Merger control enforcement

As shown in the table below, since the implementation of Competition Law in 1996, 3 negative decisions were issued. There were as well 7 conditional authorization decisions and three authorization decisions with commitments provided by the parties to the merger. RCC issued also sanctioning decisions in which it imposed severe fines on companies for failure to notify the economic concentration. None of the cases which reached under phase two of the assessment involved the issue of collective dominance.

Year	Number of mergers and acquisitions (M&A) reported or assessed	Negative-clearance decision (phase 1)	Non-objection decision (phase 1)	Authorization decision (phase 2)	Conditional authorization decision (phase 2)	Prohibition decision (following investigation according to art. 12)
1997	6	3	1	0	1	1
1998	43	8	34	1	0	0
1999	140	47	92	1	0	0
2000	193	7	180	2	3	1
2001	169	9	153	5	1	1
2002	157	14	138	5	0	0
2003	247	16	228	2	1	0
2004	165	45	118	2	0	0
2005	115	20	95	0	0	0
2006	106	24	82	0	0	0
2007	45	5	38	1	1	0
2008	76	14	60	2	0	0

5. Reforming the Romanian Competition Law

Just as competition forces undertakings to improve themselves, to adapt continuously, competition authorities must also live up to the challenges they face, and from time to time it becomes inevitable to adjust the legal framework.

In an overall current process of thinking on the reform of the Romanian legislation in the field, RCC has currently put up for discussion among other important aspects, the issue of a possible change from the dominance test to the SIEC (*Significant Impediment of Effective Competition*) test.

Even if the Romanian competition authority does not have any experience about the "operation" of the SIEC test in practice, we would like to share with you our current thoughts on this issue highly debated at international level.

On the basis of EU experience in this matter, it seems to us that the SIEC test procedure looks simpler at first glance because it requires only one step: to decide whether a merger increases the market power of the parties and it has any unilateral or co-ordinated effects which substantially lessens competition or not.

Also, SIEC seems to fit more with economic analysis and would allow for more flexibility, especially when analyzing a merger in a market that is initially concentrated and where it is all the more important to preserve that competition does exist also post-merger, even in the absence of individual market power or tacit coordination.

In this respect, Recital 25 of the new Council Regulation (EC) no. 139/2004 (hereinafter reffered as ECMR)[1] says that the notion of SIEC *"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"*. Looking into our portfolio of cases, we do not find any case that could fit into this scenario, confirming thus the existence in our national practice too, of the so-called gap in the application of dominance test to mergers that lead to non-coordinated effects. But, we do not exclude the possibility that we may cope in the future with tight oligopoly situations where the merged entity would not have a dominant position, but it is nonetheless expected to be able to profitably raise price post-merger despite expected increases in output by competitors.

However, overall, it seems to us that the difference between the SIEC test and the current test employed by RCC is minimal, as first and foremost a transaction will substantially impede competition where it creates or strengthens a market dominant position. To ascertain this, most of the merger cases assessed by RCC under the dominance test fall into the category of clear-cut cases of single dominance where the merger would enable the merging parties to unilaterally impose a profitable post merger price above competitive levels.

In the situation where there is no single firm dominance, we do acknowledge that in order to capture the reduction in competition, the dominance test could only rely on collective dominance in order to prohibit a concentration. Looking again into our portfolio of cases, we do find one case that may fit into this scenario. This case is about a merger between the third and fourth largest competitors in the cement market for which RCC issued in its early years of enforcement a non-objection decision.

Maybe, in such a scenario and also in an alleged judicial review of the case, allegations in favour of the likelihood of post-merger collective dominance would have stand since this merger would have removed a small but maverick firm from the market. Further, considering the peculiarities of this market such as high barriers to entry, transparency, product homogeneity, this merger would have led to a post merger decrease of the competitive constraints on the incumbents.

1 See recital 25 of the Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings.

Actually, this merger triggered to a certain extent the coordination of the behaviour between the remaining 3 vertically integrated players and the increase of the prices in the downstream market; these facts determined RCC to look for and gather evidence in order to prove a cartel on the cement market. But, in such a scenario, it is useless to try to make a distinction between SIEC and dominance tests, since both of them would have very well captured the coordinated anticompetitive effects of the merger.

Looking back to the three relatively recent high-profile cases lost by EC before the European Court[2] which triggered the Modernization Regulation and implicitly, the change of the test for the evaluation of the economic concentrations, we do take note of the fact that whilst market conditions favourable to tacit co-ordination were a clear-cut basis for a finding of collective dominance, there had been some uncertainty as to whether tacit co-ordination is the minimum necessary condition for finding collective dominance.

The Court of First Instance clarified in the overruling judgement of the Airtours/ First Choice merger case that it is a necessary condition and in fact, raised the standard of proof for collective dominance[3]. Since then, it became apparent that the dominance test cannot capture certain mergers that substantially lessen competition through the unilateral effect theory (i.e., without tacit co-ordination).

Thus, one of the merits of the SIEC test is that it sheds light upon horizontal merger cases where unilateral effects are suspected. The focus under the new criterion is on establishing whether the merger will affect competition on the relevant market, and the proof that the merger creates a dominant position becomes just one method of merger analysis and of showing unilateral effects.

This point can be verifiable in one of the post-2004 merger decisions (Kronospan/Constantia), where the Commission refers to its calculation of market shares as a '*first proxy to assess competitive effects*[4].

Having shown that the merger would have created a player with 60-80 per cent of a market where no other competitor had a market share greater than 10 per cent, the Commission continued by verifying whether other market indicators suggested that the merger would substantially impede effective competition such as the ability of customers to find alternative supplies, likelihood of competitors to increase output if there is a price rise, whether the transaction eliminates an important competitive force, and entry barriers.

This case shows that when compared to the structural analysis performed before where the creation or consolidation of a dominant position was deemed enough for challenging a merger, the Commission currently tests for the presence of countervailing factors when faced with high market shares. And even when market shares are below the conventional dominance thresholds, the Commission tends to verify whether other factors may indicate risk of competitive harm.

The peculiarity of this case consists also in the fact that it raised an intense exchange of correspondence between RCC and EC concerning the appropriate jurisdiction to assess the economic concentration Kronospan/Constantia. Due to the fact that on the date of the accomplishment of the transaction, Romania had not become part of the EU, both EC and Romania made separate decisions with respect to this merger. Note should be made also that even if the merger did not have a Community

2 Case T-342/99, *Airtours plc v Commission of the European Communities*, [2002] E.C.R. II-2585, Case T-310/01, *Schneider Electric SA v Commission of the European Communities*, [2002] E.C.R. II-04071 and Case T-80/02**,** *Tetra Laval BV v Commission of the European Communities*, [2002] E.C.R. II-04519.

3 Case T-342/99, *Airtours plc v Commission of the European Communities*, [2002] E.C.R. II-2585, para 62.

4 Case M.4525 Kronospan/Constantia (19 September 2007) paragraph 44.

dimension, the EC acquired jurisdiction to review the originally notified operation by means of a referral pursuant to art 4(5) of the ECMR.

Both the Commission and Romania cleared in phase two the acquisition of part of the raw and coated particle board business of Constantia Industries AG of Austria by Kronospan Holding GmbH of Germany, a member of the Kronospan Group. Kronospan eventually proposed to acquire only two of the three original Target plants, namely the companies Falco and Sprela whereas Fundermax would remain with the seller, Constantia. Moreover, Kronospan would undertake not to acquire, or have an undertaking controlled by or affiliated with it acquired, Fundermax, wholly or in part, for a period running since the date of the authorization decision.

We can therefore argue that in such a scenario, under both tests, due account can be made with respect to market shares, closeness of competition, possibilities of switching, ability of competitors to increase supply, ability of the merged entity to make it more difficult for competitors to expand, whether the merger eliminates an important competitive force.

On the basis of the Kronospan/Constantia case, RCC draws another important conclusion. Asumming that RCC would deal with a merger that would lead to noncoordinated effects in an oligopolistic market and that the issue of reallocation provided by articles 4(4) and 9 of the ECMR would interfere with respect to such a merger case, we do acknowledge that this merger case would not be possibly blocked in Romania, which still adheres to the dominance test whereas it would have been blocked under the SIEC test of the ECMR.

For this reason, we do believe that convergence not only of practices but also of principle merger rules in EU countries should not be undermined as importance. First, the use of similar criteria could serve both the legal certainty of undertakings surrounding merger approval and the co-operation among competition authorities. Second, it may happen that the parties to a merger would request referrals to Member States still applying the dominance test, since mergers inducing non-coordinated effects in oligopolistic markets are unlikely to be blocked in these Member States. This may create therefore distortions in the merger referral and assessment process.

Another noticeable advantage of the SIEC test is that it paves the way towards a wider scope under the ECMR that appears justifiable. On the one hand, the SIEC test detaches the substantive test for mergers from the control of abusive behaviour which also focuses on dominance and on the other hand, merger control is actually a prudential ex-ante tool in the hand of a competition authority having as main purpose the prevention of competition distortions. Thus, a thoughtful application of merger rules would ensure less recourse to exclusionary or exploitative type conduct of abuse.

6. Conclusions

Considering the rewording of art. 12 of Romanian Competition Law would provide for a better understanding of its form and purpose of straightly focusing on the analysis of the impact of an economic concentration over competition. This actually corresponds to what EC had mainly in mind when switched from the dominance to SIEC test[5].

5 See Commission Press Release of January 20, 2004 stating "*The Commission regards this change in the wording of the test as a clarification of, rather than an addition to, its power. This provides legal certainty for the business community by making it clear that the test enshrined in the regulation covers all those categories of anticompetitive mergers*".

In addition, it would enable RCC to prohibit or agree under remedies concentrations that do not create or strengthen dominance but are likely to have non-collusive effects through significant growth of market share that would substantially reduce competition.

SOUTH AFRICA

1. Introduction

The competition authorities of South Africa apply the substantial prevention or lessening of competition test ("SLC") to merger reviews. This test has been in place since 1999 when the current merger provisions in the Competition Act 89 of 1998 ("the current Act") were enacted. This paper will provide an overview of the current SLC test for merger review and compares it to the previous test applied to merger regulation.

2. Background

Prior to 1999, merger regulation was governed by the Maintenance and Promotion of Competition Act 96 of 1979 ("MPC Act"). In terms of the MPC Act, the substantive test applied by the then Competition Board was a hybrid test (dominance and SLC) based on whether a *"monopoly situation/s"* was being created which was not in the public interest. A monopoly situation was defined as *"a situation where any person, or two or more persons with a substantial economic connection, control in the Republic or any part thereof, wholly or to a large extent, the class of business in which he or they are engaged in respect of any commodity"*.

The current Act provides a comprehensive compulsory pre notification merger regime. In terms of the current Act, the substantive test applied in determining whether or not to approve, conditionally approve or prohibit merger is whether the merger is likely to substantially prevent or lessen competition. In addition, the competition authorities must also consider whether the merger can or cannot be justified on substantial public interest grounds.

The SLC test adopted enabled the then new authorities to rely on international judgements and laws which were far more developed than what was in existence in South Africa. In our experience the different tests applied by different countries have not affected the manner in which an investigation has been conducted by the South African competition authorities. However, the authorities comfortably rely on guidelines and jurisprudence without the fear of having to qualify the potential different approaches to the substantial merger test. In our opinion the changed regime has resulted in the authorities better able to intervene in mergers which would likely to have had an effect on consumers either through likely unilateral conduct of increased co-ordinated behaviour.

3. The substantive test for merger review

In determining whether or not a transaction is likely to substantially prevent or lessen competition the authorities consider the following factors:

- Barriers to entry;
- Level and trends of concentration;
- History of collusion in the market;

- Degree of countervailing power;
- The dynamic characteristics of the market (including growth, innovation and product differentiation);
- The nature and extent of vertical integration;
- Whether or not a party to the merger has failed or is likely to fail; and
- Whether the merger will result in the removal of an effective competitor.

In addition to the above factors the authorities consider the following factors that impact on public interest:

- The effect of the transaction on a particular industrial sector or region;
- The effect of the transaction on employment;
- The ability of small businesses, or firms controlled or owned by historical disadvantaged persons, to become competitive; and
- The ability of national industries to compete in international markets.

4. Practical application of the SLC test

4.1 Sasol Limited & AECI Limited

This matter was decided by the Competition Board during September 1998. In terms of the transaction Sasol would acquire control of AECI. The parties competed in the markets for manufacturing fertilizer and explosives as well as the supply of raw materials in the manufacturing of fertilizers and explosives. The Competition Board found that the parties would become dominant in the various markets and that the merger would likely enhance the parties market power or facilitate its exercise in a manner that would restrict or distort competition.

The Competition Board consequently prohibited the merger. Uniquely the Board made the following statement:

> *"These factors convinced the Board that it could not describe the lessening effect on competition as anything less than "substantial". "*

Had this merger be assessed in the current merger regulation environment its highly likely that the transaction would still be prohibited, considering that the transaction would have resulted in a significant change in the competitive landscape in that it would have effectively been a merger from three players to two.

4.2 Pick n Pay & Fruit and Veg City proposed merger

During January 2007 the Competition Commission recommended to the Competition Tribunal to prohibit a retail merger involving an established national retailer "*Pick n Pay*" who wanted to acquire a much smaller specialist national retailer selling primarily fruit and vegetables, known as "*Fruit & Veg City*" ("FVC"). In its analysis the Competition Commission found that the merging parties would hold significant market shares in both the national and majority of the local markets. Also, if the merger was approved, an effective competitor would be removed from the market. The Commission accordingly found that the merger was likely to substantially prevent or lessen competition and accordingly recommended the prohibition of the merger.

Had this proposed merger been investigated subject to the previous MPC Act, using the hybrid test, in our opinion this transaction would likely have had the same conclusion as due to market power and dominance concerns.

4.3 Compcorp merger

In another matter, four major retail banks wanted to acquire joint control over a firm operating as a switch between the banks on the one hand and mortgage originators on the other. Considering that the four major banks were competing for home loans, the merger effectively facilitated their ability to structure the market in such a way as to ensure that originators use the software owned by the banks to process applications. The transaction according to the Commission created a platform for co-ordinated conduct and accordingly would have likely substantially prevented or lessen competition in the home loans market. The Commission consequently prohibited the merger using the SLC test.

If this merger was assessed by the Competition Board using the hybrid test, it is unlikely that the merger would have been prohibited. The banks on their own may not have been considered dominant, and there was insufficient scope using the hybrid test to cover aspects of co-ordinated conduct.

4.4 Mondi Limited & Kohler Cores and Tubes

The Competition Tribunal prohibited a merger between Mondi Limited & Kohler Cores and Tubes (which decision was upheld by the Competition Appeal Court). The transaction would have resulted in a vertical integration between the parties which would have likely led to competitors being foreclosed from input. More importantly it was found that the merger would have facilitated collusion between the two major paper manufacturers in South Africa in the input market and other related markets in that the merger would facilitate the exchange of information in both upstream and downstream markets.

In applying the hybrid test it is unlikely that the merger would have been prohibited as specific concerns relating to coordination would not have been covered by this test.

4.5 Summary of cases

The table below summarizes the outcomes and likely outcomes in applying the different tests:

Transaction	SLC test	Hybrid test
Sasol & AECI	×	×
Pick n Pay and Fruit & Veg City	×	×
Compcorp merger	×	√
Mondi & Kohler Cores and Tubes	×	√

× Prohibition √ Approval

5. Enforcement issues

The competition regime changed significantly with the adoption of the new Act in 1999. Considering that the change included changes to the authorities, the procedures, the substantive test and the processes and procedures of the prohibited practices, it is not difficult to explain the differences in approach to enforcement between the substantive tests.

With the current Act, merging parties are compelled to notify the Commission of transactions above a specified threshold, whereas in the past the then Competition Board selectively requested parties to provide more details to their transactions. The changed regime resulted in a vast number of mergers being notified to the Commission (partly as a result of the low thresholds) to which the SLC approach was applied.

In the analysis of these transactions filed during the current regime the approach to defining the relevant market was not affected. The SLC test provides a much more structural approach to the economic analysis as compared to the previous hybrid approach of creating a “monopoly situation”. The current Act provides for greatly enhanced investigative powers which complement the changed substantive test in that information can be summoned from any party in order to assess the various factors set out in the new Act.

In our view the SLC test read together with international guidelines and jurisprudence provides parties with a reasonable ability to predict the outcome of a merger review by the competition authorities. In our opinion the transparency of processes and policies facilitates access to information which provides certainty to stakeholders.

6. Conclusion

We are of the view that considering the concentrated nature of the South African economy the SLC test is the most effective tool in preserving competition. This test coupled with the public interest factors ensures that the aim of the new Act is achieved which covers aspects such as achieving a more effective and efficient economy, providing access for consumers to markets to freely select the quality and variety of goods and services they desire, and regulating the transfer of economic ownership.

CHINESE TAIPEI

1. The Substantive Test for Merger Review

The legal tests used by most countries to assess the effects on competition of mergers and acquisitions include the dominance test, the substantial lessening of competition (SLC) test, and the public interest test.

Pursuant to Article 12 of the Fair Trade Act, the Fair Trade Commission (hereinafter the Commission) may not prohibit any of the mergers filed if the overall economic benefit of the merger outweighs the disadvantages resulted from competition restraint. The standard for merger review, however, is not specifically defined in Chinese Taipei's Fair Trade Act, but Chinese Taipei applies the new merger guidelines that are more in line with the "substantial lessening of competition" test when reviewing mergers.

The Commission's standard for merger review depends on whether the overall economic benefit of the merger outweighs the disadvantages resulted from its restraint on competition. Thus, the net effect between the economic benefit and the disadvantages of competition restraint resulting from the merger is the basis of the substantive test. From the legislative point of view, the "overall economic benefit" and the "public interest" is obviously not the same. Hence, the Commission does not consider public interest factors, such as national security, regional development, environmental protection, or full employment, in reviewing the merger proposal.

The new merger guidelines in 2006 were intended to establish a set of rules as a basis for enforcement to further ensure the transparency of the FTC's administrative procedures and to serve as reference for a substantive review. In other words, the merger review regime was based on the possibility that competition would be reduced as a result of the mergers, and would shorten the waiting period for the approval of a merger without apparent competition concerns.

If the merger filing meets the requirements in that it is reviewed by a simplified procedure, then the overall economic benefits of the merger can be presumed to have outweighed the disadvantages resulting from its restraint on competition. If there is no suspicion of obvious competition restraints in the merger filing, then the overall economic benefits of the merger can be considered to outweigh the disadvantages resulting from competition restraint. Otherwise, the overall economic benefits shall be further examined to determine whether the overall economic benefits of the merger outweigh the disadvantages resulting from competition restraint. Therefore, in the test of the merger review the Commission intends to use the SLC test.

2. Legislative Changes in the Standard of Review of Mergers

Based on its review of past cases, the Commission relaxed the restrictions on some types of mergers, which may not substantially affect competition, and streamlined the procedures for them. Even though the Commission issued the new merger guidelines in July 2006, the basic principles of reviewing merger cases have not changed. In other words, the refined merger review regime has become more reasonable, transparent and predictable. The standards for merger review and relevant regulations have not been amended since then.

3. Enforcement Issues

The merger guidelines list the definition of the market, the factors affecting the competition restraints, and considerations regarding the overall economic benefits, etc., as follows. In practice, when reviewing different types of mergers, the Commission considers different factors in weighting the "disadvantages resulted from competition restraints."

3.1 Definition of the Market

A product market refers to the scope of goods or services that, in terms of functionality, characteristics, purposes or prices, have high a degree of demand or supply substitutions. A geographic market means a region or scope in which the merging parties supply particular goods or services, and the trading counterpart can select or switch easily to other suppliers.

3.2 Factors Affecting the Competition Restraints

Horizontal mergers: The Commission, in the general procedure of a merger review, shall consider the following factors when assessing the competition restraints resulted from a horizontal merger:

- Unilateral Effects: After the merger, the enterprises participating in the merger are not restrained from market competition and thus can elevate the goods price or services remuneration. The Commission may assess the above-mentioned circumstances according to the market shares of merging enterprises, the homogeneity of goods or services, production capacity and import competition.

- Coordinated Interaction: After the merger, the merging parties and their competitors restrict business activities among themselves or, even though they are not mutually restricting one another from competition, they have taken concerted actions to remove market competition in practice. The evaluations of whether the market conditions are conducive to concerted actions among competing enterprises, the ease of monitoring and detecting deviation from collusion and the effectiveness of punishments are all factors to determine the success of coordinated interaction.

- Degree of Entry: The likelihood and timeliness of entry by potential competitors, and whether such entry would exert competitive pressures on the existing enterprises in the market shall be examined.

- Countervailing Power: Refers to the ability of trading counterparts or potential trading counterparts to prevent the merging parties from raising the prices of goods or the remuneration for services rendered.

- Other factors affecting the result of competition restraints.

Vertical mergers: The Commission, in the general procedure of a merger review, shall consider the following factors when assessing the competition restraints resulted from the vertical merger:

- The probability that other competitors could choose their trading counterparts after the merger.

- The degree of difficulty for an enterprise not participating in the merger to enter the relevant market.

- The possibility of merging parties abusing their market power in the relevant market.
- Other factors that may result in market foreclosure.

Conglomerate mergers: The Commission shall take the following factors into consideration when determining the likelihood of material potential competition:

- The impact of regulation and control being lifted on the merging parties' cross-industry operations.
- The probability of cross-industry operations by the merging parties because of technology advancements.
- The original cross-industry development plan of the merging parties besides the merger.
- Other factors that affect the likelihood of material potential competition.

3.3 Consideration of Overall Economic Benefits

With regard to the merger filing that raises suspicion of obvious competition restraints, the filing enterprises shall submit information on the following factors regarding the overall economic benefits to the Commission for deliberation:

- Consumer interests.
- The merging parties are originally in a weaker position when trading.
- One of the merging parties is a failing enterprise.
- Other concrete results related to overall economic benefits.

As the Commission reviews a merger proposal, the first step is to define the relevant market and calculate the market share or market concentration ratio. Next, the anti-competitive effect will be measured. If the proposed merger will not cause substantial harm to the relevant market, then there is no need to review the effects on the overall economic benefit. On the other hand, for merger applications with a significant concern of causing competition restraints, the enterprises filing the application may provide the above-mentioned overall economic benefit factors for the Commission's reference.

Chinese Taipei's economy has relatively limited natural resources and market hinterland; domestic firms are mostly international price takers, and international trade greatly affects domestic national income and the growth rate. Chinese Taipei is currently a small and open economy. Based on our past experiences, merger cases tend to result in limited harm to the market. Thus, there is no difficulty for the Commission to apply the current standard for a merger review.

4. Broader Policy Considerations Deriving From Different Merger Standards

Chinese Taipei is of the view that the legal certainty will be affected if different competition tests are being adopted for merger reviews. In order to enable the merger applicants to fully understand the procedure and elements in filing a merger application and to have a reasonable expectation regarding the result of a merger review, as mentioned above, the Commission has issued the merger guidelines for reviewing the proposed mergers. Currently, the Commission has not encountered difficulties in merger reviews resulting from the standard of review of mergers.

5. International Cooperation

A merger review is deemed to be the most profound area in competition law enforcement. It is not as easy as dealing with hard-core cartels in obtaining a consensus from the competition community. As the competition authorities share the goal of minimizing possible friction arising from the discrepancy between different decisions on cross-border mergers and facilitating international trade and investment, further exchanges of views and experiences might still need to be encouraged.

6. Case Study

The Commission has selected two cases for illustration. The first is that the Fubon Financial Holding Co., Ltd. (hereinafter "Fubon Financial") intended to acquire 100% of the shares of ING Life Insurance Co., Ltd. (hereinafter "ING Insurance"). The second is that the Uni-President Enterprises Corporation (hereinafter "UPEC") intended to acquire 49.5% of the shares of Weilih Food Industrial Co., Ltd. (hereinafter "Weilih")

6.1 Case 1: The Fubon Financial and ING Insurance Merger Case

In this case the Commission held the views that the market concentration ratio would not change significantly after the merger between Fubon Financial and ING Insurance; the merged company would not be able to raise the product price or service remuneration unilaterally due to the constraints of market competition. There are many life insurance companies in Chinese Taipei, and it is hard to form mutual understandings on certain competition restraints; moreover, with various insurance products and different product features, concerted actions are not likely to be formed. In addition, after Fubon Financial merged with ING Insurance, its combined market share would still be 10% lower than the leading firm; thus no entry barrier would have been created for potential competitors in the life insurance industry.

From the trading counterparts' perspective, the merger did not weaken their capacity to buy insurance from other insurance companies or their ability to negotiate for insurance transactions. Based on those findings, the Commission concluded that the merger between Fubon Financial and ING Insurance did not cause substantial harm to market competition; the overall economic benefits outweighed the disadvantages of competition restrain; thus the merger was not prohibited.

6.2 Case 2: The UPEC and Weilih Merger Case

To cite another example, UPEC and Weilih have the largest and second largest market shares (48.91 % and 19.42%) in domestic instant noodles market, respectively. After investigation in 2008, the Commission found that the competition between the two merged companies would diminish, and the merged company would have more discretion to adjust prices unilaterally. As a result, competitions in the instant noodles market would be weakened, and consumers would not have a compatible influence on prices. On the other hand, the sales of instant noodles relied on distribution channels; a lot of time and capital inputs are required to set up a distribution channel, something that the new entrants in this market would not be able to achieve easily.

Moreover, domestic instant noodles manufacturers have long established their brand image; they have a certain of influence on consumers' choices; it is neither likely nor practical for potential competitors to enter the market. Thus, such a merger may have damaged market competition and raised disadvantages of competition restraints. Alternatively, whether or not the benefits claimed in the filing, such as improving the nation's overall competitiveness and promoting consumer welfare, could be realized is still uncertain. Thus, the Commission concluded that the overall economic benefits did not outweigh the disadvantages arising from the restraints on competition in the UPEC and Weilih merger case and prohibited the application for a merger filing.

BIAC

1. Introduction

The Business and Advisory Committee (BIAC) to the OECD appreciates the opportunity to submit these comments to the OECD Competition Committee for its roundtable on the Standards for Merger Review, in particular in the light of the change of merger review standard in the EU and elsewhere from a test based on the existence of dominance to SLC/ SIEC tests. The nature of the substantive test under merger control law and, in particular the way in which that test is applied in practice, is of major interest to the international business community.

Over the past few years, a number of jurisdictions have adopted the SLC/SIEC test. These jurisdictions include New Zealand, the UK and, most notably, the EU. In turn, the change of substantive standard under the European Merger Control Regulation seems to have triggered a number of legislative changes in several other jurisdictions, including Belgium, France, Portugal, Spain, Poland and The Netherlands.

BIAC appreciates that in particular the introduction of the SIEC test in the EU has triggered a lively debate. BIAC is of the opinion that in its simplest form, the dominance test has the advantage of a larger degree of legal certainty, while the (public and private) costs associated with the review of mergers may be lower. Indeed, unilateral effects analysis tends to involve relatively complex and expensive qualitative and quantitative econometric analysis with regard to the competitive interaction between product offerings of the merging parties, as well as those of third parties. Hence, BIAC notes that the introduction and application of SLC/SIEC standards may in some cases decrease legal certainty and predictability and thereby raise transaction costs. To limit the potential for these negative effects to occur, BIAC believes that competition agencies should seek to even more explicitly spell out plausible theories of harm that they are likely to pursue in concrete matters, while an exceptional level of rigor is required in the choice and precise configuration of economic models that are used to predict post-merger effects, the type of evidence used therefore, and the methodology applied.

BIAC also notes that it may be disputed whether the practical application of dominance tests have lead to significant under-enforcement and false negative findings, but appreciates that the SLC/ SIEC test appears somewhat better suited to abstract from - not necessarily informative - structural factors, such as market shares and concentration ratios and directs the economic analysis more directly to the actual and likely economic effects of transactions, i.e. likely price rises post- merger. The SLC/SIEC test also appears potentially better suited to factor efficiencies into the analysis of mergers and facilitates convergence among jurisdictions in the field of merger control. As the international business community stands to gain from a more uniform application of merger control around the world, BIAC supports this trend, albeit that it remains sceptical about the potential of SLC/SIEC test to lead to less predictability and legal certainty and higher costs, both in terms of compliance costs, as well as pro-competitive transactions that may not materialize in the first place. Finally, BIAC tends to concur with commentators that opine that the SLC/SIEC test is by its nature better capable to capture transactions that, by eliminating important competitive forces in the market place, may give rise to elevated prices post-merger, while the transaction does not create a dominant entity.

BIAC submits however that the choice of the substantive merger control standard does not, in and of itself, address the fundamental issue. Indeed, the key question is how the applicable methodology of analysis in unilateral effects cases is structured and how the analysis is conducted. BIAC takes the position that, while it does not intrinsically favour or disfavour the SLC/SIEC test, it supports ways and means that seek to avoid the application of the SLC/SIEC test giving rise to less predictable results and increasing the costs associated with merger filings.

BIAC is a proponent of rational, effects based analysis of mergers and other structural transactions. In this regard BIAC notes that merger control analysis is particularly sensitive to a number of potential flaws that may give rise to false positive findings of anti-competitive mergers. This applies specifically to (i) overly narrowly defined relevant markets, (ii) poorly articulated theories of harm and (iii) failure to properly to take account of (static and dynamic) efficiencies. In line with this general position, BIAC supports a rigorous analysis of the potential for non-coordinated affects to occur as a result of the merger in those cases that, following a first screen or "quick look analysis", warrant closer investigation. However, as unilateral effects analysis is complex and requires inter alia careful assessment of product positioning and all relevant competitive constraints that prevail post-merger, it is important that the analysis is tailored to the facts of the case at hand and is conducted with rigor.

2. Comments on the Scope and Application of the SLC/SIEC Test As Opposed to the Dominance Test

Under SLC/SIEC tests, generally less importance is attached to structural factors, such as market shares, while greater emphasis is placed on non-coordinated effect analysis. It is maintained that the SLC/SIEC test is better suited to capture anticompetitive transactions where the merged entity is not the market leader, but where the transaction is likely to increase the market power of the remaining firms because the merger eliminates an important competitive constraint in the market place, without however increasing the potential of coordinated effects.

It is generally accepted that unilateral effects arise where a merger creates the incentive for the merged entity to increase prices and where the profitability of such prices does not depend on accommodating responses by other firms in the relevant market. If the merged entity increases prices, non-merging firms may be induced to also increase prices, which prices may then be sustained absent explicit or tacit collusion, because the merger weakens the competitive constraints faced by each merging party. However, reductions in marginal costs, for instance as a result of increased economies of scale, can outweigh the incentive for the merged firm to increase prices, or may even induce the merged firm to lower price, in which case other, non-merging market participants lower their prices also.

Unilateral effects may arise both in the case of horizontal and non-horizontal mergers[1]. In horizontal merger cases, notably those involving differentiated products, the analysis of likely unilateral effects is likely to be centred around three main components. First, one of the most important tasks in unilateral effects analysis is the measure of closeness of competition. In these types of markets, the analysis should be concentrated on the question whether the merging firms indeed exert the primary competitive constraint on each other because their products are close substitutes, while products of other firms are more "distant," thereby raising the incentive and ability of the merged entity to raise prices. Second, the analysis must properly take account of the competitive constraints that remain in the market post-merger, or that are likely to develop. In that respect, it is particularly important to concentrate on the extent to which buyers

1 In the case of non-horizontal mergers, unilateral effects may arise if the merger is likely to result in input – or customer foreclosure, as a result of which up-or downstream competitors of the merged entity may become less effective competitors, which may in turn induce the merged entity to profitably raise prices. BIAC's comments relate predominantly to the analysis of unilateral effects in horizontal merge cases.

can resist the merged firms' efforts to charge higher prices, as well as the reaction and potential repositioning of alternative suppliers. Third, the analysis must take account of (marginal) costs savings that are likely to be passed on to customers, as well as non-price efficiencies.

At the time, the debate in Europe on the introduction of the SIEC test sparked a discussion of the precise scope of the SIEC test and in particular on the question whether the prevailing dominance test allowed the Commission to intervene in all cases where intervention was necessary to protect competition and consumers. In this respect, it has been argued that the US Heinz- Beech Nut merger[2] could not have been blocked under the pre-2004 EC standard, and that the new test indeed filled an enforcement gap[3]. It was particularly debated whether the concept of collective dominance in EC law allowed the Commission to intervene in cases that did not give rise to tacit collusion but in which it was nevertheless likely that post-merger prices would increase because it would be each individual firm's best response to reduce output and increase prices. The hallmark of collective dominance is the ability of firms to adopt a common policy in the market.[4] It is at the very least doubtful that this concept extends to cases involving unilateral effects that do not involve an element of coordination.

Moreover, in the European context it was necessary to take account of the interplay between merger control and Article 82 EC, which prohibits abuse of dominance. As the concept of dominance is interpreted in the same way under the Merger Regulation and Article 82, any new departures in the context of merger control would "contaminate" Article 82. It was clear at the time that the application of the dominance test in mergers had already led to significant downward pressure on the threshold for finding dominance. It is submitted that this interplay partly explains the (unduly) low dominance threshold in EC law.[5] Others have, however, questioned the need for the introduction of the SIEC test in Europe as unnecessary[6].

The shift to the SLC/SIEC test, however, did not lead to a dramatic shift in the application of the law. The change has been evolutionary rather than revolutionary. The evolutionary shift has been facilitated by the fact that pre-2004 the European Commission was effectively applying unilateral effects analysis in its assessment of mergers under the dominance test. There had already been a shift away from relying on structural factors towards more sophisticated methods of analysis of competitive constraints. For instance, in *Volvo/ Scania*[7], *GE/.Instrumentarium*[8] and *Oracle/PeopleSoft*[9] the Commission already explicitly

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2 246, F. 3rd 708 (D.C. Cir.2001).

3 See, e.g., Gregory Werden, "Unilateral Competitive Effects and the Test for Merger Control," 4 Eur. Competition J. 95 (2008). ("The EC's adoption of the SIEC test for merger control was a reasonable response to a real problem.")

4 See, Case T-342/99 *Airtours*, 2002 ECR II-2585.

5 See, Case T-219/99 *British Airways*, 2003 ECR II-5917. The low threshold may also be explained by the absence of a monopolisation offence under EC law.

6 See, e.g., Alberto Heimler, "Was the Change of the Test for Merger Control in Europe Justified? An Assessment (Four Years After the Introduction of SIEC)", 4 Eur. Competition J. 85 (2008); Lars-Hendrik Roeller and Miguel de la Mano, "The Impact of the New Substantive Test in European Merger Control," 2 Eur. Competition J. 9 (2006); Boge and Muller, "From the Dominance Test to the SLC Test: Are there Any Reasons for a Change," 23 (10) ECLR (2002); and Giorgio Monti, "The New Substantive Test in the EC Merger Regulation, Bridging the Gap Between Economics and Law?," (July 30, 2008) LSE Legal Studies Working Paper No. 10/2008, *available at* http://ssrn.com/abstract=1153661.

7 Commission Decision declaring a concentration to be incompatible with the common market and the functioning of the EEA Agreement, Case COMP/M. 1672 *Volvo/ Scania*, (Mar. 15, 2000), *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m1672_en.pdf.

referred to closeness of competition between the merging parties' products in oligopolistic markets and resorted to econometric analyses, in particularly in bidding markets. These cases demonstrated a greater willingness to move beyond a mere analysis of structural factors.[10] For instance, in *Nokia/Siemens* the Commission analysed whether the merger would remove important competitive constraints based on how close competitors the two parties were.[11] The Commission conducted a win/loss analysis based on the two firm's bid lists and concluded that Siemens and Nokia were only to a relatively limited extent present in bids in which the other participated and won very few bids that the other lost. The Commission concluded that the two firms were not close competitors and that the effective competition would not be significantly impeded. Similarly, in *Adidas/Reebok* the Commission concluded that the two brands had a different consumer focus and that they were not close competitors. Moreover, Nike would likely retain its leadership position.[12]

In applying the SLC/SIEC test the European Commission has also analysed whether the merger would eliminate a "maverick". In *T-Mobile/Tele.*ring an established player sought to acquire a more recent entrant that was competing aggressively on price. As a new-comer Tele.ring had a smaller existing customer base and according to the European Commission had a relatively greater incentive to compete on price to gain new customers. The business obtained from new customers would more than offset cuts offered to existing customers. The European Commission considered that the incentives of the merged entity would be different because it would have a much larger existing customer base. In *Linde/BOC* a new entrant that was investing in significant new capacity sought to acquire an established player. The European Commission took the view that after the transaction Linde would no longer play the role of a maverick that would have to gain shares from the established players in order to build its business.

At least in one case the SLC/SIEC test has allowed the European Commission to intervene in circumstances in which it would have been difficult to find single dominance. In *T-Mobile Austria/Tele.ring* the European Commission concluded that the merger would give rise to non-coordinated effects although the merged entity would not have the largest market share after the merger.[13] In such circumstances it is highly unlikely that the European Commission would have been able to find single dominance. While economists readily equate dominance with market power, the legal concept of dominance implies that the firm in question is the market leader in addition to having market power. It is

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8 Commission Decision declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement, Case COMP/M. 3083 *GE/ Instrumentarium*, (Sept. 2, 2003), *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m3083_en.pdf.

9 Commission Decision declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement, Case COMP/M. 3216 *Oracle/ PeopleSoft*, (Oct. 26, 2004), *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m3216_en.pdf.

10 Kokkoris concludes that the choice of the substantive test does not have any impact on the method and execution of the analyses for the assessment of mergers leading to unilateral effects. See, I. Kokkoris, "Do Merger Simulation and Critical Loss Analysis Differ Under the SLC and Dominance Test?," 27 ECLR 249 (2006).

11 See, Case COMP/M.4297 *Nokia/Siemens*. See also Case COMP/M.3083 *GE/Instrumentarium* and Case COMP/M.3216 *Oracle/Peoplesoft*.

12 See, Case COMP/M.3942 *Adidas/Reebok*. Regarding differentiated consumer product, see also Case COMP/M.3751 *Novartis/Hexal*.

13 See, Case COMP/M.3916 T-Mobile/Tele.ring, paragraph 40.

unlikely that under EC law it is possible to find single dominance on the part of a firm that has a lower market share than one of its competitors.[14]

The SLC/SIEC test has also facilitated a shift away from significant reliance on coordinated effects theory, which suffered a significant set back in *Airtours*. Coordinated effects are easy to define in theory but difficult to prove in practice. When merger control is based on sound analysis of the facts and not the mere application of an abstract theory of harm, coordinated effects necessarily play a relatively limited role. The SLC/SIEC test has eliminated the gap and with it the incentive for the European Commission to shoehorn unilateral effects into the collective dominance framework.

In Europe, the SIEC test was introduced with the revision of the European Merger Control Regulation in 2004.[15] While the wording of the new standard of review still refers to the creation or the strengthening of a dominant position, it is clear that the test was made to apply also to cases that do not involve a dominant position[16]. The Horizontal Merger Guidelines seek to provide for the assessment of unilateral effects. They do so by establishing a series of "soft" safe harbours[17], as well as an enumeration of the factors that the Commission will consider whether significant unilateral effects are likely to result from a merger. These factors include (i) whether the merging firms have large market shares or are close competitors, (ii) whether customers have limited possibilities of switching suppliers, (ii) competitors are unlikely top increase supply if prices increase, (iv) the merged entity is able to hinder expansion by competitors and (v) whether the merger eliminates an important competitive force[18].

So far, in the EC, the most representative "gap" case that has been decided upon under the post-2004 SIEC test, is *T-Mobile/Tele.ring*, which involved the acquisition of the number 4 in the Austrian mobile phone market (Tele.ring) by the market's number 2, T-Mobile Austria. The Commission found that, post-merger, the combined entity would remain smaller than Mobilkom, the largest operator in the Austrian mobile telephony market. The Commission found that the merger would lead to post-merger price rises in light of the status that Tele.ring enjoyed as low price provider and its continuing growing market share[19].

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14 The exception may be cases where the leading firm in terms of market share is capacity constrained and its closest competitor is not. In that case the competitor may be able to effectively constrain the leading firm whereas the opposite is not true.

15 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), 2004 O.J. (L 24) 1.

16 Article 2(3) of Regulation 139/2004 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 strengthening of a dominant position". Most commentators take the view that there is no material difference between the SLC and SIEC tests.

17 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings ("EC Horizontal Merger Guidelines"), 2004 O.J. (C 31) 5. The guidelines indicate that market shares not exceeding 25% are indicative of lack of SIEC. The Commission is also unlikely to identify concerns in markets with post-merger HHI indices below 1000, in markets with a post merger index between 1000 and 2000 and delta below 25, or in a merger with a post-merger HHI above 2000 and a delta below 150.

18 See, EC Horizontal Merger Guidelines, *supra* note 17, paragraphs 27 -38.

19 It appears that the Commission's analysis is primarily based on the evolution of the market shares of Tele.ring in the years preceding the merger, switching behaviour of customers and pricing behaviour of Tele.ring. It also concluded that no other operators were likely to substitute Tele.ring's role in the market place post-merger. See, Commission Decision declaring a concentration to be compatible with the common market and the EEA Agreement, Case M.3916 *T-Mobile Austria/Tele.ring* (Apr. 26, 2006), *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m3916_20060426_20600_en.pdf.

The Commission cleared the merger after T-Mobile offered specific remedies, including the sales of UMTS frequencies, designed to strengthen the market position of smaller players.

In the US, the Clayton Antitrust act incorporates the standard of review for merger transactions.[20] Section 7 of the Clayton Act prohibits an acquisition of stock "where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Thus, the United States agencies have the ability to prohibit mergers based either on a dominance (monopolization) or an SLC basis. Moreover, they have had the ability to challenge transactions on the basis of unilateral effects since the initiation of their merger review authority in 1914. Unilateral effects theory, however, gained explicit recognition in U.S. merger review policy with the adoption of the 1992 Horizontal Merger Guidelines in 1992.

The 1992 Merger Guidelines were a watershed event in the utilization of anticompetitive effects – as opposed to structural factors – for merger analysis. As former AAG Charles James noted, "[i]t is probably fair to say that, prior to the 1992 Guidelines, anticompetitive effects -- in particular, an increased propensity for tacit collusion -- were largely presumed from high levels of concentration in combination with high barriers to entry."[21]

The US authorities have utilized unilateral effects theory for many of their merger challenges since the release of the 1992 Merger Guidelines. AAG James observed four factors that lead to this phenomenon:

- *"First, there is the growing economic focus on strategic behavior and the belief by many economists that unilateral price changes resulting from mergers can be predicted and demonstrated empirically. There is no corresponding set of predictive tools for coordinated effects.*

- *Second, coordinated effects analysis, relying as it does upon a complex set of market variables that may point in opposite directions, can be perceived to be less determinate than the types of effects predicted under unilateral theory.*

- *Third, even once all of the factors have been analyzed, we have yet to develop any well-accepted science that specifies the precise level of market concentration or the minimum number of competitors at which coordination is likely.*

- *Fourth, the (coordinated effects) analysis set forth in the Guidelines does not do as much as some might like to determine why maintaining the independence of one of the specific parties to the proposed transaction is an important enough constraint upon coordinated interaction to justify a challenge."*[22]

The US case history in enforcing merger control based on unilateral effects is still evolving. While the DOJ and FTC have had success in prosecuting mergers on this basis, they have also had challenges. The FTC's challenges to *Heinz/Beech Nut*[23] and *Whole Foods*[24] were both unsuccessful at the trial court

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20 15 U.S.C. § 18 (2000).

21 Charles A. James, "Rediscovering Coordinated Effects," Address Before the ABA Section of Antitrust Law Annual Meeting (Aug. 13, 2002), p. 7, *available at* http://www.usdoj.gov/atr/public/speeches/200124.pdf.

22 *Id* at 8.

23 *FTC v. H.J. Heinz Co.*, 246 F.3d 708 (D.C. Cir. 2001).

level, only to be reversed on appeal. The DOJ's cases against *SunGuard*[25] and *Oracle*[26] were both unsuccessful before the trial court.

Thus, while it is clear that the economic theory behind the unilateral effects model is sound, the economic and evidentiary tools necessary to prove anticompetitive harm are still under development, even in the jurisdiction that has had the ability to enforce on this basis for nearly 100 years. This should give competition authorities reason to pause and closely consider whether their model of competitive harm, and evidence supporting the model of competitive harm, under a unilateral effects analysis is sufficiently robust, in an individual case, to warrant a prohibition or challenge to a merger.

In other jurisdictions, the SLC standard is enshrined in the relevant statute. For instance, section 92 of the Canadian *Competition Act*, enacted in 1986, provides that where the Competition Tribunal finds that a merger or proposed merger "prevents or lessens, or is likely to prevent or lessen, competition substantially", the Tribunal may impose merger remedies (the term "substantially" was intentionally left undefined).

Importantly, section 92(2) explicitly states that, for these purposes, the Tribunal shall not make an SLC finding solely on the basis of evidence of concentration of market share.

In Canada, an understanding of the meaning of the SLC standard is aided by two important elements. First, the statute contains a list of factors, set out in section 93 of the *Competition Act*, which the Tribunal may consider with respect to the SLC analysis. These include: the extent of foreign competition; whether a party to the merger has failed or is likely to fail; barriers to entry including regulatory and trade barriers; and the nature and extent of change and innovation in the market. Second, further guidance from an enforcement perspective is set out in the Canadian Competition Bureau's *Merger Enforcement Guidelines*.[27] Such agency guidelines are useful in providing merging parties with the enforcement agency's views concerning terms such as: "lessening of competition", "prevention of competition" and "substantiality." Both the statutory factors and the agency's enforcement guidelines help merging parties attain greater predictability and certainty with respect to the legal norms that apply to the review of a proposed merger.

3. General Observations on the Analysis of Unilateral Effects Under the SLC/ SIEC test

As mentioned above, merger control analysis is particularly sensitive to a number of potential flaws that may give rise to false positive findings of anti-competitive mergers. This applies specifically to (i) overly narrowly defined relevant markets, (ii) poorly articulated theories of harm and (iii) failure to properly to take account of (static and dynamic) efficiencies. These concerns are particularly relevant in the area of unilateral effect analysis.

Because anticompetitive unilateral effects are likely to arise in exceptional circumstances only, it is advisable to confine a detailed analysis of those effects to those cases that prima facie may give rise to those types of effects and to identify those cases through the application of safe harbours that make clear in which cases the agency is unlikely to intervene. Antitrust agencies in the US and EU both apply safe

24 *FTC v. Whole Foods Mkt., Inc.*, 533 F.3d 869 (D.C. Cir. 2008).

25 *United States v. Sungard Data Sys., Inc.*, 173 F. Supp. 2d 20 (D.D.C. 2001).

26 *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

27 Canadian Competition Bureau, Merger Enforcement Guidelines, (Sept. 2004) *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/2004%20MEGs.Final.pdf/$file/2004%20MEGs.Final.pdf.

harbour indicia based on HHI concentration levels[28]. BIAC is generally in favour of the use of indicative factors as mentioned above under point 13 and of adequate and not unnecessarily over-inclusive safe harbours in the shape of HHI ratios or others, although it supports the use of evidence other than HHI levels (such as the evolution of market shares over time) as a "quick look" analytical tool to dispense of cases that do not merit a detailed analysis. Obviously, the fact that a preliminary analysis would indicate that there might be reasons for concern, does not imply that those concerns will indeed materialize; it merely suggests that a more detailed analysis may be warranted.

The analysis of unilateral effects should, in BIAC's view, take account of the correct counterfactual, i.e. on how the market place would have developed absent the merger. Indeed, as a general rule, markets are not stable. This implies that the analysis should take account of price trends, potential competition and other relevant factors with a view to determining which factors can be attributed to the merging parties' conduct, or to autonomous factors that will continue to discipline the merged entity. In fact, the analysis should be directed towards the question "what the merger will change."

4. Practical Suggestions for the Analysis of Unilateral Effects Under the SLC/ SIEC test

First, to assess whether a merger is likely to give rise to significant unilateral effects, it is important to understand how competition in the relevant markets works and which specific (Cournot or Bertrand) model best explains how market participants behave.

Second, as unilateral effects are only likely to arise in specific settings that include differentiated products, the analysis should focus on the question in which respects and to which degree the products of the merging firms are differentiated and how the differentiating factors (product characteristics, switching costs, advertising, geographical differences) affect the substitutability of products.

Third, any conclusions on the closeness of competition between the merging firms' products should not be based on specific similarities in some respects only; it is critically important to actually assess the importance of the differentiating attribute to consumers' purchasing decisions. This implies that, as a rule, those conclusions should preferably be based on evidence of actual switching behaviour by consumers. As nowadays there are many tests available to assess the diversion ratio, or closeness of competition between the merging parties' products in general, each of which may have weaknesses in specific circumstances, BIAC believes that reviewing agencies should particularly ensure that the tests applied are robust and complete and should avoid over-reliance on one or few tests. Indeed, precisely because unilateral effect analysis is complex, agencies should in principle base findings of anticompetitive unilateral effects on a number of different tests that all support the finding of likely elevated prices post-merger. For instance, in a particular case, it may be possible to complement the analyses of bidding studies with shock or impact analyses (that identify the substitutability between products following a specific event, such as the temporary discontinuation of supply of competitors' products), or "overlap" studies (that compare the conduct of the merging parties in areas where both are present with areas where the other party is not present). In this regard, BIAC does not believe that there any tests that should a priori be excluded from the analysis. However, agencies should apply stringent criteria when applying specific tests to a particular case at hand.

[28] For the EU, see, *supra* note 17. The US merger guidelines state that mergers are unlikely to raise concern where the post-merger HHI is less than 1,000. If the delta is less than 100, the merger is unlikely to raise concern if the post-merger HHI is in the 1,000- 1,800 range. If the delta is less than 50, the merger is unlikely to raise concern if the post-merger HHI is above 1,800. United States Depart. of Justice and Federal Trade Commission, Horizontal Merger Guidelines, (Apr. 2, 1992, rev. Apr. 8, 1997), *available at* http://www.usdoj.gov/atr/public/guidelines/hmg.htm.

Fourth, when considering the closeness of competition, it is important to not limit the analysis to the parties' own products, but to extend the analysis to third parties' products. As a rule, significant unilateral effects can only be expected to arise if the merging parties' products are close substitutes, while other firms in the market are relatively distant competitors.

Fifth, the analysis of closeness of competition in innovative markets requires specifically robust and reliable evidence. Indeed, in many of these cases, the question is whether any future or "pipeline" product would constrain the (future) prices of products that are already on the market[29]. While it may in some cases be possible to predict with a sufficient level of certainty that a new product will indeed enter the market and will compete with existing products, in many cases, such presumptions are too speculative.

Sixth, as the objective of unilateral effect analysis is to predict with a reasonable degree of certainty future price effects, the reviewing agency should take account of all relevant factors that can contribute to these effects, or that may defeat attempts to increase price. An integral part of the analysis should therefore concentrate on whether the remaining competitors face barriers to expansion and may increase capacity in response to price increases by the merged firm. The analysis should take account of the possibility that competitors have to reposition their products and the cost associated therewith; unilateral effects are unlikely if rivals can reposition their products in a timely manner. Similarly, it is highly relevant to analyse whether potential competitors would be able to enter the market in a timely and sufficient manner. Finally, this part of the analysis should concentrate on consumers' attributes. For instance, it is relevant to know whether buyers have buyer power to counter the merged firm's price increases and, in combination therewith, whether consumers are likely to switch easily to alternative suppliers if the prices charged by the merged entity would rise.

5. Non-Coordinated Effects and Offsetting Efficiencies

In some scenarios, a merger will give rise to efficiencies that are sufficient to offset the incentive for the merged firm to increase prices.[30] For this to happen, the merger must generally give rise to large reductions in marginal cost[31]. These (marginal) cost reductions may be derived from economies of scale or synergies, i.e. the combination of specific assets that improve production technology. In addition, mergers may give rise to non-price efficiencies, such as quality improvements and new products. It is important that efficiencies are adequately factored into the analysis of unilateral effect cases.

Although antitrust agencies around the world may assess efficiencies in various different manners, a general standard for the evaluation of efficiencies is that they be verifiable, merger specific and likely to materialize in a timely[32] manner. It seems however that in practice, these criteria often constitute formidable obstacles[33]. For instance, in Europe, both static and dynamic efficiencies seem to have played

29 See, e.g., Commission Decision declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement, Case COMP/M. 3687 *Johnson & Johnson/ Guidant*, (Aug. 25, 2005), *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m3687_20050825_20600_en.pdf .

30 Alternatively, the merger may give rise to non-price efficiencies that compensate for higher prices.

31 In some specific settings, fixed cost savings may also be passed on to customers.

32 See, e.g., Section VII of the EC Horizontal Merger Guidelines, *supra* note 17.

33 One reason may be that merger-specific efficiencies are more likely in markets where horizontal mergers have a greater scope for anti-competitive effects. See, e.g., Joseph Farrell and Carl Shapiro, "Scale Economies and Synergies in Horizontal Merger Analysis," 68 Antitrust L.J. 685 (2001).

only a minor role in (Phase II) merger evaluations since 2004 and appear most likely to be accepted in non-horizontal mergers[34]. In *T-Mobile/ Tele.ring*, the claimed dynamic efficiencies were not accepted[35].

BIAC is concerned that especially in horizontal unilateral effects cases, efficiencies may not be given sufficient attention , are too easily discarded as not verifiable, not merger-specific, or insufficient to outweigh negative effects and calls upon the OECD Competition Committee to critically reflect on the treatment of efficiencies in merger analysis, in particular in unilateral effects cases.

6. Conclusions

The application of SLC/SIEC standards may in some cases decrease legal certainty and predictability and thereby raise transaction costs. To limit the potential for these negative effects to occur, BIAC believes that competition agencies should seek to even more explicitly spell out plausible theories of harm that they are likely to pursue in concrete matters, while an exceptional level of rigor is required in the choice and precise configuration of economic models that are used to predict post-merger effects, the type of evidence used therefore, and the methodology applied.

BIAC is generally in favour of the use of indicative factors, as well as of adequate and not unnecessarily over-inclusive safe harbours in the shape of HHI ratios or others, although it does also support the use of evidence of other evidence than HHI levels (such as the evolution of market shares over time) as a "quick look" analytical tool to dispense with cases that do not merit a detailed analysis.

The analysis of unilateral effects should, in BIAC's view, take account of the correct counterfactual, i.e. on how the market place would have developed absent the merger. Indeed, the key question is "what the merger will change."

One of the most important tasks in unilateral effects analysis is the measure of closeness of competition. The analysis of unilateral effects should concentrate on the question whether the merging firms exert the primary competitive constraint on each other because their products are close substitutes, while products of other firms are more "distant," thereby raising the incentive and ability of the merged entity to raise prices.

The analysis must properly take account of the competitive constraints that remain in the market post-merger, or that are likely to develop. In that respect, it is particularly important to concentrate on the extent to which buyers can resist the merged firms' higher prices, as well as the way in which the supply side of the market place is likely to evolve.

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34 See, Commission Decision declaring a concentration to be compatible with the common market and the EEA Agreement, Case M. 4854 *TomTom/TeleAtlas*, (May 14, 2008), *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m4854_20080514_20682_en.pdf (acceptance of static efficiencies in the form of the elimination of double marginalization; dynamic efficiencies deemed not verifiable); and Commission Decision declaring a concentration to be compatible with the common market and the EEA Agreement, Case COMP M. 4942 *Nokia/NAVTEQ*, (July 2, 2008), *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m4942_20080702_20682_en.pdf (idem). See also Commission Decision declaring a concentration to be compatible with the common market and the EEA Agreement, Case COMP M. 5141 *KLM/Martinair*, (Dec. 17, 2008) *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m5141_20081217_20682_en.pdf (both static and dynamic efficiencies claimed but not accepted due to lack of verifiability).

35 See, *supra* note 19. See also Case COMP M. 5434 *Ryanair/Aer Lingus*, (both static and dynamic efficiencies deemed not verifiable, merger-specific and sufficiently substantial to outweigh likely elevated prices).

Finally, the analysis of unilateral effects must take account of (marginal) costs savings that are likely to be passed on to customers, as well as non-price efficiencies. BIAC is concerned that the evidentiary burdens that apply to efficiencies may be unjustifiably high and call upon the OECD Competition Committee to reflect on this issue.

SUMMARY OF DISCUSSION

1. Introduction

Frederic Jenny opened the roundtable discussion 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, which attracted a lot of interest among the delegations.

Before the discussion with the delegates, the Chair introduced the three experts who were invited to give initial presentations. Nicholas Levy, partner at Cleary Gottlieb Steen and Hamilton; John Boyce, partner at Slaughter and May; and Alberto Heimler, professor of economics at the Italian School of Government. Mr Levy and Mr Boyce discussed their experience with EC merger control and the changes in the substantive test. Mr Heimler presented a paper with his views on how the SLC test should work in practice.

According to Mr. Levy the standard of review of mergers is important as it distinguishes mergers that should be prohibited from those that ought to be approved. In addition, the legal standard used to assess mergers gives an indication as to how the analysis should be carried out by the competition authority.

The first EU merger regulation was adopted in 1989 after a vigorous debate, which did not focus much on whether the merger test should be based on the creation or strengthening of dominance or on the merger significantly lessening competition, but rather on whether social or industrial considerations should be taken into account. At the time, the European Commission was adamant that mergers should be assessed only on competition criteria and in that respect succeeded in both formulating the EC Merger Regulation and its subsequent application appropriately. Indeed, in the early years the Commission was watched as to whether it would be subject to political interference in its application of the Merger Regulation but successfully resisted any political pressure.

As regards the substantive test, in the early days there was also uncertainty as to whether the dominance test would be capable of capturing all anti-competitive transactions. The debate at the time was not on whether there were so-called “gap cases” (i.e. cases of anti-competitive mergers which would not be caught by the dominance test) but whether the dominance test could cover coordinated effects (or joint dominance cases) because the test was expressed in the singular – “the creation or strengthening of a dominant position”. By taking a logically expansive interpretation, the European Court of Justice confirmed, 10 years later, that coordinated effects were indeed captured by the dominance test.

However, over the years, controversy continued as a result of various contested cases. But the debate was not on the substantive test, rather it focussed on the framework within which the Commission assesses evidence, the system of internal checks and balances to which the Commission’s decisions are subject, and the concerns with the Commission being at the same time investigator, prosecutor and decision maker.

As part of the review of the Merger Regulation, there was a debate between 2001 and 2004 on the substantive test and whether to replace the dominance test with an SLC type test. The European Commission took the position that dominance was sufficiently broad to capture all transactions that could raise competition issues; however, to eliminate all remaining doubts, the European Commission acknowledged that the dominance test could be changed. After considerable discussion, the European

Commission adopted a hybrid test – "significant impediment to effective competition in particular through the creation or strengthening of a dominant position" (the SIEC test). In doing so it took the view that a hybrid test encompasses the best of both worlds. On the one hand, it ensured continuity of years of case law on the dominance test and, on the other hand, it makes it clear that the focus of the merger review will be on the loss of competition from the transaction.

After five years of application of the SIEC test, Mr. Levy noted that it is appropriate to ask whether this experiment has worked. There are four questions that arise: (i) Are there material differences between the dominance and SIEC standards? (ii) Is there an "enforcement gap" between dominance and SIEC? (iii) Did the change in substantive test materially alter the EU merger review system? (iv) Has the new EU merger standard facilitated international convergence in merger control?

In Mr. Levy's opinion, the differences between the dominance and the SLC standards are theoretical as much practical. The risk with the concept of dominance is that the notion of independence on which it is based is insufficient to distinguish a dominant firm from a non-dominant firm. Even a monopolist is not entirely independent, because unless demand is constant it runs the risk that any rise in prices will lead to loss in sales. If, on the other hand, dominance means just strength per se, than any increase in strength could be taken as the strengthening of a dominant position. Mr. Levy praised the Commission for having applied a flexible and dynamic approach to dominance, one which was not unduly focused on structural factors alone. In addition, according to Mr Levy, the Commission understood the importance of unilateral effects and the assessment of the closeness of competition between the parties already under the dominance test. However, the virtue of an SLC standard is that it focuses on the degree of change in the dynamics of competition, which is what merger control in essence is.

Is there an "enforcement gap" between dominance and the SLC standards? In early 2000 there was a lively debate about the so-called "gap cases". The hypothetical discussed in the Issues Paper of the Secretariat is an example of a potential gap case. In practice, not many transactions fall into this category but there have been some, such as the Heinz/Beech-Nut case. But there were always ways to capture the transactions falling in the "gap", either by adopting a sufficiently narrow market definition, or by developing a theory of harm based on the strengthening of dominant position or possibly developing a coordinated effects theory. However, given the uncertainty on whether courts would endorse these theories the Commission acknowledged there could, at least in theory, be an enforcement gap, and therefore considered the possibility of changing the merger review standard.

Did the new substantive test materially change the EU merger review system? The EU merger control system experienced many changes over the past five years: an increasing reliance on sound economics and hard evidence, a more forensic and rigorous review of that evidence and a more consistent focus on unilateral effects cases. In Mr. Levy's opinion, these changes were not caused by the change in substantive standard but simply accompanied it. In fact some of the other developments were actually more important, such as the adoption of horizontal and non-horizontal merger guidelines, which have clarified the standard applicable to conglomerate and vertical effects of mergers, the high standard of proof to which the Commission was subject by the courts, the appointment of a chief economist, the increased focus on unilateral effects, the greater emphasis on quantitative analysis and the increased internal scrutiny (checks and balances). Mr. Levy suggested that these developments had a more significant impact on EU merger control than the change in the substantive test, which was an important development that helped address possible (but rare) gap cases. However, at the end of the day it did not make as much of a difference as some of the other changes.

Mr. Levy noted that the question of whether the change in the substantive test facilitated international convergence is a particularly interesting one to be addressed at the OECD. Certainly, in recent years, there has been more convergence in merger decisions. However, there is no evidence that that this trend is due to the adoption by the EU of a substantive test more similar to that used by other agencies. Rather, Mr Levy noted that there has been an increased alignment of analytical tools and economic theories as to what merger control should be about. Diverging outcomes – the extreme example of which is the GE/Honeywell decision where there were analytical differences in the approach to conglomerate effects – were not the result of different substantive tests. According to Mr Levy, the co-existence of different substantive tests is not as important as the increasing convergence on analytical tools and economic analysis. For a practitioner, differences in jurisdictional thresholds across different countries may have far more significant implications.

To sum up, according to Mr. Levy the differences between dominance and SLC standards are in practice primarily differences of emphasis and intellectual interest. There is a small enforcement gap between dominance and SLC standards in non-collusive oligopoly cases, but those are rare and there are ways to captured them under the dominance standard. The change in and of itself had only modest practical effects on EU merger control. However, together with other changes there has been an important evolution. International convergence in merger control has been occurring notwithstanding the differences in substantive tests.

John Boyce said that the changes in the UK and the EU, which have occurred since the mid-80s, were more evolutionary than revolutionary. For most of this period, the UK actually had a public interest test but in practice decided cases on competition grounds. Therefore, the change of the SLC test with the 2002 Enterprise Act was to adapt the word of the law to the practice. A more significant change was perhaps the greater independence that the Enterprise Act granted to the OFT and the Competition Commission, which now can take their own decisions rather than merely advising the Secretary of State. However, in the UK it is also recognized that there may be wider public interest issues, which could justify intervention in mergers.

At the EU level, there have been also significant changes since the mid-80s. Initially, the European Commission had no merger review powers, yet occasionally it intervened to sanction mergers under Article 81 and 82 EC. The first merger regulation gave the European Commission express powers to review and approve mergers under the dominance test. At the outset, there was some uncertainty as to the scope of the concept of dominance, but as was mentioned by Mr. Levy, the Commission, with the backing of European courts gradually stretched the notion of dominance to cover situations involving joint dominance or coordinated effects. Later, a series of cases lead to the debate on the so-called "gap" which lead to the change of legal standard in favour of the hybrid SIEC test. Mr. Boyce noted that as a matter of fact, the European Commission successfully extended the concept of dominance to reduce the gap to a minimum. In practice, gap cases have been very few or, according to some, non-existent. Nevertheless, the change brought clarity particularly because in some jurisdictions, courts were not supporting an extensive interpretation of the concept of dominance. In Mr. Boyce's opinion, the new test certainly gave the European Commission and its Chief Economist team more freedom to use various econometric techniques in applying the new SIEC test.

Mr. Boyce mentioned that another significant change in merger control in the past two decades has been its internationalization. In the mid-80s even the largest global transactions had to be notified only in a few countries. Presently, significantly more transactions are subject to multiple notifications in an increasing number of jurisdictions, which delays the clearance process and increases legal and regulatory costs. Mr. Boyce noted that overlapping reviews are also likely to require significant resources within the competition agencies involved. This is an area where closer international cooperation in the future could help reduce the time and costs of the review.

Mr. Boyce emphasized that just as traffic rules are not an end in themselves but exist to achieve public welfare objectives so merger rules are there to reduce the risk of consumers being harmed by anticompetitive mergers. Merger rules need to be sufficiently clear to provide merging businesses with legal certainty and be enforced sensibly. It is reasonable that competition authorities should have a certain degree of discretion when enforcing merger control rules. However, agencies' discretion needs to be subject to proper checks and balances. In terms of harmonization, it is not necessary that all countries have identical rules, but in an increasingly global environment, it is sensible for authorities to understand each other. Having a similar standard can certainly contribute to that.

Looking back to 2002, the "annus horribilis" for the European Commission when three merger cases were lost in court, it was said that for a speedy and effective merger review, there was a need for a proper legal framework, clear merger guidelines, a properly staffed administration and a rapid and independent review process. It is notable that a few years later, in a presentation summarizing the changes in the new EU merger regulation, Mr. Boyce devoted significantly more space to the changes in jurisdictional thresholds and procedural changes than to the change in the substantive test. At the time, Mr. Boyce was concerned that the European Commission may attempt to stretch the boundaries of the SIEC test as it did in the past with the dominance test, making the outcome of the merger review process uncertain and unpredictable. The European Commission has not done that and today the merger control regime in the EU is reasonably predictable. With the next review of the EC Merger Regulation coming up, the European Commission is about to issue a report on how the Merger Regulation is operating in practice. The fact that no radical procedural or substantive developments are expected implies that the system has worked relatively smoothly.

Mr. Boyce concluded by saying that the evolutionary changes in the UK and EU merger review towards an SLC type test have been a success. The SIEC test in the EU is more "intellectually honest" than the Commission's previous practice when it stretched the concept of dominance beyond what some would see as its limits. By adopting the SIEC test the merger control standard can be applied independently of the Article 82 EC standard, which uses the word dominance as well but which concerns the control of monopoly power. Finally, keeping the reference to dominance in the hybrid test has facilitated the transition from the old system to the new and ensured continuity with a developed body of case law. Increased harmonization within the European Competition Network (ECN) is desirable as it facilitates cooperation, including case referrals under the EC Merger Regulation. At a more global level there is scope for further cooperation, and the alignment of substantive standard can help with that. Moving to the SLC test can also increase the credibility of a competition authority in the eyes of other authorities that already have an SLC standard. That is what happened when the UK moved away from the public interest test to the SLC standard.

Alberto Heimler began his presentation by mentioning that his remarks refer to his paper entitled "*Was the Change of the Test for Merger Control in Europe Justified 4 Years after the Introduction of the SIEC Test?*". The paper was a response to an article on the same topic published by Greg Worden in the same issue of the European Competition Journal.

In the debate on whether to change the merger test from dominance to SLC, Mr. Heimler took the minority position of defending dominance quite strongly. However, Mr. Heimler noted that when looking forward, one is often proven wrong by subsequent events, which happened to both himself and to those who promoted the SLC standard. His presentation focused on why he was wrong and the reasons for which it would have been better to stick with the dominance standard, which are however different than those he had defended originally.

Mr. Heimler mentioned the exchange he had with those who argued that the dominance standard does not adequately encompass all possible competition concerns, particularly with respect to non-collusive oligopoly mergers. Mr. Heimler argued that an SIEC test adds very little in terms of reducing false negatives but greatly increases the risk of false positives. However, Mr. Heimler stated, both views were proven wrong.

As regards dominance, Mr. Heimler thought that in Europe there was a problem with its definition. The European Court of Justice in United Brands defined dominance in terms of independence of behaviour. But not even a monopoly is independent as it is bound by the demand curve and it cannot raise prices without a limit. The notice on the definition of the relevant market, adopted by the European Commission in 1997 endorses a more economic approach of dominance. In that context dominance is the ability to raise prices by a small but significant non-transitory increase in price (SSNIP). The notion of dominance was hence shifted from independence to market power. A merger to monopoly can lead to a smaller increase in price than a SSNIP and this was one of the reasons why Mr. Heimler believed at the time that a change to SIEC standard was dangerous.

With respect to unilateral effects in the market for homogenous products, Mr. Heimler sees no problem in applying the dominance test because in a Cournot-type competition a merger always increases prices unless it is associated with price efficiencies. The dominance standard therefore works well when a merger is large enough.

In a differentiated product market, mergers among close competitors (that internalise sales) may very well increase prices. If a SSNIP test shows that a merger would not lead to the requisite change in price, then the merger should not be blocked. Mr. Heimler referred to a recent paper by Baker and Shapiro, which suggests that when identifying an anticompetitive merger one should look not at market shares but rather at the diversion ratio between the merging firms. This is analogous to a SSNIP test and therefore, if dominance is defined in terms of market power – as the ability to raise prices – then it is capable of addressing all potentially anticompetitive transactions in differentiated product markets.

Mr. Heimler noted that in the EU no merger short of dominance was blocked since 2004. Hence from an empirical point of view there has been no need to change the test. An additional concern was that the broad concept of dominance in the merger review could have created repercussions for abuse of dominance cases (Article 82 EC). However, in Mr. Heimler's opinion, the main issue in the EU is that there has been a truncated analysis in the assessment of an abuse, i.e. the finding of abuse has often been based on the existence of dominance alone. Hence, there is not a problem with the breadth of the concept of dominance itself but rather with the way abuses are analysed.

Mr. Heimler then noted that in the EU there is a problem with collective dominance, which has become a real issue after the 2002 Airtours/First Choice judgment of the Court of First Instance. In that case, according to Mr. Heimler, the court set a very stringent test for collective dominance, which basically requires a showing that firms have a common policy and present themselves in the market "as a single entity". In Mr. Heimler's view, this is a very hard standard to meet, and therefore no merger has been prohibited under a collective dominance theory since then. Mr. Heimler went on to note that in the US coordinated effects are considered in a somewhat less structured manner and would cover, for example, the acquisition of a maverick. The acquisition of a maverick in the US is considered under coordinated effects, while in Europe the analysis is made under unilateral effects.

Frederic Jenny thanked the panellists for their very interesting presentations and opened the floor to discussion with the delegates. He suggested that the discussion should focus on five areas: (i) the scope of dominance and the SLC standards, (ii) examples of "gap" cases, (iii) enforcement issues under both tests, (iv) the role of economic analysis under both tests and (v) other policy considerations and international cooperation.

2. The scope of the dominance test and of the SLC test

On the scope of the two substantive tests, Mr. Jenny noted that the SLC test can cover both unilateral and coordinated effects. It is however more controversial whether the dominance test allows this. On this issue, he noted that the submission from Switzerland, which applies the dominance test, reported on the conclusions of the 2007/2008 evaluation of the Swiss Cartel Act, which indicated that a risk exists that anticompetitive mergers may be approved. Mr. Jenny asked the Swiss delegation to discuss these conclusions and briefly comment on the Swissgrid and BZ/20 Minuten cases.

Switzerland began with a preliminary remark on the relatively high jurisdictional thresholds applicable in Switzerland. This means that mergers caught in Switzerland are mainly international and are reviewed also by the European Commission. In such situations, the Swiss authority cooperates with the European Commission if the parties to the merger agree, which they generally do. However, this also means that many smaller but potentially anticompetitive mergers escape review. Unfortunately, this is something than only the legislature can change by amending the competition act and it shows that the substantive test itself is not the only problematic issue in this area.

Under the applicable merger test, the Swiss Competition Commission can prohibit a merger which creates or strengthens a dominant position and is capable of eliminating effective competition in the relevant market. This is a wording that can be interpreted either along the lines of an SLC test or more in accordance with a strict dominance standard. The Competition Commission uses the former interpretation. It defines the relevant market but also looks at neighbouring markets, dynamic effects and so on.

In two cases this analysis led to prohibition decisions, which were challenged on appeal. The reviewing court applied a strict interpretation of the test, and ruled that effective competition was not eliminated where there was some competition left. Therefore, the question now is what "effective competition" means. In the BZ/20 Minuten case the court found that since there was no competition prior to the merger there would be no change post merger. Therefore, its interpretation of the test may be quite fact specific and hence not indicative of the general reach of the current wording.

However, following these two rulings there are in principle two possibilities for the Competition Commission to pursue. It can either continue to apply the test as before and distinguish the two cases on the facts, or it can pursue a legislative change of the test, which is a possibility endorsed by the evaluation group that drafted the 2007/2008 report. For the sake of legal certainty, the latter option would be preferable. However, it is not clear that the legislator is ready to amend the Cartel Act. In any event, the Swiss experience so far shows that the wording of the test in itself is not as important as the way it is applied in practice.

The Chair thanked the Swiss delegation and mentioned that some countries have a test that is between the dominance and SLC test. One of these countries is Spain where the test is close to the SLC standard but not the same. He asked Spain to explain what test is applied to mergers in Spain and why it was recently changed.

Spain stated that it applies a test that is slightly different from the SLC test. The first Merger Act adopted in 1989 applied a standard to mergers, which looked at whether the transaction hindered the maintenance of effective competition. The new 2007 Merger Act created a new independent Competition Commission and slightly changed the wording of the test. The new test focuses on possible impediments to the maintenance of effective competition. In contrast to the test in the EU it does not contain references to the creation of dominance or references to substantial effects or harm. Nor does it define what is meant by effective competition. However, in practice the test is applied restrictively, i.e. only mergers which present serious competition concerns are challenged.

The other changes introduced in the 2007 Merger Act include clarifications of several important factors in the assessment of mergers, such as real or potential competition, entry barriers, countervailing power of demand or supply, efficiencies and so on. In addition, it provides that only for reasons of public interest, such as national security, public health or the protection of the environment, the Council of Ministers can overrule the decision of the Competition Commission. Therefore, unlike the previous Competition Act, Government intervention can not be due to competition concerns and it is only likely to happen in very exceptional circumstances.

The Chair passed the floor to the UK delegation which in its contribution said that it applies an SLC test. However, the test applied in the UK is slightly different than the SIEC test applied by the European Commission because it contains no reference to dominance. The Chair invited the UK delegation to comment on whether this was only a matter of wording or whether there could be differences in the enforcement and specifically to discuss the Lovefilm/Amazon and Hamsard/Academy Music cases to illustrate how the test is applied in the UK.

The UK noted that prior to the adoption of the 2002 Enterprise Act, there was neither dominance nor an SIEC test in the UK, but rather a public policy test, which was interpreted on competition grounds. The important development in the last six to seven years in the UK, as in other jurisdictions, was a shift from a structural analysis of mergers toward a more economics-based approach. Greater attention is now devoted to defining the actual theory of harm, the counterfactual to the merger, as well as looking at internal documentation to establish how the parties view the market. When assessing mergers the focus is now on rivalry, specifically the closeness between the merging parties and their rivals and the competitive constraints they face. As a consequence, in the UK there have been a number of cases where it was not necessary to define the relevant market.

The Hamsard/Academy of Music case, for example, involved live concert venues and a precise product or geographic market in this instance was not thought to be not necessary. In that case, there were two services involved, live music production and live music venue management, and the reviewing agency thought it more helpful to look at the characteristics of individual concert venues and the constraints faced in each instance. In some cases, just by looking at these individual characteristics it was clear that the merged entity would have had a significant ability to raise prices. The UK delegation noted that this case illustrated well the proposition that looking at competitive constraints can be a much more direct way of assessing a merger. The Lovefilm/Amazon case was interesting as a number of factors were looked at and eventually through survey evidence and internal documents it became clear that the main competitive constraint the parties faced came from the development of new products.

The Chair turned to the Korean delegation, whose submission stated that Korea revised its Merger Guidelines in 2007 and adopted the SLC standard, while in a 2002 submission to a previous OECD roundtable, Korea had defended the dominance standard. The Chair asked the reasons behind this change of views.

Korea first described the three main changes made to the Merger Guidelines in 2007, apart from the adoption of the SLC standard. First, the HHI was introduced as a way to measure market concentration. Second, all market share presumptions were removed, allowing the KFTC to analyse the relevant SLC factors on the basis of economic evidence. Finally, pressure from foreign producers and the possibility of diversion of export volume to domestic market were added as elements to consider when assessing competition restrictions. As regards the change in the substantive standard, Korea noted that its position in 2002 was that the SLC and the dominance standards can be used to supplement each other. However, Korea recognized the benefits of the SLC test and therefore decided to revise its merger guidelines accordingly.

3. Examples of "gap" cases

The Chair moved to the next point for discussion, i.e. whether there are in fact any gap cases. He noted that Mexico is in a unique position to address this point since it has both the dominance and the SLC standard. However, in recent years, a number of mergers have exposed the weakness of the dominance test. In light of this, the Chair asked the Mexican delegation to comment on these developments and on the Coca Cola/Jugos de Valle merger.

Mexico explained that the Coca Cola/Jugos de Valle merger was a good illustration of the limits of the dominance test. While Coca Cola had been found to be dominant in the soft drinks market in an earlier investigation, its merger with Jugos de Valle, an important juice producer, would be difficult to block under the dominance test because the impact of the transaction was on a different market (the juice market). Therefore the application of the SLC test in this case was considered more appropriate to properly assess the effects of the transaction.

The Chair noted that several country contributions mentioned the existence of gap cases. The Czech Republic, where the test was changed to the SIEC after the accession to the EU in 2004, is one of them. He invited the Czech Republic to comment on the Telefonica/Deltax Systems merger and to describe how the SIEC test was applied there.

Czech Republic started by describing the evolution in its attitude to the change in the substantive test. At first, the Czech Competition Authority was sceptical about the necessity of changing the dominance test and to adopt the SLC test. In its opinion, the dominance test was capable of capturing the vast majority of problematic mergers. However, soon after the standard was changed, it realized that the SIEC test allowed more flexibility and the possibility to reach cases that they could have not reviewed under the old dominance test.

The Telefonica/Deltax Systems merger presented particular challenges which, although possible to deal with under the dominance test, were more easily addressed under the SIEC standard. Telefonica is a major telephone operator in the Czech Republic, while Deltax was a medium sized company, which provided information and communication technologies to other companies. Both parties operated on different markets, however, the contentious issue was that Deltax supplied information systems to the Czech Telecommunication Regulatory Agency and was responsible for their maintenance. The concern was that through the acquisition of Deltax, Telefonica would gain access to the information that its competitors in the telecommunications market submit to the regulatory authority. In the end, the merger was approved subject to the transfer to a third party of the service and maintenance contract with the Czech Telecommunication Regulatory Agency.

The Chair moved to the submission from Hungary, which discussed how Hungary changed to the SLC standard in June 2009 after having argued for years that both the dominance and the SLC test were substantially the same. He asked what were the reasons for this change and in particular he asked if this development was prompted by the Competition Authority coming across a gap case, such as the HTTC Matel case described in the written submission.

Hungary answered that the HTTC Matel case was instrumental in the process of moving towards an SLC-type test. This was a 4 to 3 merger in the telecommunications market. After the merger, the parties would have a combined market share of a little over 25%. There was therefore no ground to intervene on the basis of dominance or unilateral effects, and coordinated effects would have been hard to prove. There were, however, concerns about the effects of this merger due to its 4 to 3 character. Therefore, a bidding study was carried out, and while the study dispelled any concerns about this particular merger, it showed the weakness of the dominance test in the face of a potential gap case, which the HHTC Matel certainly was. According to the Hungarian delegation, even if there are not many gap cases, from time to time they occur, in particular with respect to non-collusive oligopolies as is mentioned in the Secretariat Issues paper. Hungary also stressed the benefits of the SLC test from an analytical point of view noting that its Chief Economist can apply it with much less difficulty than the dominance standard. Lastly, another reason for the change to the SLC standard was Hungary's desire to align its merger policy with that of the EU, which had adopted the SLC test several years ago.

The Chair noted the discrepancy between the position of the country contributors and that of the panellists. Most delegations seem to point out that there are a number of gap cases, hence underscoring the significance of moving towards and SLC test. On the contrary, the experts in the presentations have taken the position that the change in the standard makes very little difference. He asked the experts to comment on this perhaps only apparent discrepancy.

Mr Levy responded that in his opinion there are differences between the two tests but he also noted that if one looks at broadly similar cases that were reviewed under the two different tests, such as the France Telecom/Orange and T-Mobile Austria/tele.ring cases, it is fair to say that in both cases the same result was reached, although the France Telecom/Orange case was reviewed under the dominance standard and the T-Mobile Austria/tele.ring case under the SIEC test. What was perhaps most troubling about the dominance test was that it was not certain whether the European Courts would endorse its application in a non-collusive oligopoly scenario, which is why it was appropriate to change the legal test. Mr. Levy did not agree with the suggestion that the success of a test should be determined by the number of transactions blocked. Indeed, after the adoption of the SLC test there were concerns that the European Commission may be over-expansive in its application of the new standard. However, these concerns have been dispelled over time in practice.

As a last remark Mr. Levy referred to the Coca Cola/Jugos de Valle case mentioned by the representative of Mexico and noted that, over the past year, broadly similar transactions involving acquisitions by Coca Cola of local juice producers had been reviewed in three jurisdictions (i.e., Mexico, China, and the U.K.) under broadly similar substantive tests. What is interesting is that, notwithstanding the application of equivalent substantive tests to broadly similar fact patterns, the conclusions of the reviewing agencies were quite different (in the U.K., the transaction in question was approved unconditionally; in Mexico, the relevant transaction was approved conditionally; and in China, Coca-Cola's acquisition of a local juice producer was blocked). These cases suggest that the question of which substantive test is applied matters less than the emphasis placed on the available evidence and the theories of harm that an agency chooses to pursue.

Mr Boyce agreed with Mr. Levy that there is a difference between the SLC and the dominance tests and that there may be gap cases. However, how great this difference is depends on how dominance is interpreted. The European Commission interpreted it very broadly, rendering the gap very small. Australia, on the other hand, was held by its courts to a very narrow definition of dominance, which naturally lead to the gap being significantly larger. In response to the Hungarian experience, Mr. Boyce voiced a concern that the newly adopted test may be taken too far. In this respect, his experience shows that under the SLC standard agencies develop sophisticated theories of harm, which require the analysis of vast amount of data. This may complicate the review and may slow the process down. He urged the competition authorities to consider the impact that such analysis may have on the speed of the review because in the end, for the merging parties time is money.

Mr Heimler stressed that dominance is a better concept because the concept of dominance is more easily understood by the reviewing courts who in most instances are not experts in economic analysis. In 2002 when the European Commission lost three merger cases in court, there were concerns that by adopting the SLC test, the European Commission may attempt to become over-expansive in its analysis.

While acknowledging that none of these concerns materialised, Mr. Heimler remained worried about the potentially extensive reach of the SLC test. He noted that there have been significant developments over the years in the application of Articles 81 and 82 EC, which has moved towards a more economic approach. Similarly, the concept of dominance in the merger context could have been de-formalized in favour of a more economic approach. Mr. Heimler concluded that the sophistication of the economic and legal analysis is more important than the change of the test itself.

The Chair thanked the experts for their comments and turned to the next question for discussion, which was the hypothetical case presented in the Secretariat's Issues Paper. The Chair invited Finland to comment on the hypothetical case.

At the outset, Finland reported that it applies the dominance test but is considering the adoption of an SLC test for a number of reasons. First, in a review of past cases there have been some potential gap cases identified. Second, there is a clear intention to align the Finnish merger review to the European system.

As regards the hypothetical case, the Finnish delegation identified it as a clear gap case, which would be difficult to assess under the current dominance standard as applied in Finland. Some proponents of the dominance test have noted that the test's applicability to such challenging cases also depends on the way in which the dominance test is applied. Referring to such remarks the Finnish delegation noted that in order to apply the dominance test to this hypothetical case, the notion of dominance would require significant stretching. In this respect, the Finnish delegate agreed with Mr. Boyce's reference to the SIEC test being more intellectually honest. In a final remark Finland clarified that its 2002 submission to a previous roundtable, about the lack of difference between the dominance and SLC standards, related to the issue of legal certainty. Indeed there is very little difference in terms of legal certainty between the two legal tests because while the SLC test may at first sight appear more vague, the dominance test also carries a degree of uncertainty with respect to defining the relevant market and assessing the potential harm of a given merger.

The Chair then asked the Japanese delegation to describe how the Japanese merger test, which is very close to the SLC test, would be applied to the hypothetical case.

Japan began by outlining the merger test applicable in Japan. The test is based on a substantial restraint of competition from both a unilateral and a coordinated effects perspective. It went on to describe in detail the analysis, laid out in its written submission, of how this test would be applied to the hypothetical case. Japan noted, if Bank One, as the competitor of the merged bank, does not have any particular limitation of its ability in terms of excess capacity and the substitutability for the products of the merged bank, it would be a factor to prevent the merged bank from controlling the market from the perspective of unilateral effects. At the same time, as the market structure will become more oligopolistic, they would want to gather more information about the characteristics of the market and analyze from the perspective of coordinated effects more in detail. In short, in reviewing the hypothetical merger the Japanese authority would look not only at market share but also at additional factors, such as the competitive condition of the market, the presence of a maverick, barriers to entry and so on.

The Chair then asked the delegates if there are any technical arguments that can be made in favour of the SLC test. For example, Canada's contribution puts forth the proposition that the application of efficiency considerations is easier under an SLC standard. On this specific point, he asked the Canadian delegation to describe how efficiencies are addressed in Canada.

Canada described in detail its approach to efficiency considerations in the context of mergers and how they are assessed. In Canada, there is a bifurcated process whereby the Competition Bureau first determines whether there are SLC concerns. If there are, it is for the merging parties to argue and prove efficiency justifications. Interestingly, apart from the usual efficiency arguments linked to synergies and price reduction, the Canadian courts also require that wider considerations, such as overall savings to the economy, are given proper weight in merger review. As regards the assessment of efficiency arguments under SLC and dominance standards, Canada expressed its doubt as to whether efficiencies can be properly evaluated under a dominance standard, such as when they result in making the merged firm more competitive.

The Chair noted that the point made by the Canadian delegation is on point and one which leads to a question for the Turkish delegation. The Chair asked how the Turkish competition authority takes into account efficiency considerations in its assessment of a merger, given that it applies the dominance test.

Turkey stressed that as a first step it looks at structural elements, but that afterwards it also takes into account various additional factors, such as countervailing buyer power, history of the behavioural elements of the undertakings, participation in joint ventures, interlocking directors and contacts in more than one market.

The Chair then turned to another technical issue, i.e. the importance of carrying out a market definition under an SLC test. The UK in its contribution mentioned that in a number of recent transactions it did not define the market but instead focussed on the direct rivalry between the merging firms. On the other hand, in its submission, Ireland stresses the importance of market definition under an SLC standard. However, later in its submission it also seems to suggest that it does not always defines the market. The Chair gave the floor to the Irish delegation.

As a preliminary point Ireland noted that it always strives to review the cases sooner than before the 30-day initial review period. Market definition can be time consuming but it is often not necessary under the SLC test because the circumstances of the case show that whichever way the market is defined, there is not an SLC concern. In such circumstances, it is indeed not necessary to go through the complete market definition exercise. Often, it is more important to understand how the market works, who the competitors are, what the competitive constraints are and so on. Indeed, when a conclusion is reached that there are SLC concerns, it is necessary to present the results of the analysis on the basis of a formal market definition. However, Ireland cautioned that is very important to check whether the conclusion rests on overreliance on market definition. If a slight change to how the relevant market is defined undermines the conclusion about the existence of SLC concerns, then it is advisable to review whether the overall analysis is sound.

The Chair thanked Ireland for its contribution. He then moved to the next issue and mentioned that the Danish contribution focuses on the difference between the dominance and the SLC tests in terms of standard of proof and invited Denmark to comment on this issue.

Denmark described its experience with the adoption of the SIEC test and the change in analysis that it has brought about when compared with the dominance test. Under the SIEC test, the importance of economic analysis and of the assessment of the actual effects of a merger gained in importance. This change had been under way for some time but the switch to the SIEC test in 2005 has accelerated its pace.

With respect to the effect on the outcomes of merger reviews, Denmark was somewhat sceptical about the real impact of the change to the SIEC test. In Denmark there was no gap case. Moreover, dominance is retained as part of the SIEC test and it is not clear whether the standard of proof with respect to SIEC should be the same as under the dominance test or not. The question is whether some extra proof, such as hard econometric evidence, is required in the case of an eventual gap case.

The Chair then referred to the German contribution, which indicated that Germany applies the dominance test. As regards the standard of proof, it suggests that the standard is identical under the SLC and the dominance tests, although there is a difference in what is considered to be the harm to competition. The Chair invited Germany to comment on the general trend towards the adoption of the SLC test and whether in Germany there is still a debate about moving to an SLC standard.

Germany agreed with previous comments suggesting that the SLC and the dominance tests are not that far apart, even though they may look at mergers from different standpoints. In Germany, the dominance test is interpreted as covering both single and collective dominance. Gap cases may exist but they have not been encountered yet. In practice, there have been no cases that could not have been addressed under the dominance test.

As to the issue of economic analysis, Germany emphasized that the dominance standard does not prevent the use of sophisticated economic techniques in merger review, as the practice of the Bundeskartellamt shows. As is in other jurisdictions, economic theory plays an increasing importance in German merger review.

With respect to whether there is a debate about changing to the SLC test, Germany answered that extensive discussion took place before the last amendment of the relevant law in 2005. The conclusion of this discussion was to retain the dominance test. The main reason for doing so was the need to preserve legal certainty and continuity of 36 years of case law in merger review. However, as the EU and other jurisdictions gradually move to the SLC test, there will certainly be another debate because, as Finland noted, the convergence in standards is certainly a very important consideration.

4. The role of economic analysis under both tests

The Chair turned to the Netherlands, which in its contribution stated that the change in test makes no real difference since it only shifts the emphasis from legal characterization to economic analysis. The Chair asked the Dutch delegation to discuss the role of economic analysis under the SIEC test, particularly in view of what other jurisdictions have noted about the SIEC test allowing greater room for economic analysis.

Netherlands explained that an economics-based approach to assessing mergers plays a central role in the NMA analysis. This has not changed with the adoption of the SIEC test. However, the wording of the new test may better reflect what already happened in practice as well as provide easier access to an economics-based analysis. In that sense the Dutch delegation noted that the shift to SIEC was helpful when discussing cases with the parties and also in defending cases before the courts.

The Chair then asked the European Commission to comment on the recent developments in its approach to merger review under the SIEC test.

The European Commission (EC) mentioned that in 2002 the debate was on whether the dominance test would cover cases where horizontal mergers would lead to unilateral effects without creating a clear market leader. At that point in time, on the basis of the Courts' jurisprudence, the EC believed that dominance could cover such cases. However, there was a degree of uncertainty, which the change in test helped to dispel. In that sense, the change to the SIEC test and the adoption of Guidelines that interpret it in detail have positively contributed to legal certainty.

With respect to gap cases, the EC noted that although rare, they nevertheless occur as has been shown in two instances: the TeamMobile/Telering merger and the BASF/Ciba merger. In general, the impact of the change in the applicable test has been modest, particularly because the move towards a more effects-based approach had already begun. There may have been more emphasis on unilateral effects and quantitative analysis in recent years and the change in test was perhaps a contributing factor to that. The EC emphasized that what certainly has not changed is the intervention rate, contrary to some of the concerns voiced prior to the adoption of the SIEC test.

As regards coordinated effects, the EC stressed that even though there have been cases such as Airtours/First Choice or Sony/BMG in which the court disagreed with the EC's analysis, these concerned the application of the concept of coordinated effects to the specific facts of individual cases rather than the concept itself. While there have been no recent prohibitions under coordinated effects theory, there have been a number of cases in which concerns over coordinated effects were resolved through remedies. The adoption of the SIEC test has not changed much in this area.

Last, the EC pointed to an area, which had not yet been discussed, non-horizontal mergers. In these types of cases there are companies that may have a degree of market power but are not necessarily dominant. By vertically integrating, they may have the ability and the incentive to raise prices in another market. Such a change may have negative effects on consumers even if dominance is not reached in the second market. There have been two cases, Tom Tom/Tele Atlas and Nokia/Navteq, that illustrate this point. In both cases, the EC developed a theory of harm based on unilateral effects; however, in the end, the evidence found did not support the theory. The EC noted that experience with these types of cases has shown that the SIEC test may have contributed to finding the appropriate analysis as well as adding legal certainty, in particular after the non-horizontal merger guidelines were issued.

The Chair noted that the EC contribution was the first to raise the issue of vertical mergers. Another issue that had not been discussed thus far was the question of whether the two tests may lead to under- or over-enforcement. This question was addressed in the Australian submission.

Australia described its experience with the dominance test as perhaps out of date because it moved to the SLC test in 1992. However, prior to that date, dominance was interpreted very narrowly, unlike in some other jurisdictions, and therefore virtually only covered single firm dominance. This situation led to serious under-enforcement, the effects of which remained until today, in particular in the media and grocery sectors. The change to the SLC test eliminated this deficit without leading to over-enforcement. There was a slight increase in prohibitions right after the adoption of the SLC test, but that has stabilized over time and now the prohibition rate in Australia is in the range of 2-3%. As a final remark, Australia responded to some of the questions regarding the relative lack of legal certainty under the SLC standard. It remarked that like other jurisdictions it adopted detailed merger guidelines and that the AAAC regularly releases assessments and statements of reasons in relation to particularly important mergers. This ensures sufficient legal certainty and there have been no complaints from the business community so far.

5. International cooperation

The Chair turned to the last topic of this roundtable and asked the delegates to comment on the question whether convergence on substantive tests facilitates cooperation among competition authorities. He asked the US to present its views on this issue.

The US stated that in its experience diverging standards have not hampered international cooperation. Given the developments which were already discussed, many authorities around the world use an approach based more and more on economic theory irrespective of whether they operate under the dominance or SLC standard. There have been many cases in which authorities that use different tests arrived at the same conclusions. Even in cases such as Heinz/Beech-nut and Peoplesoft/Oracle, which could technically be considered gap cases, the authorities on both sides of the Atlantic reached a similar result. For example, the US cooperates with the Bundeskartellamt quite often on merger cases and the fact that Germany still applies the dominance test has not prevented the two agencies from reaching a sound common position.

However, the US also stressed that having the same standard may ease cooperation with other authorities as it enables them to use the same vocabulary and to focus on commonalities.

The US noted that international cooperation has evolved significantly in the past decade due to the growing understanding of the importance of focusing on economic analysis, which is relatively independent from the applicable substantive test. One area where there is more work to be done is possibly the area of vertical mergers as was mentioned by the EC. There it seems possible that different results could be reached by authorities applying different tests. Therefore, this is an issue that should be further discussed in the future. In this respect, the US emphasized the importance of various international fora in which experiences and best practices are exchanged for international cooperation.

The Chair noted that the issue of benefits arising from use of the same vocabulary is also discussed in the submission from Romania. He asked the Romanian delegation to present its view on what the arguments are in favor of increased cooperation through convergence.

Romania noted that it still applies the dominance test but that a change to the SIEC test is contemplated. It went on to state the reasons why it considers international convergence to be important. First, having a common standard across different jurisdictions is beneficial for the international business community as it brings more predictability with respect to the outcome of cases. Second, within the EU, convergence can lead to the establishment of common principles and also facilitates eventual reallocation of cases within the European Competition Network.

The Chair then invited Poland to presents its view that convergence of tests is not necessary for international cooperation.

Poland submitted that it agreed with the US position with regard to international cooperation: it is far more important to have a common analytical approach, which does not require a complete convergence of the legal tests. However, it noted that there may be areas in which convergence could further facilitate international cooperation, such as procedural rules and exchange of information.

The Chair concluded the roundtable by briefly summarizing the discussion. He noted that first, there seems to be a clear move towards the SLC test; second, there appears to be quite a few gap cases at the national level; and third that dominance is an encompassing test only when given an economic interpretation. He also noted that one of the arguments in favor of dominance focused on the fact that judges more easily accept the concept of dominance than that of SLC. However, as dominance was gradually interpreted in an expansive manner it also became increasingly economic, which is a development that reduces the appeal of this argument. This issue also plays out in the area of legal certainty, where there were arguments from both sides. Indeed the SLC test may be a more complicated concept; however, dominance has lost its precision through its expansive interpretation. The Chair further noted that one key take-away from this roundtable is that most of the countries that have switched to an SLC test have been satisfied with the change.

He concluded the roundtable by thanking all the contributors, interveners and the Secretariat for a very stimulating Issues Paper and a very interesting hypothetical case.

COMPTE RENDU DE LA DISCUSSION

1. Introduction

Frederic Jenny ouvre la table ronde sur la norme de contrôle des fusions, plus particulièrement consacrés à l'expérience des pays concernant le changement de norme d'examen des fusions qui consiste à abandonner le critère de position dominante pour celui de la réduction substantielle de la concurrence/d'entrave significative à une concurrence effective, sujet jugé spécialement intéressant par les délégués.

Avant de donner la parole aux délégués, le Président présente les trois experts invités à introduire le débat. Nicholas Levy, associé du cabinet Cleary Gottlieb Steen and Hamilton, John Boyce, associé du cabinet Slaughter and May, et Alberto Heimler, professeur d'économie à l'Ecole d'administration italienne. M. Levy et M. Boyce vont évoquer leur expérience du contrôle des fusions dans l'UE et l'évolution du critère de fond. M. Heimler présentera un article dans lequel il exprime son point de vue sur la façon dont devrait être appliqué le critère de la réduction substantielle de la concurrence.

Selon M. Levy, la norme de contrôle des fusions est importante car elle permet de distinguer les fusions qu'il convient d'interdire de celles qu'il convient d'approuver. La norme juridique utilisée pour évaluer les fusions fournit en outre une indication sur la façon dont les autorités de la concurrence doivent procéder dans leur analyse.

Le premier règlement communautaire sur le contrôle des fusions a été adopté en 1989 après un débat animé qui n'a pas tant porté sur le fait de savoir si le critère devait se fonder sur la création ou le renforcement d'une position dominante, ou sur la réduction substantielle de la concurrence, mais plutôt s'il fallait tenir compte des considérations d'ordre social ou industriel. À cette époque, la Commission européenne défendait ardemment la conception selon laquelle les fusions devaient être évaluées uniquement selon le critère de leur impact sur la concurrence ; de ce point de vue, elle est parvenue à fixer de façon appropriée la formulation du règlement communautaire sur les fusions et son application consécutive. Les premières années, la Commission a fait l'objet d'une surveillance attentive, les observateurs guettant toute interférence politique dans son application du règlement relatif aux fusions. Elle a toutefois résisté avec succès à toutes les pressions politiques.

Concernant le critère de fond, on se demandait également dans les premiers temps si le critère de position dominante serait suffisant pour prendre en compte toutes les opérations anticoncurrentielles. Le débat, à l'époque, ne portait pas tant sur ce que l'on a appelé les « *gap cases* » (c'est-à-dire les cas dans lesquels le critère de position dominante ne permettait pas de couvrir les concentrations anticoncurrentielles), mais sur le fait de savoir si ce critère pouvait couvrir les effets coordonnés (cas de domination conjointe) parce qu'il était formulé au singulier : « *du fait de la création ou du renforcement d'une position dominante*. » En adoptant une interprétation logiquement plus large, la Cour de justice de l'Union européenne a confirmé, dix ans plus tard, que le critère de la position dominante permettait bien de prendre en compte les effets coordonnés.

Cependant, au fil des années, la controverse a continué, alimentée par divers dossiers ayant soulevé des contestations. Le débat n'a toutefois pas porté sur le critère de fond, mais plutôt sur le cadre utilisé par la Commission pour évaluer les informations, le système interne de poids et contrepoids auquel sont soumises les décisions de la Commission et les inquiétudes dues au fait que la Commission cumulait les casquettes d'enquêteur, d'accusateur et de juge.

Dans le cadre de la révision du règlement sur les fusions, on a débattu entre 2001 et 2004 du critère de fond et on s'est demandé s'il ne fallait pas abandonner le critère de la position dominante pour celui de la réduction substantielle de la concurrence. La Commission européenne considérait que la position dominante était une notion suffisamment large pour couvrir toutes les opérations susceptibles de soulever des difficultés du point de vue de la concurrence ; toutefois afin de dissiper toute incertitude, elle a reconnu qu'il était possible de modifier le critère de la position dominante. Après un long débat, la Commission européenne a adopté un critère hybride, celui de l'« *entrave significative à la concurrence effective résultant généralement de la création ou du renforcement d'une position dominante* ». Par cette décision de créer un test hybride, elle entendait faire d'une pierre deux coups. D'une part, elle assurait la continuité d'années de jurisprudence fondée sur le critère de la position dominante et de l'autre, elle indiquait clairement que les concentrations seraient évaluées à l'aune de la perte de concurrence qu'elles induiraient.

Après cinq années de pratique du critère de l'entrave significative à une concurrence effective, M. Levy fait remarquer que l'on est en droit de faire le bilan de cette expérience. Quatre questions se posent : (i) existe-t-il des différences matérielles entre le critère de la position dominante et celui de l'entrave significative à une concurrence effective ? (ii) existe-t-il un « vide réglementaire » entre la position dominante et l'entrave significative ? (iii) est-ce que le changement de critère de fond a notablement modifié le système communautaire de contrôle des fusions ? (iv) la nouvelle norme communautaire en matière de concentration a-t-elle facilité la convergence dans le domaine du contrôle des fusions ?

Selon M. Levy, les différences entre le critère de la position dominante et celui de la réduction substantielle de la concurrence sont aussi théoriques que pratiques. Le concept de position dominante pèche en ce que la notion d'indépendance sur laquelle il se fonde est insuffisante pour permettre de distinguer une entreprise dominante d'une entreprise non dominante. Même une entreprise en situation de monopole n'est pas entièrement indépendante, parce qu'à moins que la demande soit constante, elle court le risque qu'une hausse des prix induise une perte de chiffre d'affaires. Si, en revanche, la position dominante signifie simplement une position de force, alors tout renforcement peut être interprété comme un renforcement d'une position dominante. M. Levy rend hommage à la Commission d'avoir retenu une approche souple et dynamique de la position dominante, qui ne se limite pas, à juste titre, aux facteurs structurels. En outre, selon M. Levy, la Commission avait compris déjà avec le critère de la position dominante l'importance des effets unilatéraux et de l'évaluation de l'étroitesse de la concurrence entre les parties. Cependant, le critère de la réduction substantielle de la concurrence présente l'avantage de s'intéresser au degré de modification de la dynamique de concurrence, ce qui est l'essence même du contrôle des fusions.

Existe-t-il un « vide réglementaire » entre le critère de la position dominante et celui de la réduction substantielle de la concurrence ? Au début de l'année 2000, les « gap cases » ont suscité un débat animé. Le cas hypothétique évoqué dans le document de réflexion du Secrétariat est un exemple de lacune potentielle. Dans la pratique, rares sont les opérations qui entrent dans cette catégorie, mais il y en a eu, comme dans l'affaire Heinz/Beech-Nut. Il existe cependant toujours des moyens de couvrir les opérations qui pourraient passer à travers les mailles du filet, soit en adoptant une définition du marché suffisamment étroite, soit en retenant la thèse d'un impact préjudiciable du renforcement de la position dominante ou celle d'effets coordonnés. Toutefois, comme il n'est pas certain que les tribunaux se rallient à ces thèses, la Commission a reconnu qu'il pouvait exister, en théorie tout au moins, un vide réglementaire et a par conséquent examiné la possibilité de modifier la norme de contrôle des fusions.

Est-ce que le nouveau critère de fond a modifié sensiblement le système communautaire de contrôle des fusions ? Le système communautaire de contrôle des fusions a considérablement évolué au cours des cinq dernières années : il met davantage l'accent sur la logique économique et les faits observables, qui sont analysés avec davantage de rigueur et de méthode, tandis que les effets unilatéraux sont considérés de façon plus systématique. De l'avis de M. Levy, ces évolutions ne trouvent pas leur origine dans le changement de la norme de fond, mais elles l'ont seulement accompagné. En fait, plusieurs autres évolutions ont eu davantage d'impact, comme l'adoption de lignes directrices sur l'évaluation des concentrations horizontales et non horizontales, qui ont clarifié la norme applicable aux concentrations verticales et conglomérales, le strict régime de preuve que les tribunaux ont imposé à la Commission, la nomination d'un économiste en chef, l'attention renforcée portée aux effets unilatéraux, l'accent placé davantage sur l'analyse quantitative et la consolidation du processus de contrôle interne (système de poids et contrepoids). M. Levy estime que ces évolutions ont eu davantage d'impact sur le contrôle communautaire des concentrations que le changement de critère de fond, qui constituait une modification importante, utile pour les (rares) cas susceptibles de passer entre les mailles du filet, mais qui, au bout du compte, a eu moins d'incidence que les autres évolutions.

M. Levy remarque qu'il est particulièrement intéressant dans le cadre de l'OCDE de poser la question de savoir si la modification du critère de fond a facilité la convergence internationale. Il est certain que, depuis quelques années, les décisions relatives aux concentrations présentent davantage de convergence. Rien ne permet cependant d'affirmer que cette tendance soit due à l'adoption par l'Union européenne d'un critère de fond davantage en phase avec celui utilisé par les autres organismes internationaux. M. Levy observe en revanche une tendance à l'alignement des outils d'analyse et des théories économiques du contrôle des fusions. Les résultats divergents, dont la décision concernant GE/Honeywell est un cas extrême de différences analytiques dans l'approche des effets congloméraux, ne proviennent pas de l'utilisation de critères de fond différents. Selon M. Levy, la coexistence de critères de fond différents revêt moins d'importance que la convergence croissante des outils d'analyse et des théories économiques. Dans la pratique, les différences de seuil réglementaire d'un pays à l'autre peuvent avoir bien plus de conséquences.

Pour résumer, selon M. Levy, les différences entre la norme de la position dominante et celle de la réduction substantielle de la concurrence recouvrent principalement dans la pratique des préférences ou des divergences d'intérêt d'ordre intellectuel. Il existe un vide réglementaire entre la norme de la position dominante et celle de la réduction substantielle de la concurrence, mais ce vide se limite aux cas d'oligopole non collusoire, qui sont rares et qu'il y a toujours moyen de couvrir en employant la norme de la position dominante. La modification en elle-même n'a eu qu'une incidence pratique réduite sur le contrôle des fusions dans l'Union européenne. Cependant, associée aux autres changements, elle a représenté une évolution importante. La convergence internationale du contrôle des concentrations s'est opérée en dépit des différences entre les critères de fond.

John Boyce indique que les changements intervenus au Royaume-Uni et dans l'Union européenne depuis le milieu des années 80 constituaient davantage une évolution qu'une révolution. Durant la majeure partie de cette période, le Royaume-Uni disposait en fait d'un critère d'intérêt public, mais dans la pratique, les décisions se fondaient sur des considérations de concurrence. Par conséquent, le changement de critère avec l'introduction de celui de la réduction substantielle de la concurrence via la loi britannique sur les entreprises de 2002 (*2002 Enterprise Act*) n'a fait qu'inscrire la pratique dans le droit. L'indépendance accrue conférée par la loi à l'*Office of Fair Trading* (OFT) et à la Commission de la concurrence, désormais en mesure de prendre eux-mêmes les décisions et non de rendre des avis au *Secretary of State*, constitue probablement une évolution plus significative. Au Royaume-Uni, cependant, l'on s'accorde aussi à reconnaître que les considérations plus vastes d'intérêt public peuvent justifier que l'on intervienne dans les concentrations.

Au niveau de l'Union européenne, des changements importants se sont également produits depuis le milieu des années 80. Initialement, la Commission européenne n'avait aucun pouvoir de contrôle des concentrations, mais intervenait occasionnellement pour sanctionner certaines opérations au titre des articles 81 et 82 du traité instituant la Communauté européenne. Le premier règlement sur les fusions a expressément conféré à la Commission européenne les pouvoirs de contrôler et d'approuver les concentrations en se fondant sur le critère de la position dominante. Au départ, il existait quelques incertitudes sur la portée du concept de position dominante, mais, comme l'a indiqué M. Levy, la Commission, avec le soutien des tribunaux européens, a étendu la notion de position dominante aux situations de domination conjointe et aux effets coordonnés. Plus tard, une série d'affaires a suscité un débat sur les opérations échappant au contrôle, qui a débouché sur une modification de la norme juridique et sur l'adoption du test hybride de l'entrave significative à une concurrence effective. M. Boyce remarque qu'en fait, la Commission européenne était parvenue à élargir suffisamment le concept de domination pour que peu de cas échappent à son contrôle. Dans la pratique, très rares ont été ceux qui sont passés entre les mailles du filet et certains observateurs considèrent même qu'il n'y en a pas eu. Quoi qu'il en soit, cette modification a permis de clarifier les choses, car dans certains pays, les tribunaux se refusaient à une interprétation extensive de la notion de position dominante. De l'avis de M. Boyce, il est certain que la Commission européenne et l'équipe de l'économiste en chef de la DG Concurrence disposent de davantage de liberté dans la mise en œuvre de diverses techniques économétriques pour l'application du nouveau critère de l'entrave significative à une concurrence effective.

M. Boyce mentionne qu'une autre évolution notable du contrôle des fusions au cours des deux dernières décennies a été son internationalisation. Au milieu des années 80, seuls quelques pays imposaient la notification des plus grandes opérations mondiales de concentration. Le nombre d'opérations relevant de multiples notifications dans un nombre croissant de pays est aujourd'hui beaucoup plus élevé, ce qui retarde le processus d'autorisation et en augmente le coût juridique et réglementaire. M. Boyce remarque que les contrôles faisant doublon peuvent aussi mobiliser d'importantes ressources de la part des autorités de la concurrence concernées. C'est un domaine dans lequel le renforcement de la coopération internationale pourrait à l'avenir contribuer à la réalisation d'économies sur le temps consacré aux évaluations et sur le coût de celles-ci.

M. Boyce souligne qu'à l'instar des règles du code de la route, qui ne sont pas une fin en soi, mais qui existent pour la réalisation d'objectifs ayant trait au bien-être public, les règles régissant les concentrations sont là pour atténuer les risques que les consommateurs fassent les frais de fusions anticoncurrentielles. La réglementation applicable aux concentrations doit être suffisamment claire pour que les entreprises cherchant à se rapprocher n'aient pas à souffrir d'incertitudes juridiques et pour qu'elle puisse être appliquée avec bon sens. On peut raisonnablement accepter que les autorités de la concurrence disposent d'une certaine latitude dans la mise en œuvre des règles de contrôle des fusions. Il convient cependant d'encadrer cette nécessité d'une marge de manœuvre discrétionnaire des autorités par un système de contrepoids adéquat. Concernant l'harmonisation, il n'est pas nécessaire que tous les pays aient des règles identiques, mais dans un environnement de plus en plus mondial, il serait logique que les différentes autorités puissent se comprendre. Une norme commune peut certainement y contribuer.

Pour revenir à 2002, l'« *annus horribilis* » de la Commission européenne, durant laquelle elle n'a pas eu gain de cause devant les tribunaux dans trois affaires, il a été dit qu'un contrôle diligent et efficace des concentrations exigeait un cadre juridique approprié, des lignes directrices claires en matière de fusions, une administration dotée des moyens humains nécessaires et une procédure d'évaluation rapide et indépendante. Il est remarquable que quelques années plus tard, lorsqu'il a entrepris de synthétiser les évolutions de la nouvelle réglementation communautaire sur les fusions, M. Boyce ait consacré un temps sensiblement plus long aux modifications des seuils et des procédures réglementaires qu'au changement du critère de fond. À cette époque, M. Boyce s'inquiétait de ce que la Commission européenne puisse tenter d'étirer les limites du critère de l'entrave significative comme elle l'avait fait pour le critère de la position dominante, ce qui aurait rendu l'aboutissement de la procédure de contrôle des concentrations incertain et imprévisible. La Commission européenne s'en est abstenue et, aujourd'hui, le régime du contrôle des fusions dans l'Union européenne est raisonnablement prévisible. À l'approche du prochain examen du règlement communautaire sur les concentrations, la Commission européenne s'apprête à publier un rapport sur le fonctionnement de ce règlement dans la pratique. Dans la mesure où l'on n'anticipe aucune évolution radicale de procédure ou de fond, on peut conclure que le système fonctionne relativement sans accroc.

M. Boyce conclut en saluant l'orientation des processus de contrôle des fusions au Royaume-Uni et dans l'Union européenne vers un critère de réduction substantielle de la concurrence, qui constitue selon lui une évolution réussie. Le critère de l'entrave significative à une concurrence effective en vigueur dans l'Union européenne est plus « honnête intellectuellement » que la pratique antérieure de la Commission, qui étendait le concept de situation dominante au-delà de ce que certains pourraient considérer comme ses limites. Avec l'adoption du critère de l'entrave significative, la norme de contrôle des fusions peut être appliquée indépendamment de la norme de l'article 82 du traité instituant la Communauté européenne, qui emploie également le terme de position dominante, mais concerne le contrôle du pouvoir de monopole. Enfin, en conservant la référence à la position dominante dans le critère hybride, on a facilité la transition de l'ancien système au nouveau et assuré la continuité d'une jurisprudence très développée. L'harmonisation croissante au sein du Réseau européen de la concurrence (REC) est souhaitable, car elle facilite la coopération, y compris les saisines dans le cadre du règlement communautaire relatif aux concentrations. La coopération internationale trouvera encore à se renforcer à l'échelle mondiale et l'harmonisation de la norme de fond pourra y contribuer. L'adoption du critère de la réduction substantielle de la concurrence renforce par ailleurs la crédibilité d'une autorité de la concurrence aux yeux de ses homologues qui s'en sont déjà dotés. On a pu l'observer au Royaume-Uni lorsque le critère de l'intérêt public a été abandonné au profit de la norme de réduction substantielle de la concurrence.

Alberto Heimler introduit sa présentation en mentionnant que ses remarques se réfèrent à un article qu'il a rédigé sous le titre « La modification du critère de contrôle des fusions était-elle justifiée, quatre ans après l'introduction du critère de l'entrave significative à une concurrence effective ? » (*Was the Change of the Test for Merger Control in Europe Justified 4 Years after the Introduction of the SIEC Test?*). Cet article était la réponse à un autre article sur le sujet publié par Greg Worden dans le même numéro du *European Competition Journal*.

Dans le débat sur l'adoption du critère de réduction substantielle de la concurrence comme norme de contrôle des fusions (au lieu de celui de la position dominante), M. Heimler a défendu la position minoritaire consistant à soutenir ardemment le critère de la position dominante. M. Heimler remarque toutefois que lorsque l'on considère l'avenir, il est fréquent que la tournure des événements vous donne tort, ce dont il a été victime, tout autant d'ailleurs que les promoteurs de la norme de la réduction substantielle de la concurrence. Sa présentation s'articule autour des raisons de ses errements et des motifs pour lesquels il estime qu'il aurait été préférable de conserver la norme de la position dominante, qui ne sont cependant pas les mêmes que ceux qu'il avait lui-même initialement défendus.

M. Heimler mentionne l'échange qu'il avait eu avec ceux qui estimaient que la norme de la position dominante ne couvrait pas de façon appropriée toutes les préoccupations possibles de restriction de la concurrence, en particulier en cas de fusion d'oligopoles non collusoire. M. Heimler avait répondu que l'apport d'un critère d'entrave significative à la concurrence effective était très limité au niveau de la réduction des faux négatifs, tout en accroissant dangereusement le risque de faux positifs. Toutefois, M. Heimler remarque que ces deux points de vue se sont avérés erronés.

Concernant la position dominante, M. Heimler estime qu'il y avait en Europe un problème de définition. Dans l'affaire United Brands, la Cour de justice de l'Union européenne a défini la position dominante en termes d'indépendance de comportement, mais même un monopole n'est pas indépendant, car il est limité par la courbe de la demande et ne peut pas augmenter ses prix indéfiniment. L'avis relatif à la définition du marché pertinent, adopté par la Commission européenne en 1997, prône une approche plus économique de la position dominante. Dans ce contexte, la position dominante consiste en la capacité à faire passer une hausse de prix légère, mais sensible, et non passagère (*small but significant non-transitory increase in price* ou SSNIP). La notion de position dominante a ainsi basculé de l'indépendance au pouvoir de marché. Une concentration monopolistique peut aboutir à une hausse de prix inférieure au SSNIP et c'est une des raisons pour lesquelles M. Heimler estimait à l'époque que l'adoption de la norme d'entrave significative à une concurrence effective était dangereuse.

À propos des effets unilatéraux sur un marché de produits homogènes, M. Heimler estime que l'application du critère de la position dominante ne pose pas de problème parce que dans une situation de concurrence de type Cournot, une concentration aboutit toujours à une hausse des prix à moins d'être efficiente au niveau des prix. Par conséquent, le critère de la position dominante fonctionne bien en cas de fusion de taille suffisante.

Sur un marché de produits différenciés, les concentrations entre concurrents proches (internalisant les ventes) peuvent très bien entraîner des hausses de prix. Si un test SSNIP montre que le rapprochement n'aboutirait pas à l'augmentation de prix visée, la concentration ne devrait pas être interdite. M. Heimler fait référence à un article récent de Baker et Shapiro qui préconise pour identifier les concentrations anticoncurrentielles de ne pas considérer les parts de marché, mais plutôt le taux de diversion des clients entre les entreprises qui fusionnent. Cela s'apparente à un test SSNIP et par conséquent, si la position dominante est définie en termes de pouvoir sur le marché – au sens de la capacité d'augmenter les prix – alors cette norme est capable de couvrir toutes les opérations potentiellement anticoncurrentielles sur les marchés de produits différenciés.

M. Heimler remarque que dans l'Union européenne, aucune fusion n'a été interdite depuis 2004 en l'absence de position dominante. Par conséquent, d'un point de vue empirique, il n'a été aucunement nécessaire de changer le critère. Un autre problème est que la vaste notion de position dominante dans le contrôle des fusions pourrait avoir des répercussions en matière d'abus de position dominante (article 82 du traité instituant la Communauté européenne). Toutefois, de l'avis de M. Heimler, la principale question dans l'Union européenne est qu'il y a eu une analyse tronquée dans l'évaluation des abus, à savoir que le constat d'abus s'est souvent fondé sur la seule existence d'une position dominante. En conséquence, la difficulté ne vient pas tant de l'étendue du concept de position dominante que de la façon d'analyser les abus.

M. Heimler fait ensuite remarquer que dans l'Union européenne se pose le problème de la position collective dominante, qui est devenu réellement un enjeu après le jugement rendu en 2002 par le Tribunal de première instance des Communautés européennes dans l'affaire Airtours/First Choice. Dans cette affaire, selon M. Heimler, le tribunal a imposé un critère très strict pour la position collective dominante, exigeant en fait de démontrer que les entreprises ont une politique commune et se présentent sur le marché « comme une entité unique ». Du point de vue de M. Heimler, c'est une condition qu'il est très difficile de remplir et en conséquence aucune concentration n'a été interdite depuis en vertu de la théorie de la position collective dominante. M. Heimler poursuit en remarquant qu'aux États-Unis, la façon de considérer les effets coordonnés est un peu moins structurée et qu'elle pourrait par exemple concerner l'acquisition d'un franc-tireur. L'acquisition d'un franc-tireur est considérée aux États-Unis du point de vue des effets coordonnés, alors qu'elle est analysée en Europe sous l'angle des effets unilatéraux.

Frederic Jenny remercie les intervenants pour leurs présentations très intéressantes et donne la parole aux délégués. Il propose d'organiser les débats autour de cinq axes : (i) la portée des normes de position dominante et de réduction substantielle de la concurrence, (ii) les exemples de cas passant à travers les mailles du filet, (iii) les questions liées à la mise en application des deux critères de fond, (iv) le rôle de l'analyse économique dans le cadre des deux critères de fond et (v) les autres considérations de politique générale et la coopération internationale.

2. La portée des critères de position dominante et de réduction substantielle de la concurrence

Concernant la portée des deux critères de fond, M. Jenny remarque que le critère de la réduction substantielle de la concurrence est en mesure de couvrir à la fois les effets unilatéraux et les effets coordonnés. Il n'est pas certain que le critère de la position dominante soit aussi polyvalent. De ce point de vue, il remarque que l'exposé de la Suisse, qui applique le critère de la position dominante, fait état des conclusions de l'évaluation de 2007/2008 de la loi suisse sur les cartels soulignant le risque d'approbation de concentrations anticoncurrentielles. M. Jenny demande à la délégation suisse de présenter ces conclusions et de commenter brièvement les affaires Swissgrid et BZ/20 Minuten.

La délégation suisse commence son intervention par une remarque préliminaire sur le niveau relativement élevé des seuils réglementaires applicables en Suisse. Cela signifie que les concentrations visées en Suisse sont principalement internationales et qu'elles sont également soumises au contrôle de la Commission européenne. Dans ces situations, l'autorité suisse coopère avec la Commission européenne si les parties à la fusion l'acceptent, ce qui est généralement le cas. Cela signifie cependant également que de nombreuses concentrations plus petites, mais potentiellement anticoncurrentielles, ne sont pas soumises à contrôle. Malheureusement, c'est un état de fait que seul le législateur pourra modifier en modifiant le droit de la concurrence et qui révèle que le critère de fond n'est pas le seul problème dans ce domaine.

En application du critère applicable aux fusions, la Commission suisse de la concurrence a le pouvoir d'interdire une concentration qui crée ou renforce une position dominante et peut entraîner la suppression d'une concurrence efficace sur le marché pertinent. Cette formulation laisse place à une interprétation dans la lignée du critère de la réduction substantielle de la concurrence ou plus conforme à la norme stricte de la position dominante. La Commission de la concurrence retient la première de ces interprétations. Elle définit le marché pertinent, mais considère également les marchés voisins, les effets dynamiques, etc.

Dans deux affaires, cette analyse a conduit à des interdictions, qui ont fait l'objet d'un recours. Le tribunal a retenu une interprétation stricte du critère et conclu que la concurrence efficace n'était pas éliminée tant qu'il restait une certaine concurrence. La question est donc maintenant de savoir ce que l'on entend pas « concurrence efficace ». Dans l'affaire BZ/20 Minuten, le tribunal a jugé que puisqu'il n'y avait pas de concurrence avant le rapprochement, celui-ci n'apporterait pas de modification. En conséquence, son interprétation du critère peut être tout à fait spécifique au cas d'espèce et est donc peu indicative de la portée générale de la formulation actuelle.

Toutefois, après ces deux jugements, la Commission de la concurrence a en principe le choix entre deux possibilités. Elle peut soit continuer d'appliquer le critère de la même façon qu'avant et distinguer ces deux affaires sur les faits, soit rechercher une modification législative du critère, solution préconisée par le groupe chargé de l'évaluation qui a rédigé le rapport 2007/2008. Dans un souci de sécurité juridique, cette dernière option apparaîtrait préférable. Il n'est cependant pas certain que le législateur soit prêt à modifier la loi sur les cartels. De toute façon, l'expérience de la Suisse jusqu'ici montre que la formulation du critère en elle-même n'est pas aussi importante que la façon dont il est appliqué en pratique.

Le Président remercie la délégation suisse et mentionne que certains pays utilisent un critère qui se situe à mi-chemin entre celui de la position dominante et celui de la réduction substantielle de la concurrence. L'un de ces pays est l'Espagne, dont le critère se rapproche de la norme de la réduction substantielle de la concurrence, sans y être identique. Il invite la délégation espagnole à expliquer quel critère l'Espagne applique aux concentrations et pourquoi ce critère a récemment été modifié.

La délégation espagnole indique qu'elle applique un critère qui est légèrement différent de celui de la réduction substantielle de la concurrence. La première loi sur les fusions adoptée en 1989 applique aux concentrations une norme qui examine si l'opération nuit au maintien d'une concurrence effective. La nouvelle loi sur les fusions, de 2007, a créé une nouvelle Commission de la concurrence, indépendante, et modifié légèrement la formulation du critère. Le nouveau critère cible les obstacles éventuels au maintien d'une concurrence effective. Contrairement au critère de l'Union européenne, il ne contient aucune référence à la création d'une position dominante, ni aux effets ou préjudices substantiels. Il ne définit pas non plus ce que l'on entend par concurrence effective. Toutefois, dans la pratique, le critère est appliqué de façon restrictive, c'est-à-dire que seules sont remises en cause les concentrations soulevant des préoccupations graves du point de la concurrence.

Parmi les autres modifications introduites par la loi sur les fusions de 2007, plusieurs facteurs importants de l'évaluation des concentrations ont été clarifiés, comme la concurrence réelle ou potentielle, les barrières à l'entrée, le pouvoir compensateur de l'offre de la demande ou l'efficience, etc. En outre, la nouvelle législation précise que le Conseil des ministres ne peut passer outre la décision de la Commission de la concurrence que pour des motifs d'intérêt public, comme la sécurité nationale, la santé publique ou la protection de l'environnement. En conséquence, contrairement à la loi antérieure sur la concurrence, l'intervention des pouvoirs publics ne peut être motivée par des problèmes de concurrence et apparaît réservée à des circonstances très exceptionnelles.

Le Président donne la parole à la délégation britannique, qui a précisé dans son exposé qu'elle utilisait le critère de réduction substantielle de la concurrence. Cependant, le critère appliqué au Royaume-Uni diffère légèrement du critère de l'entrave significative à une concurrence effective utilisé par la Commission européenne, car il ne contient aucune référence à la position dominante. Le Président invite la délégation britannique à préciser le fait s'il s'agit d'une question de formulation ou s'il pourrait y avoir des différences dans la mise en œuvre, et à évoquer de façon plus spécifique les affaires Lovefilm/Amazon et Hamsard/Academy Music pour illustrer la façon dont le critère est appliqué au Royaume-Uni.

La délégation britannique fait remarquer que jusqu'à l'adoption de la loi de 2002 sur les entreprises, le Royaume-Uni ne disposait ni d'un critère de position dominante ni d'un critère d'entrave significative à une concurrence effective, mais appliquait un critère d'intérêt public, interprété du point de vue de la concurrence. L'évolution importante de ces six ou sept dernières années au Royaume-Uni, comme dans d'autres pays, a concerné le passage d'une analyse structurelle des concentrations à une approche fondée davantage sur la logique économique. L'on s'emploie désormais davantage à définir une véritable théorie du préjudice, à analyser la fusion en contre-épreuve et à examiner les documents internes pour déterminer la façon dont les parties considèrent le marché. L'évaluation des concentrations met désormais l'accent sur la rivalité et, de façon plus spécifique, sur l'étroitesse de la concurrence entre les parties fusionnant et leurs rivaux et sur les contraintes concurrentielles qu'elles subissent. Il y a eu en conséquence au Royaume-Uni plusieurs affaires pour lesquelles il n'a pas été nécessaire de définir le marché pertinent.

L'affaire Hamsard/Academy of Music concernait par exemple des salles de concert et en l'espèce il n'a pas été jugé nécessaire de définir un produit ou un marché géographique précis. Dans cette affaire, il s'agissait de deux services, la production de concerts et la gestion de salles de concerts, et l'autorité de contrôle a estimé qu'il était plus utile de considérer les caractéristiques des salles de concert et les contraintes s'exerçant sur chacune des parties. Dans certains cas, en considérant simplement ces caractéristiques individuelles, il est apparu que la nouvelle entité disposerait d'une capacité significative pour augmenter les prix. La délégation britannique fait remarquer que cette affaire illustre bien l'idée selon laquelle l'examen des contraintes concurrentielles peut être une façon beaucoup plus directe d'évaluer l'impact d'une concentration. L'affaire Lovefilm/Amazon est intéressante en ce que plusieurs facteurs ont été pris en compte et finalement, les informations collectées et documents internes ont clairement montré que la principale contrainte concurrentielle qui s'exerçait sur les parties provenait de la conception de nouveaux produits.

Le Président se tourne vers la délégation coréenne, qui a indiqué dans son exposé que la Corée a réexaminé ses lignes directrices applicables aux fusions en 2007 et a adopté la norme de la réduction substantielle de la concurrence, alors que dans une présentation à l'occasion d'une précédente table ronde de l'OCDE en 2002, la Corée avait défendu la norme de la position dominante. Le Président demande quelles ont été les raisons qui l'ont amenée à changer d'avis.

La délégation coréenne décrit dans un premier temps les trois modifications apportées en 2007 aux lignes directrices applicables aux fusions, en dehors de l'adoption de la norme de réduction substantielle de la concurrence. Tout d'abord, l'indice d'Herfindahl Hirschman (IHH) a été introduit pour mesurer la concentration des marchés. Ensuite, toutes les présomptions fondées sur la part de marché ont été éliminées, permettant à la Commission coréenne de la concurrence d'analyser les facteurs pertinents de réduction substantielle de la concurrence sur la base d'informations d'ordre économique. Enfin, la pression des producteurs étrangers et la possibilité de réorientation de volumes d'exportation vers le marché intérieur ont été ajoutées comme éléments à prendre en compte dans l'évaluation des restrictions à la concurrence. Concernant l'évolution de la norme de fond, la Corée fait remarquer que sa position en 2002 était que les normes de réduction substantielle de la concurrence et de position dominante pouvaient être complémentaires. La Corée reconnaît toutefois les avantages du critère de la réduction substantielle de la concurrence et a donc décidé de modifier en conséquence ses lignes directrices applicables aux fusions.

3. Exemples de cas passés à travers les mailles du filet

Le Président aborde le thème de discussion suivant, c'est-à-dire le fait de savoir si certaines opérations peuvent échapper à la réglementation. Il remarque que le Mexique bénéficie d'une situation privilégiée pour répondre à cette question puisqu'il applique à la fois la norme de la position dominante et celle de la réduction substantielle de la concurrence. Cependant, ces dernières années, plusieurs opérations de concentration ont mis en évidence les insuffisances du critère de la position dominante. Dans ce contexte, le Président demande à la délégation mexicaine de commenter ces évolutions, ainsi que la fusion Coca Cola/Jugos de Valle.

La délégation mexicaine explique que la fusionCoca Cola/Jugos de Valle illustre bien les limites du critère de la position dominante. Une enquête conduite précédemment avait permis de conclure que Coca Cola occupait une position dominante sur le marché des boissons non alcoolisées. Cependant, il aurait été difficile d'interdire sa fusion avec Jugos de Valle, producteur important de jus de fruits, en appliquant le critère de la position dominante, parce que l'impact de l'opération concernait un marché différent (celui des jus de fruits). On a par conséquent jugé plus approprié d'appliquer le critère de la réduction substantielle de la concurrence pour évaluer correctement les effets de l'opération.

Le Président remarque que plusieurs contributions des pays mentionnent l'existence de cas échappant à la réglementation. C'est notamment le cas de la République tchèque, qui a opté pour le critère de l'entrave significative à une concurrence effective dans le sillage de son adhésion à l'Union européenne, en 2004. Il invite la République tchèque à commenter la fusion Telefonica/Deltax Systems et à expliquer comment le critère de l'entrave significative a été appliqué dans cette affaire.

La République tchèque décrit d'abord l'évolution de son attitude concernant la modification du critère de fond. Au début, l'autorité de la concurrence tchèque était sceptique quant à la nécessité d'abandonner le critère de la position dominante pour celui de la réduction substantielle de la concurrence. Selon elle, le critère de la position dominante pouvait prendre en compte la vaste majorité des concentrations problématiques. Cependant, peu de temps après la modification de la norme, elle s'est rendu compte que le critère de l'entrave significative autorisait davantage de souplesse et ouvrait la possibilité d'étendre la réglementation à des opérations qui n'auraient pas pu être examinées avec l'ancien critère de la position dominante.

La fusion Telefonica/Deltax Systems soulevait des problèmes particuliers qu'il aurait été certes possible de traiter avec le critère de la position dominante, mais qu'il a été plus facile d'appréhender avec la norme d'entrave significative à une concurrence effective. Telefonica est un opérateur de télécommunications majeur en République tchèque, alors que Deltax était une entreprise de taille moyenne qui fournissait des technologies d'information et de communication aux entreprises. Les deux parties à la fusion étaient présentes sur des marchés différents. Le problème venait cependant de ce que Deltax fournissait des systèmes d'information à l'Autorité tchèque de régulation des télécommunications et était responsable de leur entretien. Le problème était que via l'acquisition de Deltax, Telefonica gagnerait accès aux informations que ses concurrents sur le marché des télécommunications soumettaient à leur autorité de tutelle. En fin de compte, la fusion a été approuvée sous réserve du transfert à un tiers du contrat de service et d'entretien conclu avec l'Autorité tchèque de régulation des télécommunications.

Le Président passe ensuite à la contribution de la Hongrie, qui commente l'adoption de la norme de la réduction substantielle de la concurrence en juin 2009, alors que depuis des années, la Hongrie défendait la thèse selon laquelle il n'y avait pas de différence notable entre le critère de la position dominante et celui de la réduction substantielle de la concurrence. Il demande quelles raisons ont justifié cette évolution et plus précisément si elle a été motivée par une affaire ayant échappé au contrôle de l'Autorité de la concurrence, tel que l'affaire HTTC Matel décrite dans la contribution.

La Hongrie répond que l'affaire HTTC Matel a joué un rôle décisif dans le processus d'adoption d'un critère mesurant la réduction substantielle de la concurrence. Cette fusion allait ramener de 4 à 3 le nombre des opérateurs de télécommunications présents sur le marché. La nouvelle entité issue de la fusion aurait une part de marché un peu supérieure à 25 %. Il n'y avait donc aucune raison d'intervenir sur la base de la position dominante ou des effets unilatéraux, tandis que les effets coordonnés auraient été difficiles à prouver. L'incidence de cette opération était cependant préoccupante, car elle allait réduire de 4 à 3 le nombre des intervenants sur le marché. Une étude économétrique d'appels d'offres a été réalisée et, si elle a permis de dissiper toute inquiétude dans le cas de cette fusion spécifique, elle a mis en évidence les insuffisances du critère de la position dominante face à une opération qui aurait pu passer à travers les mailles du filet, ce qui était certainement le cas de cette opération HHTC Matel. De l'avis de la délégation hongroise, même si les opérations passant à travers les mailles du filet sont rares, il y en a de temps à autre, en particulier dans les situations d'oligopole non collusoire, comme l'indique le document de réflexion du Secrétariat. La Hongrie souligne également les avantages du critère de la réduction substantielle de la concurrence d'un point de vue analytique, notant que son économiste en chef rencontre beaucoup moins de difficultés pour l'appliquer que celui de la position dominante. Enfin, une autre raison ayant motivé l'adoption de la norme de la réduction substantielle de la concurrence était le souhait de la Hongrie d'aligner sa politique en matière de fusions sur celle de l'Union européenne, qui a adopté le critère de la réduction substantielle de la concurrence il y a plusieurs années.

Le Président remarque des divergences entre la position exprimée dans les contributions des pays et celle des experts entendus. La plupart des délégations semblent remarquer qu'il existe des cas échappant à la réglementation, soulignant l'intérêt d'adopter le critère de la réduction substantielle de la concurrence. En revanche, les experts ont considéré dans leur présentation que l'évolution de la norme avait très peu d'impact. Il demande aux experts de s'exprimer sur ce qui n'est peut-être qu'une divergence apparente.

M. Levy répond qu'à son avis il existe des différences entre les deux critères, mais il note également que si l'on observe des cas largement similaires auxquels ont été appliqués des critères différents, comme les affaires France Telecom/Orange et T-Mobile Austria/tele.ring, force est de constater qu'on est parvenu dans les deux cas à un résultat identique, alors que la norme de la position dominante a été utilisée dans le cas France Telecom/Orange et que c'est le critère de l'entrave significative à la concurrence qui a été appliqué dans l'affaire T-Mobile Austria/tele.ring. Ce qui est peut-être plus troublant à propos du critère de la position dominante, c'est qu'il n'est pas certain que les tribunaux européens acceptent son utilisation dans un scénario d'oligopole non collusoire, et c'est la raison pour laquelle il était approprié de modifier le critère juridique. M. Levy n'est pas d'accord avec l'idée selon laquelle la réussite d'un critère est fonction du nombre d'opérations qu'il permet de bloquer. D'ailleurs, après l'adoption du critère de réduction substantielle de la concurrence, on s'est inquiété de ce que la Commission européenne puisse aller trop loin dans son application de la nouvelle norme. Ces craintes se sont cependant dissipées avec le temps au regard des faits.

Formulant une dernière remarque, M. Levy note, en référence à l'affaire Coca Cola/Jugos de Valle mentionné par la délégation mexicaine, qu'au cours de l'année écoulée, des opérations de même ordre concernant l'acquisition par Coca Cola de producteurs locaux de jus de fruits ont été contrôlées dans trois pays (nommément, le Mexique, la Chine et le Royaume-Uni) appliquant des critères de fond largement similaires. Ce qui est intéressant, c'est que malgré l'utilisation de critères de fond équivalents dans des contextes factuels quasiment identiques, les autorités de contrôle sont parvenues à des conclusions extrêmement différentes : au Royaume-Uni, l'opération en question a été approuvée sans condition, au Mexique, elle a été approuvée avec conditions, et en Chine, l'acquisition par Coca Cola d'un producteur local de jus de fruits a été interdite. Ces affaires permettent de penser que la question du choix du critère de fond à appliquer à moins d'importance que l'accent mis sur les informations collectées et la théorie du préjudice à laquelle adhère l'autorité concernée.

M. Boyce est d'accord avec M. Levy sur l'existence de différences entre le critère de la position dominante et celui de la réduction substantielle de la concurrence et sur l'existence de cas susceptibles d'échapper à la réglementation. Cependant, la différence entre les deux critères est fonction de l'interprétation du concept de position dominante. La Commission européenne l'a interprété dans une acception très large, réduisant considérablement la différence. L'Australie, en revanche, a été tenue par ses tribunaux à une définition très étroite de la notion de position dominante, ce qui a naturellement abouti à une divergence marquée. En réponse à l'affaire évoquée par la Hongrie, M. Boyce fait part de son inquiétude à l'égard d'une application excessive du critère nouvellement adopté. À cet égard, il a eu l'occasion de pouvoir constater que la norme de la réduction substantielle de la concurrence tendait à conduire les autorités de la concurrence à se doter de théories sophistiquées du préjudice exigeant l'analyse de vastes quantités de données. Cela peut avoir pour effet de compliquer l'évaluation et de ralentir le processus. Il invite instamment les autorités de la concurrence à considérer l'impact qu'une telle analyse peut avoir sur la durée de l'évaluation car, au bout du compte, le temps des parties représente de l'argent.

M. Heimler souligne que la position dominante est un concept plus utile car il est plus facilement compréhensible par les tribunaux amenés à se prononcer, qui dans la plupart des cas ne sont pas experts en analyse économique. En 2002, année au cours de laquelle la Commission européenne a perdu dans trois affaires de fusion devant les tribunaux, on s'est demandé si avec l'adoption du critère de la réduction substantielle de la concurrence, la Commission européenne n'avait pas été tentée d'étendre trop loin son analyse. Tout en reconnaissant que ces craintes ne se sont aucunement matérialisées, M. Heimler reste préoccupé par la portée potentiellement excessive du critère de la réduction substantielle de la concurrence. Il remarque que l'application des articles 81 et 82 du traité instituant la Communauté européenne a considérablement évolué au fil des années en direction d'une approche plus économique. De la même façon, le concept de position dominante dans le contexte des fusions a peut-être été détrôné par une logique plus économique. M. Heimler conclut qu'une analyse économique et juridique sophistiquée est plus importante que l'évolution du critère lui-même.

Le Président remercie les experts pour leurs commentaires et aborde le thème de discussion suivant, concernant le cas hypothétique envisagé dans le document de réflexion du Secrétariat. Le Président invite la Finlande à exprimer ses commentaires sur ce cas hypothétique.

La Finlande précise pour commencer qu'elle applique le critère de la position dominante, mais qu'elle envisage l'adoption du critère de la réduction substantielle de la concurrence, pour plusieurs raisons. D'abord, l'examen des affaires passées montre que certaines opérations ont peut-être échappé au contrôle. Ensuite, la Finlande a clairement l'intention d'aligner son contrôle des fusions sur le système de l'Union européenne.

Concernant le cas hypothétique, la délégation finlandaise estime qu'il s'agit clairement d'un cas échappant au contrôle qu'il serait difficile d'évaluer dans le cadre de la norme de position dominante telle qu'elle est actuellement appliquée en Finlande. Certains défenseurs du critère de la position dominante ont fait remarquer que l'applicabilité de ce critère à des cas aussi difficiles dépend également de la façon dont il est appliqué. Se référant à ces remarques, la délégation finlandaise remarque que l'application du critère de la position dominante à ce cas hypothétique exigerait une acception plutôt élastique de la notion de position dominante. À cet égard, la délégation finlandaise souscrit à l'opinion de M. Boyce selon laquelle le critère de réduction substantielle de la concurrence est plus honnête intellectuellement. Pour conclure, la Finlande précise que son exposé en 2002 sur l'absence de différence entre la norme de la position dominante et celle de la réduction substantielle de la concurrence s'entendait du point de vue de la sécurité juridique. En effet, il existe très peu de différences du point de vue de la sécurité juridique entre les deux critères juridiques, car si le critère de la réduction substantielle de la concurrence peut de prime abord apparaître plus vague, celui de la position dominante induit également un degré d'incertitude au niveau de la définition du marché pertinent et de l'évaluation du préjudice potentiel d'une concentration donnée.

Le Président prie alors la délégation japonaise de décrire la façon dont la norme en vigueur au Japon, qui s'apparente étroitement au critère de la réduction substantielle de la concurrence, trouverait à s'appliquer au cas hypothétique.

Le Japon commence par décrire la norme en vigueur au Japon. Cette norme se fonde sur une restriction substantielle de la concurrence dans la double perspective des effets unilatéraux et des effets coordonnés. La délégation poursuit en décrivant en détail l'analyse, présentée dans sa contribution, de la façon dont ce critère trouverait à s'appliquer dans le cas hypothétique. Le Japon remarque que si Bank One, en tant que concurrente de la banque fusionnant, ne subit pas de limitation particulière de sa capacité en termes d'excédent de capacité et de substituabilité des produits de la banque fusionnant, cela constituerait un facteur pour interdire que la banque fusionnant contrôle le marché dans la perspective des effets unilatéraux. En même temps, la structure du marché étant appelée à devenir plus oligopolistique, il serait utile d'avoir des informations sur les caractéristiques du marché et de procéder à une analyse plus détaillée dans la perspective des effets coordonnés. Pour résumer, dans l'évaluation de cette opération hypothétique de fusion, l'autorité japonaise prendrait en compte non seulement la part de marché, mais aussi des facteurs supplémentaires, comme le paysage concurrentiel sur le marché, la présence d'un franc-tireur, les barrières à l'entrée, etc.

Le Président demande aux délégués si certains arguments techniques plaident en faveur du critère de la réduction substantielle de la concurrence. L'exposé du Canada, par exemple, met en avant l'idée selon laquelle l'application des considérations d'efficience est plus facile dans le cadre d'une norme de réduction substantielle de la concurrence. Sur ce point spécifique, il invite la délégation canadienne à décrire comment l'on traite les efficiences au Canada.

Le Canada décrit en détail son approche des considérations d'efficience dans le contexte des fusions et la façon dont elles sont évaluées. Au Canada, il existe un processus en deux temps, dans le cadre duquel le Bureau de la concurrence détermine d'abord s'il existe des problèmes de réduction substantielle de la concurrence. Si c'est le cas, il appartient aux parties à la fusion de défendre et prouver les justifications d'efficience. Il est intéressant de noter qu'outre les arguments habituels d'efficience liés aux synergies et aux baisses de prix, les tribunaux canadiens exigent également que l'évaluation de la fusion donne un poids approprié à des considérations plus larges, comme le bénéfice global pour l'économie. Concernant l'évaluation des arguments d'efficience dans le cadre de la norme de la réduction substantielle de la concurrence et dans le cadre de la norme de la position dominante, le Canada exprime un doute sur la possibilité d'évaluer correctement les efficiences dans le cadre de la norme de la position dominante, notamment lorsqu'elles ont pour effet de rendre plus compétitive l'entité issue de la fusion.

Le Président remarque que le point soulevé par la délégation canadienne est intéressant et qu'il rejoint une question posée par la délégation turque. Le Président demande comment l'autorité turque de la concurrence prend en compte les considérations d'efficience dans son évaluation des fusions, compte tenu du fait qu'elle applique le critère de la position dominante.

La Turquie souligne qu'en premier lieu elle considère les éléments structurels, mais qu'ensuite, elle prend aussi en compte divers autres facteurs, comme une puissance d'achat compensatrice, l'historique de comportement des entreprises, la participation à des coentreprises, les administrateurs communs et les contacts sur plusieurs marchés.

Le Président aborde une autre question technique, celle de l'importance de la définition du marché dans le cadre du critère de réduction substantielle de la concurrence. Le Royaume-Uni mentionne dans son exposé que dans le cas de plusieurs opérations récentes de concentration, il n'a pas défini le marché mais s'est intéressé plutôt à la rivalité directe entre les entreprises fusionnant. En revanche, dans sa présentation, l'Irlande souligne l'importance de la définition du marché dans le cadre d'une norme de réduction substantielle de la concurrence. Toutefois, elle semble également suggérer plus loin qu'elle n'entreprend pas systématiquement une définition du marché. Le Président donne la parole à la délégation irlandaise.

En préliminaire, l'Irlande remarque qu'elle s'efforce toujours de conduire une évaluation dans le délai d'examen initial de 30 jours. Définir le marché peut prendre du temps, mais n'est souvent pas nécessaire avec le critère de la réduction substantielle de la concurrence lorsque, de quelque façon que l'on définisse le marché, les circonstances de l'affaire révèlent l'absence de problèmes de réduction substantielle de la concurrence. Dans ces circonstances, il n'est vraiment pas nécessaire d'entreprendre une procédure complète de définition du marché. Souvent, il est plus important de comprendre comment le marché fonctionne, qui sont les concurrents, quelles sont les contraintes concurrentielles, etc. En vérité, lorsqu'on arrive à la conclusion qu'il existe des problèmes de réduction substantielle de la concurrence, il est nécessaire de présenter les résultats de l'analyse sur la base d'une définition formelle du marché. Cependant, prévient l'Irlande, il est très important de vérifier que la conclusion ne repose pas de façon excessive sur la définition du marché. Si une modification légère du marché défini comme pertinent suffit à remettre en cause la conclusion qu'il existe des problèmes de réduction substantielle de la concurrence, il est recommandé de vérifier la fiabilité de l'ensemble de l'analyse.

Le Président remercie l'Irlande pour sa contribution. Il aborde ensuite le point suivant et mentionne que le Danemark considère notamment dans sa contribution la différence entre le critère de la position dominante et celui de la réduction substantielle de la concurrence du point de vue de la norme de preuve, et invite le Danemark à faire part de ses commentaires sur cette question.

Le Danemark décrit son expérience dans l'adoption du critère d'entrave significative à la concurrence et la modification qui en a résulté au niveau de l'analyse par rapport au critère de la position dominante. Avec le critère de l'entrave significative, l'analyse économique et l'évaluation des effets réels de la fusion ont pris davantage d'importance. Même si cette évolution s'est inscrite dans la durée, elle s'est accélérée avec le passage au critère d'entrave significative à la concurrence, en 2005.

Concernant son impact sur les conclusions des évaluations d'opérations de concentration, le Danemark est quelque peu sceptique quant au fait que cette évolution ait eu réellement un impact. Au Danemark, on ne recense pas de cas ayant échappé à la réglementation. En outre, la position dominante demeure intégrée au critère de l'entrave significative à la concurrence et il n'est pas certain qu'il faille adopter la même norme de preuve dans le cadre de l'entrave significative à la concurrence que dans le cadre du critère de la position dominante. La question est de savoir si un supplément de preuve, sous la forme par exemple de données économétriques objectives, est nécessaire face à l'éventualité d'un cas échappant à la réglementation.

Le Président évoque la contribution de l'Allemagne, dans laquelle il est indiqué que l'Allemagne applique le critère de la position dominante. Concernant la norme de preuve, elle est identique dans le cadre du critère de la position dominante et du critère de la réduction substantielle de la concurrence, bien qu'il existe une différence quant à ce qui est considéré comme constituant un préjudice pour la concurrence. Le Président invite l'Allemagne à commenter la tendance générale en direction de l'adoption du critère de la réduction substantielle de la concurrence et à faire savoir si l'on continue de débattre en Allemagne de cette évolution.

L'Allemagne approuve les commentaires précédents indiquant que le critère de la réduction substantielle de la concurrence et celui de la position dominante ne sont pas si différents, même s'ils abordent les opérations de concentration sous des angles différents. En Allemagne, le critère de la position dominante est interprété comme couvrant à la fois la position dominante unique et la position dominante collective. Il est possible que certains cas échappent à la réglementation, mais cela ne s'est pas encore produit. Dans la pratique, aucun cas ne s'est présenté qui n'aurait pas pu être examiné dans le cadre du critère de la position dominante.

À propos de la question de l'analyse économique, l'Allemagne souligne que la norme de la position dominante n'interdit pas l'utilisation de techniques économétriques sophistiquées pour l'examen des fusions, comme en attestent les pratiques du Bundeskartellamt. Comme dans d'autres pays, la théorie économique revêt une importance croissante dans le contrôle des fusions en Allemagne.

Quant à la question de savoir s'il existe un débat sur l'adoption du critère de la réduction substantielle de la concurrence, l'Allemagne répond qu'un débat en profondeur a eu lieu avant la dernière modification de la loi concernée, en 2005. Ce débat a abouti à la conclusion qu'il convenait de conserver le critère de la position dominante. La principale raison en était la nécessité de préserver la sécurité juridique et la continuité de 36 années de jurisprudence du contrôle des fusions. Toutefois, à mesure que l'Union européenne et d'autres juridictions adoptent le critère de la réduction substantielle de la concurrence, le débat ressurgira certainement car, comme le fait remarquer la Finlande, il est certain que la convergence des normes est une considération très importante.

4. Le rôle de l'analyse économique dans le cadre des deux critères

Le Président se tourne vers les Pays-Bas, dont la contribution mentionne que le changement de critère ne fait pas vraiment de différence puisqu'il se borne à mettre l'accent sur l'analyse économique au lieu de la qualification juridique. Le Président invite la délégation néerlandaise à commenter le rôle de l'analyse économique dans le cadre du critère de l'entrave significative à la concurrence et plus particulièrement compte tenu de ce que les autres juridictions ont estimé que ce critère laissait davantage place à l'analyse économique.

Les Pays-Bas expliquent que les considérations économiques jouent un rôle central dans l'analyse de l'autorité néerlandaise de la concurrence pour l'évaluation des concentrations. Cela n'a pas changé avec l'adoption du critère de l'entrave significative à la concurrence. Toutefois, la formulation du nouveau critère reflète peut-être mieux ce qui se faisait déjà dans la pratique tout en facilitant une analyse fondée sur des considérations d'ordre économique. Dans ce sens, la délégation néerlandaise note que le passage à la norme de l'entrave significative a été utile pour le débat avec les parties et également pour l'argumentation devant les tribunaux.

Le Président invite la Commission européenne à commenter les récentes évolutions dans son approche du contrôle des fusions dans le cadre du critère de l'entrave significative à la concurrence effective.

La Commission européenne (CE) indique qu'en 2002 le débat a porté sur le fait de savoir si le critère de la position dominante pouvait couvrir des cas de fusion horizontale induisant des effets unilatéraux sans émergence d'un leader de marché clairement démarqué. À ce stade, sur la base de la jurisprudence des tribunaux, la CE estimait que la position dominante devrait couvrir ces cas. Il y avait toutefois une part d'incertitude, que le changement de critère contribue à dissiper. En ce sens, le passage au critère de l'entrave significative à la concurrence effective et l'adoption des Lignes directrices qui en font une interprétation détaillée ont contribué de façon positive à la sécurité juridique.

Concernant les failles, la CE remarque que bien qu'elles soient rares, elles existent néanmoins, comme deux exemples l'on démontré : la fusion TeamMobile/Telering et la fusion BASF/Ciba. De façon générale, la modification du critère applicable n'a qu'un impact modéré, notamment parce que l'évolution avait déjà commencé en direction d'une approche davantage axée sur les effets. Sans doute a-t-on mis davantage l'accent sur les effets unilatéraux et sur l'analyse quantitative ces dernières années et la modification du test est l'un des facteurs qui y ont contribué. La CE souligne que le taux d'intervention en tout cas n'a pas changé, contrairement aux préoccupations qu'on pouvait avoir avant l'adoption du critère de l'entrave significative.

À propos des effets coordonnés, la CE souligne que malgré les divergences des tribunaux avec l'analyse de la CE dans certaines affaires comme Airtours/First Choice ou Sony/BMG, ces divergences portaient sur l'application du concept d'effets coordonnés aux circonstances de l'espèce et pas sur le concept lui-même. Si aucune opération de concentration n'a été interdite dernièrement en vertu de la théorie des effets coordonnés, on dénombre plusieurs cas dans lesquels les problèmes d'effets coordonnés ont trouvé une solution grâce à l'emploi de mesures correctrices. L'adoption du critère de l'entrave significative à une concurrence effective n'a pas changé grand chose dans ce domaine.

Enfin, la CE évoque un sujet dont on n'a pas encore débattu, les concentrations non horizontales. Dans ce type d'opérations, il y a des entreprises qui exercent peut-être un certain pouvoir de marché, mais qui ne détiennent pas nécessairement une position dominante. L'intégration verticale peut leur conférer la capacité et la motivation d'augmenter leurs prix sur un autre marché. Une telle évolution peut avoir une incidence préjudiciable pour le consommateur, même en l'absence de position dominante sur le second marché. Deux affaires, Tom Tom/Tele Atlas et Nokia/Navteq, illustrent ce point. Dans les deux cas, la CE a développé une théorie du préjudice fondée sur les effets unilatéraux ; cependant, au bout du compte, cette théorie ne s'est pas trouvée confirmée par les faits. La CE remarque que l'expérience de ce type d'affaires démontre que le critère de l'entrave significative à la concurrence effective a peut-être contribué à ce que l'on aboutisse à une analyse appropriée, tout en renforçant la sécurité juridique, en particulier après la publication des lignes directrices sur l'examen des concentrations non horizontales.

Le Président remarque que la CE est la première à soulever la question des fusions verticales dans sa contribution. Une autre question qui n'a pas encore été évoquée est celle de savoir si les deux critères peuvent entraîner une intervention insuffisante ou au contraire excessive. C'est une question que l'Australie aborde dans sa contribution.

L'Australie estime que son expérience de l'utilisation du critère de la position dominante est peut-être obsolète, dans la mesure où elle a adopté le test de la réduction substantielle de la concurrence en 1992. Or, avant cette date, le concept de position dominante était interprété très étroitement, au contraire d'autres juridictions, et se bornait donc pratiquement à couvrir les cas de position dominante d'une entreprise unique. Cette situation avait entraîné une insuffisance grave d'intervention, dont les effets se font encore sentir aujourd'hui, en particulier dans les secteurs des médias et de la distribution alimentaire. Le passage au critère de la réduction substantielle de la concurrence a éliminé cette insuffisance sans entraîner d'intervention excessive. Immédiatement après l'adoption du critère de la réduction substantielle de la concurrence, on a pu observer une augmentation légère des interdictions, mais cela s'est stabilisé avec le temps et le taux de rejet en Australie est de l'ordre de 2 % à 3 %. Pour finir, l'Australie répond à certaines questions concernant le manque relatif de sécurité juridique avec le critère de réduction substantielle de la concurrence. Elle fait remarquer qu'à l'instar d'autres juridictions, elle a adopté des lignes directrices détaillées sur les fusions et que l'autorité australienne de la concurrence publie régulièrement des évaluations et des communiqués détaillant les motivations de ses décisions dans le cas d'opérations particulièrement importantes. Il en résulte une certitude suffisante et jusqu'ici les entreprises ne se sont pas plaintes.

5. Coopération internationale

Le Président aborde le dernier sujet de cette table ronde et demande aux délégués de commenter la question de savoir si la convergence des critères de fond facilite la coopération entre les autorités de la concurrence. Il invite les États-Unis à présenter leur point de vue sur cette question.

Les États-Unis déclarent que, d'après l'expérience qu'ils en ont, la divergence des normes n'interdit pas la coopération internationale. Compte tenu des évolutions déjà évoquées, de nombreuses autorités à travers le monde utilisent une approche qui se fonde de plus en plus sur la théorie économique, qu'elles appliquent la norme de la position dominante ou celle de la réduction substantielle de la concurrence. On dénombre de nombreux cas dans lesquels les autorités parviennent à des conclusions identiques en employant des critères différents. Même dans des affaires comme Heinz/Beech-nut et Peoplesoft/Oracle, qu'on pourrait considérer d'un point de vue technique comme des « *gap cases* », les autorités des deux côtés de l'Atlantique ont abouti à un résultat similaire. À titre d'illustration, les États-Unis coopèrent assez souvent avec le Bundeskartellamt dans les affaires de fusion et le fait que l'Allemagne continue d'appliquer le critère de la position dominante n'a pas empêché les deux autorités de parvenir à une solide position commune. Les États-Unis soulignent aussi toutefois que partager la même norme peut faciliter la coopération avec les autres autorités dans la mesure où cela permet d'utiliser le même vocabulaire et de se concentrer sur les éléments communs.

Les États-Unis remarquent que la coopération internationale a considérablement évolué au cours de la dernière décennie parce qu'on comprend de plus en plus qu'il faut mettre l'accent sur l'analyse économique, qui est relativement indépendante du critère de fond applicable. Un domaine dans lequel il reste encore des progrès à accomplir est peut-être celui des fusions verticales, mentionné par la CE. Dans ce domaine, il semble possible que les autorités puissent parvenir à des résultats divergents en appliquant des critères différents. C'est par conséquent une question dont il faudra continuer de débattre. À cet égard, le États-Unis soulignent l'importance des divers forums internationaux permettant l'échange d'expériences et des meilleures pratiques dans le cadre de la coopération internationale.

Le Président remarque que les bienfaits de l'utilisation d'un vocabulaire commun sont également évoqués dans l'exposé de la Roumanie. Il invite la délégation roumaine à présenter son point de vue sur les arguments en faveur d'un renforcement de la coopération par la convergence.

La Roumanie fait observer qu'elle continue d'appliquer le critère de la position dominante, mais qu'elle envisage d'adopter le critère de la réduction substantielle de la concurrence. Elle poursuit en indiquant les raisons pour lesquelles elle considère que la convergence internationale est importante. D'abord, partager une norme commune entre diverses juridictions est bénéfique pour les entreprises à l'échelle internationale, car cela apporte davantage de prévisibilité quant à l'issue des affaires. Ensuite, au sein de l'UE, la convergence peut conduire à l'élaboration de principes communs et faciliter également une éventuelle redistribution des dossiers au sein du Réseau européen de la concurrence.

Le Président invite la Pologne à présenter son point de vue selon lequel la convergence des critères n'est pas nécessaire pour la coopération internationale.

La Pologne précise qu'elle partage la position des États-Unis sur la coopération internationale : il est beaucoup plus important d'avoir une approche analytique commune, ce qui ne nécessite pas une convergence complète des critères juridiques. Elle fait toutefois remarquer qu'il peut exister des domaines dans lesquels la convergence pourrait faciliter davantage la coopération internationale, comme les règles de procédure et l'échange d'informations.

Le Président conclut en résumant brièvement les propos des participants à la table ronde. Il remarque, premièrement, qu'il semble y avoir une évolution marquée en direction du critère de la réduction substantielle de la concurrence, deuxièmement, qu'il paraît y avoir un certain nombre de cas échappant à la réglementation au niveau national et, troisièmement, que le critère de la position dominante ne peut être de large portée que si l'on en donne une interprétation économique. Il note également que l'un des arguments en faveur de la position dominante s'appuie sur le fait que les juges acceptent plus facilement la notion de position dominante que celle de réduction substantielle de la concurrence. Cependant, dans la mesure ou la notion de position dominante est de plus en plus interprétée dans une acception très large, elle devient progressivement plus économique, ce qui limite la portée de cet argument. Cette question a également des ramifications dans le domaine de la sécurité juridique, pour laquelle on recense des arguments en faveur des deux thèses. Certes, le critère de la réduction substantielle de la concurrence peut être une notion complexe, mais celle de position dominante a perdu sa précision à mesure que son interprétation se faisait plus large. Le Président remarque par ailleurs que l'une des grandes conclusions que l'on peut tirer de cette table ronde, c'est que la plupart des pays qui ont opéré le passage au critère de la réduction substantielle de la concurrence sont satisfaits de ce changement.

Le Président clôt la table ronde en remerciant tous les participants et les auteurs de contributions, ainsi que le Secrétariat pour avoir élaboré un document de réflexion particulièrement stimulant et un cas hypothétique très intéressant.