The New Merger Regulation: is it making a difference?

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The new SIEC test

- New test (Article 2.3):
  - *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, shall be declared incompatible with the common market.*
- Commission guidelines on the assessment of horizontal mergers

The new test: objectives

- Objectives of the SIEC test:
  - adopting an **effects-based approach** focusing not only on market structure but also on economic incentives of the merged firm and rivals
  - avoiding any **enforcement gap** (i.e "non coordinated effects" when merged entity is not a clear market leader in terms of market shares);

The new test: is it making a difference?

- High degree of **continuity** between the application of the old and the new EC merger regulation.
  - The Commission had already initiated a move towards an effects based approach under the dominance test
- Greater emphasis on **non-coordinated effects analysis**.
  - Less reliance on structural factors (e.g. market shares) and more emphasis of elimination of competitive constraints
- **No more concerns identified** than in the past.
  - The new test influences assessment in both directions.

Non-coordinated effects (1)

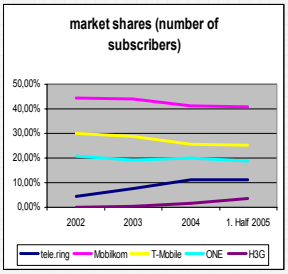
- Non-coordinated effects dismissed (despite merger entity with substantial market shares):
  - Merger between distant substitutes:
    - Philips/Agilent; Volvo/Renault (old test)
    - Siemens/VA Tech (electrical plant building market)
    - Bayer/Roche (Austrian antacids market)
    - Amer/Salomon
  - Lack of capacity constraints:
    - Johnson & Johnson / Guidant (accessory markets)
    - Bertelsmann/Springer
  - Efficiencies:
    - Conditions developed in the horizontal guidelines
    - Inco/Falconbridge (verifiable, but not merger specific or passed on)

Non-coordinated effects (2)

- Non-coordinated effects identified (even if merged entity would not have high market shares or would not be market leader):
  - Merger between close substitutes:
    - Novartis/Hexal (German anti-rheumatics market)
  - Elimination of potential entrant / innovator / maverick:
    - Linde/BOC (non-cordinated and co-ordinated assessed)
    - T-Mobile Austria / Tele.ring

The *Tele-ring* Case (1)

- Merger of no. 2 (T-Mobile) and no. 4 (Tele-ring) mobile phone operators in Austria – but merged entity would be no. 2
- Tele-ring's market share increasing steeply: >50% of switching customers go to Tele-ring
- Tele-ring generally charging cheapest prices
- Conclusion: Tele-ring plays special role in market ("maverick")



The *Tele-ring* Case (2)

- Tele-ring incentives: high fixed costs to be recouped – need to enlarge customer base
- Competition assessment: merger would lead to: (a) removal of maverick; (b) symmetry of two leading market players
- Non-coordinated effects: removal of main competitive constraint for 2 leading players (Mobilkom, T-Mobile) – SIEC
- Remedy: transfer of sites and frequencies to H3G, a small player with incentives to replicate Tele-ring's maverick role