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Case No COMP/M.3853 - SOLVAY / FOURNIER

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REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 18/07/2005

In electronic form on the EUR-Lex website under document number 32005M3853

Office for Official Publications of the European Communities
L-2985 Luxembourg

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 18/07/2005

SG-Greffe(2005) D/203711

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b)

To the notifying party

Dear Sir / Madam,

Subject: Case No COMP/M.3853 Solvay/Fournier
Notification of 13/06/2005 pursuant to Article 4 of Council Regulation No 139/2004[1]

1. On 13/06/2005, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 by which the undertaking Solvay S.A. ("Solvay", Belgium) acquires within the meaning of Article 3(1)(b) of the Council Regulation control of the whole of the undertaking Fournier Industrie et Santé S.A. ("Fournier", France) by way of purchase of shares. Solvay and Fournier will henceforth be referred to as "the Parties".

I. THE PARTIES

2. **Solvay** is an international chemicals and pharmaceuticals group, with its headquarters in Brussels, Belgium. Solvay is listed on the Euronext 100 index of leading European companies. It has operations virtually in all EEA States and it operates in 50 countries worldwide[2].

1 OJ L 24, 29.1.2004 p. 1.

2 See Solvay's 2004 Annual Report.

3. **Fournier** is a family-owned pharmaceutical company with headquarters in France. Fournier is established in 30 countries worldwide and in particular in Europe, Canada, China, and in South-East Asia. Fournier markets its products in more than 80 countries. [65-85]% of Fournier's turnover is generated outside France through subsidiary companies and partnerships.

II. THE OPERATION

4. The transaction will involve the acquisition by Solvay of 100% of the voting rights and share capital of FIS/Fournier from natural persons belonging to the Le Lous family, members of the family of the company founder and/or their holding companies. The transaction is structured as (i) the direct acquisition by […] of the majority of the shares of […]; and (ii) 100% of the shares of […] which holds the remaining (minority) of the shares of […].

III. CONCENTRATION

5. The transaction relates to the acquisition of sole control of Fournier by Solvay and constitutes therefore a concentration within the meaning of Article 3 (1)(b) of the Merger Regulation.

IV. COMMUNITY DIMENSION

6. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion (Solvay: 7,877.3 million EUR, Fournier: [590-595] million EUR). Each of Solvay and Fournier have a Community-wide turnover in excess of EUR 250 million (Solvay: […] million EUR, Fournier: […] million EUR), but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension.

V. COMPETITIVE ASSESSMENT

A Overview

7. The concentration intends to enlarge Solvay's cardiovascular portfolio by combining expertise and products of both companies. In addition, Solvay's aim is to accelerate the growth and profitability of Solvay's Pharmaceutical sector through the purchase of Fournier. Only four markets are concerned by the transaction.

8. With regard to vertical relationships, both parties produce active ingredients mostly for their own needs and to a limited amount sell it to third parties. The market investigation did not indicate any competition concern regarding the active ingredients, therefore the vertical relationship will not be further analysed in the present decision.

9. Certain pipeline markets were investigated by the Commission, in the combinations, where one of the Parties had a pipeline product and the other one an existing product in potentially the same ATC 3 class. In the pharmaceutical industry, a full assessment of the

competitive situation requires examination of the products which are not yet on the market, but which are at an advanced stage of development[3].

10. Three of the Parties' advanced development products (Feno-CO-Q-10, Zolip and B2-antagonist) are candidates in Phase […] and in Phase […] development respectively. The market investigation however broadly confirmed the Parties' submission that these products would not be substitutable to the products of the Parties already marketed, namely (Omacor in C10B and Betaserc in N7C). Since no competition concerns were raised on these markets therefore, no further analysis would be required for the purpose of the present decision.

B. Market definitions

RELEVANT PRODUCT MARKETS

(i) ATC-3 level

11. In previous decisions[4], the Commission noted that medicines may be subdivided into therapeutic classes by reference to the "Anatomical Therapeutic Chemical" classification (ATC), devised by European Pharmaceutical Marketing Research Association (EphMRA) and maintained by EphMRA and Intercontinental Medical Statistics (IMS). The ATC is hierarchical and has 16 categories (A, B, C, D, etc.) each with up to four levels. The first level (ATC 1) is the most general and the fourth level (ATC 4) the most detailed. The third ATC level allows medicines to be grouped in terms of their therapeutic indications, i.e. their intended use. This level is generally used as the starting point for defining and enquiring about market definition in competition cases. However, it is appropriate to carry out analyses at other ATC levels, or a mixture thereof, if the circumstances of a case show that sufficiently strong competitive constraints faced by the undertakings involved are situated at another level, and that, therefore, there are indications that the third ATC level does not lead to a correct market definition.

(ii) Prescribed/non-prescribed (OTC)

12. The Commission has in the past[5] defined separate markets for OTC (as opposed to prescription) pharmaceuticals because medical indications (as well as side effects), legal framework, marketing and distributing tend to differ between these categories, even if the active ingredients are identical. OTC products may be advertised to the public at large. Doctors do not need to intervene in the purchase of these products. Consumers make their own choice and bear the costs of their purchase, generally leading to a higher price elasticity of demand. By contrast, prescription pharmaceuticals need to be prescribed by a doctor, whose intervention is thus essential in the choice of the product. Pricing for prescription products is influenced by the public health care system, who pays (part of) the purchase price via reimbursement. Marketing, therefore, is targeted at

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3 See, e.g., COMP M.1878– *Pfizer/Warner-Lambert*, 22/05/2000 and COMP M.737-*Ciba-Geigy/Sandoz*, 04/02/1998

4 See e.g. COMP M.3544 – *Bayer Healthcare/Roche* 19/11/2004, COMP M.3354-*Sanofi-Synthelabo/Aventis* 26/04/2004

5 See COMP M.3544 – Bayer Healthcare/Roche, COMP M.3394 –Johnson & Johnson/MSD Europe 29/03/2004

prescribers, that is, doctors and hospitals. "Semi-ethical" products are OTC drugs for which reimbursement can be obtained if they are purchased on prescription. In the present case, the market investigation has largely confirmed that prescription and OTC products constitute separate product markets.

RELEVANT GEOGRAPHIC MARKETS

13. The Commission has previously defined the geographic markets for pharmaceutical products as being national in scope, despite the trend towards harmonisation at a European level. The parties submit that certain developments in recent years may point to a broader geographic market, but have nonetheless accepted the approach taken by the Commission in past cases.

14. The results of the investigation suggest that the Commission should not deviate from its previous practice in assessing pharmaceutical markets at the national level. At this stage, despite the presence of large European wholesalers and of parallel trade, the competition still takes place at national level.

C. Assessment

AFFECTED MARKETS

15. In line with the Commission's past practice, the parties have identified four horizontally affected Group III markets (market shares below 35%), which are discussed below. The four affected markets are A6A and A9A, two OTC markets in Sweden; C2A and G3C, two prescription-bound markets in France.

(i) OTC A6A (Laxatives) in Sweden

16. The A6A class includes OTC and prescription-bound products in Sweden, used for the treatment of constipation. The parties submit that the relevant product market should be defined by reference to the ATC 3 category. The market investigation did not bring up alternative market definitions.

17. An affected market was found in Sweden and the size of the market was EUR [20-25] million. The parties' products overlap in the OTC segment. It should be also mentioned that OTC A6A market is largely composed by semi-ethical products, which therefore can be reimbursed.

18. On the A6A OTC market the parties' combined market share amounted to [20-30] % (Solvay [0-5] %; Fournier [15-25] %) in value, based on 2004 figures by PharmX Data[6]. The Parties face strong competition from Pfizer ([30-40] %), Norgine ([10-20] %) and Recipe ([5-10]%). In addition the market appears to be contestable through new generic entry, as the active ingredients are off-patent. The market investigation found no evidence that would suggest that the transaction, despite the limited combined market share, may significantly impede effective competition.

(ii) OTC A9A (digestives including enzymes) in Sweden

6 PharmX is a data collection system of Läkemedelstatistik AB, which is a fully owned subsidiary of the Swedish Association of Pharmaceutical Industry

19. The A9A class includes enzymes acting on the digestive tract. The parties submit that the relevant product market should be defined by reference to the ATC 3 category. The market investigation did not propose alternative market definitions either.

20. In Sweden the ATC-3 A9A category includes solely OTC products and the size of the market was EUR [2-6] million. As in the A6A market, the OTC A9A products are largely semi-ethical, including parties' products. The Parties submitted that their combined market share amounted to [20-30]% (Solvay [20-30]%; Fournier [0-5]%) in value in 2004, based on PharmX Data. The market investigation however clarified that Fournier's market presence is due to its distribution activity only. Fournier therefore is not present through its own product, but depends on the one produced by […].

21. The investigation also proved that Solvay's market share was strongly declining (combined market share in 2002: [50-60]%), as its products Creon and Creon Forte were facing increasing competition, mainly through parallel trade. These parallel traders amount for about 45-50% of the market (e.g. Orifarm ([30-40]% in 2004) Paranova ([10-20]% in 2004) and import mainly Creon products into Sweden, repackage them and sell them as Pankreon Forte. The investigation confirmed these market shares, however it also showed their volatility. It revealed that Orifarm lost its leadership in the first quarter of 2005 and Paranova, another parallel trader, replaced the previous market leader. In general, market shares held by parallel importers might overstate their actual market power, since parallel traders are dependent on the supply policy of the producer in other countries with lower prices, from where the products are sourced. The present investigation anyhow confirmed that parallel traders have been present on this market from 2000 onwards and that they have eroded Solvay's market share from [60-70]% to [20-30]%.

22. There are other important competitors on the market like Johnson & Johnson ([5-10]%) and Meda ([5-10]%). The Parties' reasoning that no specific entry barriers exist on the market and the digestive enzymes market is easily accessible for all competitors was confirmed by the investigation.

23. The investigation revealed no competition concerns that would arise on this market due to the transaction.

(iii) Prescription C2A (antihypertensives (of non-herbal origin) plain) in France

24. The C2A ATC 3 class includes a group of substances used primarily for the treatment of hypertension. The affected market is the French market for prescription-bound pharmaceuticals and the size of the market was EUR [130-140] million. Based on the Commission's previous decisions[7], the Parties submitted that C2A is the correct market definition. The market investigation did not bring up alternative market definitions, and the ATC-3 class definition was therefore considered for the purposes of this decision.

25. The Parties' respective market shares in value were of [10-20]% for Fournier and [10-20]% for Solvay (in 2004, based on GERS data, i.e. IMS data for France). The Parties' aggregate market share was approximately [20-30]%. They faced competition from Servier ([30-40]%), the market leader, Altana Pharma ([10-20]%), Pfizer ([10-20]%) and

[7] COMP M.1403 Astra/Zeneca 26/02/1999 and COMP M.2922 Pfizer/Pharmacia 27/02/2003

Beaufour Ipsen ([5-10]%). The investigation confirmed that market is contestable as most of the products are out of patent protection and therefore generic entry is possible. The market investigation found no evidence that would suggest that the transaction, despite the limited combined market share, may significantly impede effective competition.

(iv) Prescription G3C (oestrogen) in France

26. The G3C ATC 3 class includes all substances used for hormone replacement therapy for oestrogen insufficiencies and menopause. The affected market is the French market for prescription-bound pharmaceuticals and the size of the market is EUR [40-50] million. The Parties' respective market share in value amounted to [20-30]% for Fournier and to [0-5]% for Solvay (in 2004, based on GERS data, i.e. IMS for France).

27. The Parties faced competition from Merck/Theramex ([20-30]%), Besins ([10-20]%), Novartis ([10-20]%), Sanofi-Aventis ([0-5]%) and some other companies. The Parties have also considered alternative market delineation, based on an enlarged market comprising G3C, G3E and G3F. On that basis, their combined share would have been about [20-30]% (Solvay: [10-20]% and Fournier: [10-20]%). The market investigation did not provide clear indications as to the appropriate scope of the market, but confirmed that in either alternative the transaction would not significantly impede effective competition. For the purposes of the present case the market definition can therefore be left open.

28. The investigation confirmed that generic companies were free to enter and the barriers to entry were relatively low. It revealed no substantial competition concerns.

VI. CONCLUSION

29. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EC) No 139/2004.

For the Commission
signed
Neelie KROES
Member of the Commission