

***Case No COMP/M.4972 -
PERMIRA / ARYSTA***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 25/02/2008

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 25-II-2008

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party:

Dear Sir/Madam,

**Subject: Case No COMP/M.4972 – Permira / Arysta
Notification of 21 January 2008 pursuant to Article 4 of Council
Regulation No 139/2004¹**

1. On 21 January 2008, the Commission received notification of a proposed concentration pursuant to Article 4, and following a referral pursuant to Article 4(5) of Council Regulation (EC) No 139/2004 (the "Merger Regulation") by which Permira Holdings Limited ("Permira", Channel Islands) acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of Arysta LifeScience Corporation ("Arysta", Japan) by way of purchase of shares.
2. After examination of the notification, the Commission has concluded that the operation falls within the scope of the Merger Regulation and does not raise serious doubts as to its compatibility with the common market and the EEA agreement.

I. THE PARTIES

3. Permira is a private equity firm that buys and sells undertakings with the aim of making a profit over the medium term. It has previously bought and resold a number of chemicals companies. The only undertakings in which Permira currently has an interest

¹ OJ L 24, 29.1.2004, p. 1.

and that have any relevance to the activities of Arysta are Cognis, a specialty chemicals company, and Provimi, which is mainly active in animal feed markets².

4. Arysta is primarily a crop protection company with some additional legacy activities in animal pharmaceuticals and animal feed markets. It specialises in obtaining rights to conventional crop protection products and then outsourcing their production. Arysta was created from divisions of a number of Japanese conglomerates.

II. THE OPERATION

5. On 21 October 2007, certain shareholders of Arysta and IEIL Japan Co. Ltd ('IEIL Japan'), a special purpose vehicle established solely for the purpose of this transaction, signed a Share Purchase Agreement by which IEIL Japan, which is indirectly controlled by Permira IV fund which is in turn controlled by Permira, proposes to acquire the entire issued and to be issued share capital of Arysta.

III. CONCENTRATION

6. The transaction will result in the acquisition of sole control by Permira over Arysta and therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

IV. COMMUNITY DIMENSION

7. The concentration does not meet the jurisdictional thresholds of Article 1(2) of the Merger Regulation as Arysta's aggregate Community-wide turnover does not exceed EUR 250 million. Similarly, it does not meet the thresholds of Article 1(3) [...].
8. However, as the proposed transaction was capable of being reviewed in 13 Member States, the notifying party submitted a request for referral under Article 4(5) of the Merger Regulation on 12 December 2007. None of the Member States competent to examine the concentration indicated its disagreement with the request for referral within the period laid down by the Merger Regulation.
9. The concentration is therefore deemed to have a Community dimension pursuant to Article 4(5) of the Merger Regulation

V. COMPETITIVE ASSESSMENT

10. The proposed transaction does not give rise to any horizontally affected markets as there are no markets on which Arysta and Permira are both active with a combined market share of 15% or more. However, on the basis of the narrowest possible product market definitions retained by the Commission in previous cases concerning the agrochemical sector³, there are six Member State/crop combinations for post-emergence graminicides

² Permira also controls BorsodChem, a Hungarian producer of chemicals used in the manufacture of plastics. Among many other chemicals, BorsodChem produces aniline, a petrochemical produced from benzene. According to the notifying party, a marginal application of this chemical (<2%) is an input in the manufacture of active ingredients used in some crop protection products. It is therefore not a direct input into Arysta's products, but rather an input for Arysta's suppliers. [...]

³ See Case No COMP/M.1806 AstraZeneca/Novartis, decision of 26 July 2000 and Case No COMP/M.2547 Bayer/Aventis Crop Science, decision of 17 April 2002.

(a type of herbicide) which would be vertically affected as Arysta's market share exceeds 25% and Cognis is active upstream in the manufacture of adjuvants that are used in these herbicides (and other agrochemicals).

A. Relevant product markets

(i) Active substances and adjuvants (upstream market)

11. Cognis, the chemicals company that is jointly-controlled by Permira and Goldman Sachs, produces a number of chemicals that are potentially or actually upstream of Arysta's crop protection products.
12. According to the notifying party's description, crop protection products consist of active substances (the substance that actively controls and regulates the pest) and inerts. Inerts include solvents, fillers and adjuvants. Adjuvants make the active substance more effective or easier to apply. Adjuvants can be sub-divided into surfactants, esters and other additives. This is the notifying party's own categorisation, the appropriateness of which was largely confirmed by the market investigation.
13. As there is no horizontal overlap between the parties' activities with regard to active substances the market investigation focussed on the possible vertical links arising from Cognis' production of adjuvants and Arysta's manufacture of crop protection products, primarily post-emergence graminicides.
14. Cognis is active in all adjuvant segments, i.e. surfactants, esters and other additives. In a previous case involving surfactants (*Huntsman/Ciba Te Business*⁴), the Commission found that surfactants are substances that reduce the surface tension of a solution so that it can spread and wet surfaces more effectively. It was also found that surfactants could be subdivided into four relevant product markets based on the ionic properties in water of the different surfactant segments, which is a function of their composition and indirectly, of the production processes used. These four markets are: i) anionic surfactants; ii) non-ionic surfactants; iii) cationic surfactants and iv) amphoteric surfactants. This has been confirmed by the market investigation.
15. Esters are another distinct type of adjuvant according to the notifying party. They occur naturally (such as fats and oils) or can be synthesised by reacting an acid or anhydride with alcohol ("esterification") or by conversion of an organic acid into another ester of that same acid ("transesterification"). The notifying party submits that in the EEA, the main demand for esters in volume terms is for use as a PVC plasticizer, as reactive acrylic esters and for biodiesel. The notifying party acknowledges that the Commission has, in a past case involving a merger of major horizontal competitors in the esters market, examined narrow sub-segments of the esters market⁵. In the present case, however, as there is no horizontal overlap between the parties' activities and potential vertical relationships are purely hypothetical in its view, the notifying party submits that it is not necessary to define ester markets more narrowly.

⁴ Case No COMP/M.4179 Huntsman/Ciba Te Business, decision of 30 June 2006.

⁵ Case No IV/933 ICI/Unilever identified a market for *Short Chain Polyol Esters (SCPEs)*.

16. The third category of adjuvant considered by the notifying party is additives which it defines as all those adjuvants that are not surfactants or esters. Additives have many applications, most of which are not related to agricultural end products, including inter alia plastics, rubbers, paints and coatings. In terms of additives that are relevant to Arysta's agricultural end products, Cognis is active in the production of defoamers that are used in flowable formulations to prevent foam. The notifying party has provided data on the basis of (i) all additives (ii) additives used for agrochemical applications and (iii) defoamers for agrochemical applications.
17. As in the present case, the market investigation has not identified any narrower markets where competition concerns could arise as a result of the proposed transaction, the exact market definition can be left open.

(ii) Herbicides (downstream market)

18. Herbicides are crop protection products that prevent or reduce weed competition in a crop. In previous decisions, (*AstraZeneca/Novartis* and *Bayer/Aventis Crop Science*) the Commission has drawn a distinction between selective and non-selective herbicides. Non-selective herbicides are crop protection products that are designed to clear fields of weeds after the harvest of one crop and prior to the sowing of the next. In contrast, selective herbicides are designed to kill only weeds and leave intact the crop to which they are applied.
19. The Commission has also considered in previous cases, whether further distinctions should be made between broadleaf weed herbicides, herbicides used for the control of grasses (graminicides) and broad spectrum herbicides (that are effective against both types of weed), and between pre- and post-emergence herbicides⁶. In this respect, the Commission has previously identified separate product markets for post-emergence graminicides for each of the following crops: potatoes, vegetables, sugar beet, soybean and oil seeds.
20. In the present case, the notifying party submits that Commission's previous decisional practice regarding post-emergence graminicides is too restrictive and does not accurately reflect the competitive situation. It submits that post-emergence graminicides compete with other herbicides as farmers typically tend to use pre-emergence and/or broad-spectrum products in preference to post-emergence graminicides and only use the latter when other products have not been effective. The notifying party also submits that most post-emergence graminicides are registered for use on a number of crops with the result that a market definition based on a single crop is artificially narrow.
21. Based on the market investigation it appears that there are circumstances when only post-emergence graminicides are effective in the control of grasses and that post-emergence graminicides have certain advantages vis-à-vis pre-emergence and broad-spectrum products. The market investigation also confirmed that it is appropriate to distinguish, within the market for post-emergence graminicides, between the type of crops for which they are destined.

⁶ Pre-emergence herbicides are applied to a target crop before it has germinated whereas post-emergence graminicides are applied after germination.

22. The market investigation therefore lends support to the Commission's previous definition of the market, but in the absence of competition concerns the precise product market definition can be left open.

B. Relevant geographic markets

(i) Active substances and adjuvants (upstream market)

23. The notifying party submits that the markets for active substances and adjuvants (surfactants, esters and other additives) are at least EEA-wide and could be global. This corresponds to the most recent case where adjuvants (surfactants) were considered⁷. The market investigation confirmed this market definition.

(ii) Herbicides (downstream market)

24. In line with earlier Commission decisions, the notifying party submits that the markets for formulated crop products including post-emergence graminicides are still national in scope. In this regard, it notes that recent legislation concerning the registration, evaluation, authorisation and restriction of chemicals (REACH⁸) concerns the registration of chemicals (including active ingredients for agrochemicals) but does not affect the registration of downstream agrochemicals themselves (including post-emergence graminicides) which continue to be regulated at national level. The market investigation has shown that from the perspective of the final customer, the market is still likely to be national.

25. However, the precise geographical market definition can be left open in the present case in the absence of competition concerns.

C. Competitive assessment

26. The proposed transaction does not give rise to any horizontal overlaps in relation to agrochemical end products or their upstream inputs. On the basis of previous market definitions retained by the Commission there are however several vertically affected markets for post-emergence graminicides (see below) as Arysta's market share exceeds 25% and Cognis, a company over which Permira exercises joint control, is active in the upstream market of adjuvants.

(i) Cognis' position in adjuvants (upstream markets)

27. Cognis is active in the production of surfactants, esters and additives which are collectively referred to as adjuvants. Cognis' share of all surfactants and each of the segments previously identified by the Commission (namely anionic surfactants, non-ionic surfactants, cationic surfactants and amphoteric surfactants) in no case exceeds

⁷ Case No COMP/M.4179 *Huntsman/Ciba Te Business*, decision of 30 June 2006

⁸ Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency.

25% either at a global, EEA or Western European level⁹. As far as esters are concerned, Cognis estimates its market share to be [0-10]% and [10-20]% at a global and EEA-wide level respectively. Cognis' share of ester production used for agrochemical applications is also less than 25% on a global or EEA-wide basis in both volume and value terms. Similarly, Cognis estimates its share of the market for additives in general and additives used in agrochemical applications to be less than 25% at a global and EEA-wide level. Furthermore, Cognis would have less than 25% share of a hypothetical narrower market of defoamers for agrochemical end products in the EEA.

28. The market investigation sought to verify with competitors in upstream (adjuvant) as well as downstream (agrochemical) markets whether there may be any specific adjuvant used for agrochemicals, where Cognis is likely to have a strong position (exceeding 25%). Based on the responses received, no potential narrower markets could be identified, where Cognis is likely to have any such position.

(ii) Arysta's position in post-emergence graminicides (downstream market)

29. On the basis of the market definitions used in previous Commission decisions, (distinct national markets for post-emergence graminicides for each of certain crop types), the proposed transaction would give rise to the following affected markets¹⁰.

Country	Post- emergence graminicide by crop-type	Segment size/EUR ¹¹	Arysta's sales/EUR ¹²	Arysta's share
France	Sugar beet	[...]	[...]	[40-50]%
Germany	Potatoes	[...]	[...]	[50-60]%
Poland	Potatoes	[...]	[...] ¹³	[30-40]%

⁹ The parties have taken Western Europe (as used by the Commission in Huntsman/Albright and Wilson) to mean Switzerland, Germany, Austria, UK, Ireland, France, Italy, Spain, Portugal, Netherlands, Belgium, Luxembourg, Denmark and Sweden.

¹⁰ Only one respondent in the market investigation indicated that Arysta's market shares for post-emergence graminicides may exceed 25% for three additional Member State/crop combinations. Even if this was the case, the possibility of three additional affected markets based on the market definition of post-emergence graminicides by crop and by Member State has no impact on the competitive analysis.

¹¹ These sales data are based on end-user sales.

¹² In order to present market share estimates that are prepared on a consistent basis, these figures are based on Kynetec's estimates of Arysta's sales at end-user level, rather than on Arysta's actual sales (Arysta does not possess this information; it sells its products to distributors who then sell to different customers for different crop applications). Kynetec is a company that compiles independent Panel data on agrochemical end products using I-map software.

¹³ Of these sales, EUR [...] relate to a product called Quizalofop, which Arysta formulates and distributes (on an exclusive basis) under licence from a Japanese third party (Nissan) in the following EU countries: Poland; [...]. The notifying party argues that such market shares should be attributed to Nissan, rather than Arysta – on that basis, Arysta's shares in Poland would fall [...], i.e. substantially below the threshold of 25%.

Country	Post- emergence graminicide by crop-type	Segment size/EUR ¹¹	Arysta's sales/EUR ¹²	Arysta's share
Sweden (2005)	Potatoes	[...]	[...]	[50-60]%
	Oil seed	[...]	[...]	[30-40]%
	Sugar beet	[...]	[...]	[60-70]%

Source: Arysta best estimates, derived from independent Panel data (2006 unless otherwise stated)

30. The notifying party submits that on any plausible wider alternative market definition in line with previous Commission decisions, Arysta's market share would not exceed 25%. The market investigation did not provide any indication that would contradict this statement.

(iii) Competitive assessment

31. Although Cognis is active in markets that are upstream of the post-emergence graminicide markets in which Arysta is present, there is no actual link between the parties' activities in the EEA.¹⁴ The notifying party suggests that the possibility of any potential links arising post-transaction is remote with the result that it does not consider that the proposed transaction would give rise to any vertically related markets, whether affected markets or otherwise.

32. On the basis of information provided by the notifying party and on the basis of the market investigation, it appears that any risk of foreclosure as a result of the proposed transaction is unlikely to materialise. This appears to be confirmed by the fact that neither competitors of Cognis in upstream markets, nor competitors of Arysta in downstream markets raised any serious concerns regarding the competitive effects of the transaction.

Customer foreclosure

33. According to the notifying party, agrochemical markets account for a relatively small proportion of the adjuvant sales of Cognis. Within agrochemicals, post-emergence graminicides are only one (and according to notifying party a relatively small one) of many agrochemical product segments/markets. Based on the market investigation, the Commission could not identify any specific adjuvant that can only be used in post-emergence graminicides for the specific crops identified in each of the affected markets. Furthermore, the market investigation confirmed that the relevant upstream markets were at least EEA-wide in scope, whereas the only affected markets can be found in a small number of Member States. Arysta's market share in any plausible wider downstream market for agrochemicals defined in line with previous Commission decisions is below 25%. In light of this and in the absence of specific adjuvants used only for the manufacture of products in affected downstream markets, even if Arysta

¹⁴ In Russia and Ukraine, Arysta's Clethodim 24% post-emergence graminicide is commercially bundled with a Cognis adjuvant product (Agnique BL 5310 Amigo) but parties submit that there are no such arrangements in the EEA. The market investigation did not give any indication of similar bundling arrangements in the EEA.

were to source all its adjuvants from Cognis, there would remain a sufficiently large customer base for other suppliers of adjuvants.

Input foreclosure

34. For input foreclosure to be a concern, the vertically integrated firm resulting from a merger must have market power in the upstream market. The market shares provided by the notifying party in the present case do not give any indication that Cognis has market power in the upstream markets. Moreover, respondents in the market investigation (both at the upstream and downstream levels) confirmed that there is no adjuvant produced by Cognis for which alternative suppliers do not exist. Therefore, even if Cognis were to restrict downstream competitors' access to adjuvants post-transaction, such a foreclosure strategy would not be effective given the presence of alternative adjuvant suppliers. This is further supported by the fact that a number of competitors in the downstream market seek to dual or multi-source their adjuvant requirements and/or are vertically integrated in the production of adjuvants.
35. There were some indications in the market investigation that switching between adjuvant suppliers could require additional compliance procedures vis-à-vis national authorities, depending on the magnitude of the change in formulation. This could range from notifying national authorities of a minor change in the agrochemical end product's formulation or, in certain circumstances, undergoing a full re-registration process for each agrochemical end product and crop combination. Even though a full re-registration process can be costly and time consuming (as it is required in each Member State where the particular agrochemical end product is to be commercialised) the market investigation showed that such product re-registrations are not unknown in the industry. In any event, it should be noted that competitors in the downstream market did not raise any concerns regarding the possibility of input foreclosure as a result of the proposed transaction.
36. As Cognis is jointly-controlled, the notifying party argues that it would not be in the economic interest of the other shareholder, Goldman Sachs, to sanction a foreclosure strategy to the benefit of Arysta, which is solely controlled by Permira, as this would in effect mean a transfer of wealth from Goldman Sachs to Permira. It is to be noted that the ownership structure of the merged entity is one of the various considerations that the Commission may take into account in its assessment of the likely incentives of the merged entity. In cases where two companies have joint control over a firm active in the upstream market and only one of them is active in the downstream market, the company without downstream activities may have little interest in foregoing input sales. The incentive to foreclose is therefore smaller than when the upstream company is fully controlled by a company with downstream activities¹⁵. However, in the present case given the lack of indications of the merged entity having any market power in upstream markets, a detailed assessment of incentives is not needed.

¹⁵ See Commission notice on the Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings and cases COMP/M.3440 – EDP/ENI/GDP (2004), COMP/M.4403 – Thales/Finmeccanica/Alcatel Alenia Space//Telespazio referred to therein

37. Based on the above, the Commission finds it unlikely that the merged entity would have the ability and the incentive to foreclose access to adjuvants used in agrochemical applications.

VI. CONCLUSION

38. 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