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Case No COMP/M.5973 - CVC / CHARDEN INTERNATIONAL

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REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
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MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

PUBLIC VERSION

To the notifying party

Dear Sir/Madam,

Subject: Case No COMP/M.5973 – CVC/Charden International
Notification of 7 September 2010 pursuant to Article 4 of Council Regulation No 139/2004[1]

1. On 07.09.2010, the European Commission received a notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which the undertaking CVC Capital Partners SICAV-FIS S.A. ("CVC", Luxembourg) acquires within the meaning of Article 3(1)(b) of the Merger Regulation control of the whole of the undertaking Charden International B.V. ("Charden", Netherlands) by way of purchase of shares.

I. THE PARTIES

2. **CVC** provides investment advice to and manages investments on behalf of investment funds ("the CVC Funds"). The CVC Funds hold controlling interests in a number of companies in various industries including chemicals, utilities, manufacturing, retailing and distributions, primarily in Europe and the Asia-Pacific region. One of the CVC Funds' controlled portfolio companies is Leaf International B.V. ("Leaf"), which is a manufacturer of sugar confectionery and chewing gum.

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

3. **Charden** is the ultimate parent company of the Autobar group ("Autobar"), operating primarily in Europe. Autobar is active in the supply, installation and operation of vending equipment and beverage systems (mainly hot beverages) and the provision of vending ingredients (including own-label and branded products).[2]

II. THE TRANSACTION AND THE CONCENTRATION

4. The proposed transaction consists of the acquisition of sole control by CVC over Charden from Acorn (Luxco) 3 Sarl, management and two Dutch foundations.

5. On 7 August 2010, the parties entered into a sale and purchase agreement. Upon completion, it is envisaged that the CVC Funds will have a shareholding of approximately […] % in Charden. Further […] % will be held by management and […] % by Acorn (Luxco) 3 Sarl[3].

6. According to the shareholders agreement, post-transaction, Charden will be governed by a board of directors where the CVC Funds have at all times a majority of directors. Most decisions are taken by simple majority. In addition, the CVC Funds will have veto rights with regard to […].[4] CVC will therefore have sole control over Charden.

7. The notified transaction thus constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

III. EU DIMENSION

8. In 2009, the undertakings concerned had a combined aggregate worldwide turnover of more than EUR 5,000 million[5] [CVC EUR […] million[6]; Charden EUR 569 million]. Each of them had an EU-wide turnover in excess of EUR 250 million [CVC EUR […]; Charden EUR […] million in 2009], but none of them achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State. The notified operation therefore has an EU dimension.

IV. COMPETITIVE ASSESSMENT

9. The transaction does not lead to horizontal overlaps.[7] However, as Leaf is present in sugar confectionery and gum which constitutes an input for Autobar's vending machine services the transaction gives rise to limited[8] vertical links between the parties.

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[2] The principal brands of Autobar are Autobar, Café Bar, Pelican Rouge/Roode Pelikaan, ICS, Celsus and Chequer Foods.

[3] According to the notifying party, as certain members of the management and Acorn (Luxco) 3 Sarl have been offered to rollover some of their shares in Charden on completion, the final percentage figures could vary slightly.

[4] […]

[5] Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.04.2008, p. 1).

[6] The CVC turnover figures for 2009 are not yet audited.

[7] It should be noted that on the Finnish market Leaf sells chocolate bars and Autobar sells chocolate squares for consumption with coffee only. However, in 2009, Autobar's chocolate sales in Finland amounted to only EUR […].

1. Market definition

1.1. Vending services (downstream)

10. The transaction concerns vending services, in particular the supply, instalment and operation of vending machines for hot beverages, cold drinks and snacks/food including confectionery.

Relevant product market

11. With reference to previous Commission decisions, the notifying party suggests that vending services can be defined as the sale of products and services at an unattended point of sale through a machine operated by introducing coins or other means of payments[9]. Vending machines can be used to provide a large range of products, such as hot drinks, cold drinks, food/snacks, tobacco, etc.

12. In the *Compass/Selecta*[10] case the Commission considered a distinction between full vending services (i.e. including the supply and installation of vending machines) and ancillary vending services (e.g. procurement of ingredients to stock the machines and cleaning services). The Commission's market investigation in that case did not support such a distinction[11] and the notifying party suggests that for the purpose of the present case such a segmentation is not relevant as Autobar does not provide ancillary services in relation to the snack/food segment.

13. The questions of whether the vending services can be sub-segmented according to the type of product sold i.e. vending of hot beverages, cold drinks and snacks/food (including confectionery) or, whether a distinction between full vending services and ancillary vending services is appropriate, can be left open for the purposes of the present decision as the transaction does not give rise to serious doubts irrespective of the market definition.

Relevant geographic market

14. In line with the Commission previous findings[12], the notifying party submits that the relevant geographical market for vending machine services is national in scope due to differences in legislation, culture and security requirements among different EU countries and the need to have staff available in the proximity of the point of vending machines.

15. Furthermore, the notifying party submits that customers generally seek tenders on a national basis and prices of products stocked in vending machines will be uniform across a whole country. In this regard, the notifying party explains that vending is not a typical retail market where the consumer is the direct customer, but rather the

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8 Total sales to Autobar represent approximately [0-5]% of Leaf's business and, from Autobar's perspective, products purchased from Leaf represent approximately [0-5]% of its business.

9 See case COMP/M.4202 – Charterhouse/Elior, paragraphs 13-16.

10 See case COMP/M.2373 – Compass/Selecta, paragraph 13 sec.

11 See case COMP/M.2373 – Compass/Selecta, paragraph 16.

12 See case COMP/M.2373 – Compass/Selecta, paragraph 26-27.

owners/operators of the site from which vending is to be offered. In addition, according to the notifying party, customers seek "one-stop shop" national servicing. For example, Autobar generally operates one national service desk in each country.

16. In line with the findings of the Commission in case *Compass/Selecta*, for the purposes of the present decision, the geographic market for vending machine services is considered national in scope.

1.2. Confectionery (upstream)

17. Leaf is active in the confectionery market (being primarily sugar confectionery and gum) under various brands (e.g. Sportlife, Malaco, Läkerol, King, etc.). Leaf brands are sold (generally indirectly via wholesalers[13]) to vending machine operators, including Autobar.

Relevant product market

18. The notifying party suggests treating sugar confectionery (including gum) as a single market.

19. In the recent *Kraft Foods/Cadbury* decision the Commission made a distinction between a market for (i) sugar confectionery and (ii) chocolate confectionery. Within chocolate confectionery, separate markets were defined for countlines[14], tablets and pralines.[15]

20. In *CVC/Schuitema* the Commission considered whether a further segmentation of the sugar confectionery market according to various types of candies (gum, liquorice, other candies) was appropriate. However, the precise market definition was ultimately left open.[16]

21. In *Mars/Wrigley*, the results of the market investigation suggested that a sub-division of the confectionery markets into chocolate, gum and sugar confectionery might be appropriate. However, the Commission left open how exactly the product markets should be defined.[17]

22. For the purpose of the present case a distinction between sugar confectionery, gum and chocolate confectionery is made, but the precise market definition can be left open as the transaction does not give rise to serious doubts irrespective of the market definition.

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13 Based on information provided by the notifying party, approximately […]% of Leaf's sales to vending machine operators in the affected countries (Netherlands, Sweden, Norway, Finland) are made indirectly via wholesalers.

14 Countlines are individually-wrapped bars which are usually covered with chocolate coating or made out of solid chocolate.

15 See case COMP/M.5644 – Kraft Foods/Cadbury, paragraph 24.

16 See case COMP/M.5176 – CVC/Schuitema , paragraph 11.

17 See case COMP/M.5188 – Mars/Wrigley, paragraph 13-14.

Relevant geographic market

23. The notifying party submits that the relevant geographic markets for sugar confectionery are at least national in scope. This is in line with previous decisions[18], in which the Commission concluded that the relevant geographic market for chocolate confectionery was national in scope. The results of the market investigation in *CVC/Schuitema* indicated national markets for sugar confectionary as well.[19]

24. The precise geographic market definition can be left open for the purposes of the present decision as the transaction does not give rise to serious doubts irrespective of the market definition.

2. Competitive assessment

2.1. Market position on the downstream and upstream markets

25. The proposed transaction gives rise to vertically affected markets in the Netherlands, Norway, Sweden and Finland.

Vending services (downstream)

26. Autobar's market share exceeds 25% in the overall market for vending machine services and in the possible submarket for vending machine services for hot beverages[20] in the Netherlands.

Table 1: Autobar market shares by value in percentage

Vending machine services	*Netherlands*	*Norway*	*Sweden*	*Finland*
Hot beverages	[40-50]	[10-20]	[10-20]	[5-10]-[10-20]
Cold drinks	[5-10]	[0-5]	[0-5]	[5-10]-[10-20]
Snacks/food	[10-20]	[0-5]	[0-5]	[0-5]
Overall vending services[21]	[40-50]	[10-20]	[10-20]	[10-20]

Source: Estimates based on Datamonitor (market size) and Autobar internal sales data

18 See Case COMP/M.4824 – Kraft/Danone Biscuits, paragraph 23 and case COMP/M.2072 Phillip Morris/Nabisco, paragraph 17.

19 See case COMP/M.5176 – CVC/Schuitema , paragraph 15.

20 However, Leaf's products do not constitute an input to the potential sub-segment for vending of hot beverages.

21 Including sales of machines and ingredients.

Confectionery (upstream)

27. In confectionery, Leaf's market share exceeds 25% in the following markets: in the Netherlands in the possible sub-segment of gum only; in Norway in the possible sub-segment for sugar confectionery other than gum; in Sweden in the overall market for sugar confectionery as well as the possible sub-segment sugar confectionery other than gum; and in Finland in the overall market for sugar confectionery, the possible sub-segment sugar confectionery other than gum and in the possible sub-segment of gum only.

Table 2: Leaf market shares by value in percentage

Confectionery	*Netherlands*	*Norway*	*Sweden*	*Finland*
Sugar confectionery (other than gum)	[10-20]	[20-30]	[40-50]	[30-40]
Gum	[30-40]	[0-5]	[5-10]	[60-70]
Sugar confectionery	[10-20]	[20-30]	[30-40]	[40-50]
Chocolate confectionery	0	0	0	[5-10]

Source: AC Nielsen

2.1. Input foreclosure

28. In order for the combined entity to have the ability to foreclose its downstream competition three conditions must be fulfilled: (i) the existence of a significant degree of market power, (ii) the importance of the input and (iii) the absence of timely and effective counter-strategies. [22]

29. As can be seen in table 2 above, Leaf has markets shares between [10-20]% and [40-50]% on the market for sugar confectionery in the four countries concerned (Netherlands, Norway, Sweden, Finland). In all four countries Leaf continues to face competition from producers of well known branded confectionery products (e.g. Mars/Wrigley, Cadbury/Kraft and Nestlé).

30. In the Dutch market for gum, were Leaf has a market share of [30-40]% with its Sportlife brand, it faces competition from the Stimorol brand owned by Kraft/Cadbury ([20-30]% market share). Other competitors are Perfetti and Freedent ([10-20]% and [5-10]% market shares respectively). In relation to the overall sugar confectionery market, Leaf faces additional competition from Haribo.

31. In Finland, Leaf sells chewing gum under the Jenkki brand and has achieved a [60-70]% market share. Competitors are Fazer ([10-20]% market share) and Wrigley ([10-20]% market share). On the sugar confectionery market (other than gum), Leaf achieved

[22] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ 2008/C 265/07), paragraph 32 and following.

market shares of [30-40]%, mainly with the brands Malaco, Läkerol, Mynthon and Sisu). Its main competitor is Fazer ([30-40]%).

32. Similarly, in the Swedish and Norwegian markets for sugar confectionery Leaf is the market leader. Nevertheless, it faces competition from Fazer ([5-10]% market share), Cloetta ([5-10]%) and Vicks ([5-10]%) in Sweden and from Nydar ([10-20]%), Brynild ([10-20]%), DOC-Nidar ([5-10]%) and Fishermans-Galleberg ([5-10]%) in Norway.

33. Even with Leaf's considerable market shares, competitors of Autobar in the vending services market will be able to source from alternative suppliers. Leaf does not supply any "must have" products. For example, if Leaf were to pursue a foreclosure strategy for gum in vending machines in the Netherlands, vending machine operators could stock other brands such as Stimorol, Mentos, Freedent or Sylifresh. Similarly, for Finland, Sweden and Norway, vending machine operators can stock other brands as indicated in paragraph 31 and 32 above. Moreover, gum accounts for only a very small part of vending machine services. According to the parties' estimates, for example in the Netherlands, gum sales represent [0-5]% of the snacks/food sales via vending machine, which in turn constitute approximately [10-20]% of all vending machine sales, i.e. gum sales account for far less than [0-5]% of overall sales through vending machines.

34. Furthermore, as shown in paragraph 17, Leaf sales are generally not made directly to vending machine operators but via wholesalers, which makes any potential foreclosure strategy more difficult to implement.

35. The incentive of the parties to foreclose competitors will thus depend on the degree to which foreclosure would be profitable.[23]

36. In this regard, the notifying party submits that the revenue lost from Autobar's vending machine competitors in case of a pursuit of a foreclosure strategy cannot remotely be compensated by any increase in sales from Autobar. In 2009, Autobar's confectionery sales in the Netherlands amounted to EUR […] million, of which EUR […] of sugar confectionery (including gum). According to the parties' estimates Leaf's sales of chewing gum and sugar confectionary to Autobar amounted to EUR […], whereas Leaf's sales to Autobar's competitors in the Netherlands equalled EUR […]. In the light of these figures, it is very unlikely that an input foreclosure strategy would be profitable as Autobar would not be able to recoup the revenues, and ultimately the profits, foregone by Leaf. Similarly, in Finland Leaf's sales to Autobar reached EUR […] only, to be compared with EUR […] of sales to other vending machine operators. Moreover, Autobar would be unable to increase its sales significantly, as competitors will always be able to source Leaf products via wholesalers. Furthermore, in view of the overall limited share of confectionery in vending machine sales, the potential increase of Autobar's revenues via a change in its product portfolio is limited.

Conclusion on input foreclosure

37. On the basis of the above, post-transaction, it is very unlikely that Leaf will be in a position to foreclose competitors of Autobar from access to its products.

2.2. Customer foreclosure

23 Non-Horizontal Merger Guidelines, paragraph 40.

38. In assessing the ability to foreclose access to downstream markets, the Commission will verify whether the company involved is an important customer with a significant degree of market power in the downstream market.[24]

39. According to the data shown in table 1 above, Autobar does not have in any of the four countries concerned (Netherlands, Sweden, Finland and Norway) a market position that would allow Autobar to foreclose Leaf's competitors from vending. Even in the Netherlands, where Autobar has an overall market share of [40-50]% due to its relatively strong position in the sale of hot beverages, Autobar has a moderate share of [10-20]% in sales of snack/food (including sugar confectionery and gum), and therefore, competitors of Leaf have sufficient alternatives to sell confectionery in vending machines.

40. Furthermore, confectionery products are sold through several channels, of which vending machines represent just one (and a very minor) route to market. In the Netherlands, the share of vending in overall confectionery sales is estimated at approximately [0-5]%, while its share of vending in total confectionery sales via the impulse channel[25] (as opposed to the retail channel) is around [0-5]%. If Autobar does not provide the brand(s) that consumers want, they will be able to buy their preferred confectionery elsewhere.

41. The incentive of the parties to foreclose competitors will thus depend on the degree to which foreclosure would be profitable.[26]

42. Autobar does not have the incentive to foreclose because it would imply carrying a reduced and less attractive range of products, implying a deterioration in its competitive position with respect to other vending machine operators such as Douwe Egberts, Maas and Selecta. This would have negative effects not only on current sales, but also on its ability to win future contracts for the provision of vending services. Autobar's customers could switch or threaten to switch to other suppliers if it failed to offer an adequate range of leading brands.

43. Moreover, according to the notifying party, experience has shown the difficulty of extending a stronghold in the confectionery market into the vending services market. A number of confectionery manufacturers have at different times operated branded vending machines. They have either exited the market because the offer of own-brand only products in vending machines was not a viable business proposition (Cadbury, e.g.), or they have allowed vending operators to stock other manufacturers' leading brands as well (Nestlé, Mars, e.g.).

Conclusion on customer foreclosure

44. Post-transaction, it is very unlikely that Autobar will be in a position to foreclose Leaf's competitors from access to the downstream vending machine services market(s).

V. CONCLUSION

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[24] Non-Horizontal Merger Guidelines, paragraph 61.

[25] Including sales by petrol stations, tobacco shops, bars, restaurants, canteens, cinemas and corner shops.

[26] Non-Horizontal Merger Guidelines, paragraph 68.

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

For the European Commission,

(signed)
Joaquín ALMUNIA
Vice-President of the European Commission