



EUROPEAN COMMISSION
DG Competition

Case M.7962 – CHEMCHINA / SYNGENTA

Only the English text is available and authentic.

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

Decision on the implementation of remedies - Art. 8(2) -
Purchaser approval
Date: 15.03.2018



EUROPEAN COMMISSION

Brussels, 15.03.2018
C(2018) 1708 final

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

To the notifying party

Dear Sir/Madam,

**Subject: Case M.7962 – ChemChina/Syngenta
Approval of Nufarm Ltd as purchaser of the Divestment Business
following your letter of 30 October 2017 and the Trustee's opinion
of 6 March 2018.**

I. FACTS AND PROCEDURE

1. By decision adopted on 5 April 2017 (the "Decision") based on Article 8(2) of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings¹ (the "Merger Regulation"), the Commission declared the concentration by which the undertaking China National Chemical Corporation ("ChemChina", China) acquires control of the whole of the undertaking Syngenta AG ("Syngenta", Switzerland) compatible with the internal market subject to certain conditions and obligations (the "Commitments"). ChemChina and Syngenta are hereinafter referred to as "the Parties" and ChemChina is hereinafter referred to as "the Notifying Party".
2. In particular, the Commitments provided that in order to address concerns relating to the combination of ChemChina and Syngenta's activities in crop protection products, the Parties would divest a portfolio of crop protection products including herbicides, fungicides, insecticides, seed treatment products, and plant growth regulators (PGRs) in the EEA (together "the Divestment Business"). The Divestment Business includes the rights to a number of crop protection product registrations on specific geographies in the EEA, pipeline registrations and

¹ OJ L 24, 29.01.2004, p. 1. 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

intellectual property rights related to these product registrations and necessary to maintain such registrations and continue selling and manufacturing these products. The purchaser of the Divestment Business would also be granted an irrevocable, exclusive, transferable, royalty-free license, to obtain access and to use the product registration data and lead active ingredient) data. The registrations to be divested were classified in three different portfolios: Portfolio 1 (existing products), Portfolio 2 (pipeline products) and Portfolio 3 (products likely to lose their registrations between 2017 and 2023).

3. On 14 June, 4 October and 27 October 2017, the Notifying Party submitted three requests to modify the Commitments ("the Modification requests").² The Notifying Party requested to remove [...] registrations from the list of [...] registrations to be divested belonging to Portfolio 1 (Annex 1.1 of the Schedule to the Commitments) and [...] of the [...] registrations to be divested belonging to Portfolio 3 (Annex 3 of the Schedule to the Commitments). The Parties proposed these modifications for the following reasons:
 - i) [...].
 - ii) [...].
 - iii) [...].
 - iv) [...].
 - v) [...].
4. The Notifying Party also requested to remove [...] trademarks from the list of [...] trademarks to be divested either because [...].
5. By the present decision, the Commission does not take any position as to whether the Modification requests can be wholly or partly granted.
6. By letter of 30 October 2017, the Parties proposed Nufarm Ltd ("Nufarm" or "the Proposed Purchaser") for approval by the Commission as purchaser of the Divestment Business and submitted two Asset Purchase Agreements ("APAs") between Nufarm and Adama³ (a wholly-owned subsidiary of ChemChina) and Nufarm and Syngenta respectively and two Transitional Supply Agreements ("TSAs") between Nufarm and Adama and Nufarm and Syngenta respectively (the "Proposed Agreements"). These agreements were signed on 23 October 2017. Subsequently, the Parties and Nufarm agreed on certain terms to be included in amendments to the APAs and TSAs to implement the Commitments. New versions of the APAs and TSAs were then signed on 1 March 2018.
7. On the basis of these new versions of the APAs and TSAs, Duff and Phelps N.V., the Monitoring Trustee in charge of monitoring compliance with the Commitments (the "Trustee") submitted on 6 March 2018 an assessment of Nufarm's suitability as a purchaser and, in particular, indicated that Nufarm fulfils the purchaser criteria

² The Commitments provide that *"the Commission may further, in response to a reasoned request from the Notifying party showing good cause, waive, modify or substitute, in exceptional circumstances, one or more of the undertaking in these Commitments"* (paragraph 65).

³ Adama is a wholly-owned subsidiary of ChemChina active in crop protection products.

set out in Section D of the Commitments. In this assessment, the Trustee also indicated that, on the basis of the Proposed Agreements, the Divestment Business would be sold in a manner consistent with the Commitments.

II. ASSESSMENT OF THE PROPOSAL

II.1. Suitability criteria for the Purchaser

8. Pursuant to paragraph 19 of the Commitments, the Commission has to verify that the Purchaser fulfils the purchaser criteria and that the Divestment Business is being sold in a manner consistent with the Commitments.
9. According to paragraph 18 of the Commitments, in its assessment of the Proposed Purchaser, the Commission should verify in particular that:
 - a. The Purchaser is independent of and unconnected to ChemChina and Syngenta and its affiliated undertakings.
 - b. The Purchaser has the financial resources, proven expertise and incentives to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors.
 - c. The acquisition of the Divestment Business by the Purchaser must neither be likely to create, in light of the information available to the Commission, *prima facie* competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed. In particular, the Purchaser must reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business.

II.2. Presentation of the Purchaser

10. Nufarm is a crop protection products and seed company founded in 1957 and headquartered in Melbourne, Australia. Nufarm has approximately 3,200 employees, sells products in more than 100 countries and has 12 manufacturing facilities. The company mainly focuses on the off-patent (i.e. the generics) segment of the crop protection market, which consists of products based on technical active ingredients for which the patent has expired.
11. Nufarm generates approximately [...]% of its global crop protection sales (USD [...] in 2017) in Europe. Nufarm's crop protection business, which represents approximately [...]% of Nufarm's global turnover,⁴ has a portfolio that includes herbicides ([...]% of Nufarm's total crop protection sales), fungicides and insecticides ([...]% and [...]% of crop protection sales, respectively), with the remaining [...]% of crop protection sales split between plant growth regulators ("PGR") and seed treatments.
12. Moreover, approximately 60% of Nufarm's common shares are publicly listed on the Australian Stock Exchange. Among the remaining 40% of Nufarm's common shares, 22.6% of Nufarm's total common shares is owned by the company's largest shareholder, Sumitomo Chemical Company Limited ("Sumitomo Chemical").

⁴ The remaining [...]% of the Turnover is achieved in seeds technologies.

II.3. Independence from the Parties

13. There are no ownership links between Nufarm and the Parties. The Trustee has not found any evidence of material dependency between the Parties and Nufarm whether in terms of equity/corporate links or commercial agreements. The economic links between the Parties and Nufarm relate primarily to minor ordinary course trading activities that are customary in the crop protection industry. These are acceptable given that they are immaterial in terms of magnitude.
14. Nufarm is a member of cost sharing agreements, such as task forces or stewardship agreements, with Adama and Syngenta. The participation of Nufarm and Syngenta and/or Adama in these agreements is a common practice in the industry and reflects the willingness of companies to share the costs of re-registrations of crop protection products or promote together good agricultural practices. These joint participations, as they are limited to one particular activity, do not affect the independence of Nufarm from either Syngenta, Adama or ChemChina.
15. Moreover, given that Sumitomo Chemical holds 22.6% of Nufarm's shares and has several collaboration agreements with Nufarm, the Trustee also applied several tests to establish the independence between Sumitomo Chemical and the Parties. The Trustee found that there is no material dependency between the Parties and Sumitomo Chemical whether in terms of equity/corporate links or commercial agreements. The economic links between the Parties and Nufarm relate primarily to minor ordinary course trading activities which are immaterial in terms of magnitude.
16. Based on the information provided by the Trustee, the Commission thus considers that the Proposed Purchaser is independent from and unconnected to the Parties.

II.4. Financial resources, proven expertise and incentive to maintain and develop the Divested Business as a viable and active competitor

17. The Trustee submits that the Proposed Purchaser has sufficient financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable and competitive business.
18. According to the Trustee, Nufarm has sufficient resources to finance the acquisition and develop the Divestment Business as a viable and active competitor. In its financial year 2017, Nufarm reported net sales of approximately USD 2,346 million and a gross profit of approximately USD 689 million. Nufarm has a market capitalization of approximately USD 2,051 million and an estimated adjusted enterprise value of approximately USD 2,648 million.
19. The acquisition of the Divestment Business by Nufarm will be financed with a combination of new and existing debt facilities and new equity issuance: [...] and an equity raise of USD [...] ([...] % of current market capitalization) [...]. The Trustee therefore concludes that Nufarm has sufficient access to funds to finance the acquisition of the Divestment Business and subsequently operate (and further build) the Divestment Business.
20. As regards proven expertise, Nufarm is a global manufacturer of crop protection products, which operates 12 manufacturing plants across Australia, New Zealand, Asia, Europe and the Americas. Nufarm has a large portfolio of crop protection products. The Trustee has assessed the sales and marketing, R&D, regulatory and

manufacturing capabilities of the proposed Purchaser and found that Nufarm has the proven expertise to manage the Divestment Business. In terms of integration capabilities, Nufarm has multiple times successfully integrated product portfolios in its existing European operations.

21. In terms of incentives, the acquisition of the Divestment Business fits in well with Nufarm's strategy. Nufarm considers this acquisition as an attractive opportunity to drive increased scale and customer relevance in Nufarm's core geographies and markets, and would accelerate Nufarm's presence amongst its strategic crops and diversify into new crops. Notably, the addition of the Divestment Business's existing and pipeline crop protection products will reinforce Nufarm's presence in numerous strategic crops (such as cereals, corn, fruit and vegetables and oilseed rape) and complement Nufarm's existing formulated product portfolio especially with respect to fungicides and insecticides.
22. The Trustee reviewed Nufarm's business plan and found that, based on financial and non-financial considerations, Nufarm has strong incentives from both a financial and a non-financial point of view to maintain and develop in full the Divestment Business.
23. In view of the above considerations, the Commission considers that the proposed Purchaser has the financial capabilities, proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force in competition with with Adama-Syngenta and other competitors.

II.5. Absence of *prima facie* competition concerns

24. Pursuant to clause 18(c) of the Commitments, the acquisition of the Divestment Business by the Purchaser must neither be likely to create *prima facie* competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed.
25. The acquisition of the Divestment Business (also referred to as 'Century') by Nufarm was notified to the Commission on 30 January 2017 and unconditionally approved by the Commission on 6 March 2018.⁵ Based on the data communicated by the Parties, the Commission identified a total of 246 markets where both Nufarm and Century are present.⁶ Out of those markets, [...] are horizontally affected markets in that the Parties' combined market share is 20% or higher. The transaction also gives rise to some limited vertical relationships because Nufarm (but not Century) sells some volumes of two specific active ingredients (tebuconazole and bromoxynil) which are used by Century/Nufarm in the downstream markets for some crop protection products. However, the Commission concluded that the acquisition of Century by Nufarm did not raise serious doubts as to its compatibility with the internal market. In relation to horizontal overlaps, the Commission found that the concentration did not raise serious doubts because of the presence of several alternative competitors in various pesticide markets within the EEA.⁷ With regard to vertical relationships, the Commission found that there was no risk of input or customer foreclosure arising from the concentration.⁸

⁵ M.8725 Nufarm/Century.

⁶ In crop protection markets, the relevant markets are defined as a combination Crop/Sector /Segment/Sub-segment at national level. "Sector" stands for insecticides, fungicides, selective

26. Based on information submitted by the Parties, the acquisition of Century by Nufarm is not reviewable by any other competition authority.
27. On the basis of the above and taking into account the reasoned opinion submitted by the Trustee, the Commission concludes that the acquisition of Century by Nufarm does not create prima facie competition concerns nor does it give rise to a risk that the implementation of the Commitments will be delayed.

III. ASSESSMENT OF THE TRANSACTION DOCUMENTS

28. The Transaction documents comprise:
 - i. the Assets Purchase Agreements (or APAs);
 - ii. the TSA with Adama;
 - iii. the TSA with Syngenta.
29. As regards the scope of the Proposed Agreements, the registrations and trademarks identified in the Modification requests have not been included in the APAs.
30. Pursuant to paragraph 19 of the Commitments, "*the Commission may approve the sale of the Divestment Businesses without one or more Assets or parts of the Personnel, or by substituting one or more Assets or parts of the Personnel, if this does not affect the viability and competitiveness of the Divestment Businesses after the sale, taking into account the proposed purchaser(s)*".
31. [...].⁹
32. [...].
33. Moreover, Nufarm already has a significant presence and activities in Europe which further ensures that the exclusion of the registrations and trademarks identified in the Modification request will not impact the viability or the competitiveness of the Divestment Business.
34. This has been confirmed by the Trustee, who indicated in the assessment of 6 March 2018 that the products concerned by the Modification requests are justified and do not affect the viability or the competitiveness of the Divestment Business.
35. In view of the above, the Commission agrees with the exclusion of the assets identified in the Modification requests, in line with paragraph 19 of the Commitments.

herbicides, plant growth regulator and seed treatment formulations. A segment is a distinction within the sector that is relevant for market definition purposes (for example by type of weed for herbicides or type of disease for fungicides). A subsegment is a subdivision of the segment. See M.7962 ChemChina/Syngenta.

⁷ M.8725 Nufarm/Century, paragraphs 36-125.

⁸ M.8725 Nufarm/Century, paragraphs 126-134.

⁹ [...].

36. According to paragraph 5 of the Schedule to the Commitments, the Party (either Adama or Syngenta) divesting rights in relation to a crop protection product in some or all Member States, as set forth in Tables 1 to 3 of the Schedule (the “Divestment Product Territory”), shall not, for a period of [...] after Closing, introduce and sell any new product with substantially the same formulation as such divested crop protection products in the Divestment Product Territory (“the non-compete clause”). This non-compete clause has been extended to [...] for certain products [...], as a result of an agreement between the Parties and Nufarm. The extension of the duration of this clause is justified in this particular case and should help to support the viability of the Divestment Business going forward.
37. In relation to intellectual property, paragraph 2(b) of the Schedule to the Commitments specified that intellectual property used by the Divestment Business, including the brand names, registered trademarks and knowhow will be disposed as follows: (i) intellectual property used primarily by the Divestment Business in the EEA¹⁰ shall be transferred to the Purchaser with the Notifying Party retaining an exclusive, irrevocable, perpetual, royalty free, licence to use such intellectual property, outside of the scope of the Divestment Business (e.g., non-crop protection products, crop protection products not included in the Divestment Business or outside the EEA or the relevant Member States covered by Divestment CP Products); and (ii) intellectual property also used by the Divestment Business, but used primarily by the Notifying Party in any part of the Parties’ business which relates to any other products aside from the Divestment Business shall be retained by the Notifying Party and licensed to the Purchaser on an irrevocable, perpetual, royalty free basis.
38. In relation to trademarks and patents, the Parties are transferring all registered trademarks that they own, brands of products with no registered trademarks as well as four patents, and receive a licence back in relation to non crop protection products or crop protection products sold outside the EEA. In relation to know-how, however, all know-how is licensed to the Buyer under an “*irrevocable, perpetual, royalty free*” licence.
39. It appears firstly that the know-how required to manufacture a crop protection product encompasses several items which combined constitute the “technical package” of a product. These items include the materials that are used in making the formulation and the exact way of how to use them in the process of making the formulation. To formulate a product, all the know-how contained in the technical package is required. Secondly, each know-how item mentioned above is not only used for a specific formulated product that is being divested but also for retained products having the same type of formulation. Accordingly, as per the Notifying Party, the know-how is a combination of technical data and trade secrets which cannot be separated. This is the reason why, as opposed to trademarks and patents, the know-how is licensed and not transferred.
40. The Trustee has confirmed that the Proposed Purchaser s found on 18 January 2018 an arrangement with the Parties in order to ensure a smooth licensing of the know-how, such as visits to the Parties' manufacturing facilities after closing to facilitate deeper knowledge transfer on specific items and regular meetings between Nufarm

¹⁰ Or in the relevant EEA Member State for products which have a geographic scope limited to one or more EEA Member States

and the Parties' regulatory teams. In addition, Adama will provide technical support and assistance as required by the TSA.

41. Therefore Nufarm considers that there are no significant differences in having the know-how licensed from the Parties rather than transferred. This has been confirmed by the Trustee.
42. In the light of the above considerations and taking into account the reasoned opinion submitted by the Trustee, the Commission concludes that the transaction documents are consistent with the Commitments and that, accordingly, the Divestment Business is being sold in a manner consistent with the Commitments.

IV. CONCLUSION

43. On the basis of the above assessment the Commission approves Nufarm as a suitable purchaser for the above-mentioned reasons.
44. On the basis of the Proposed Agreements, the Commission further concludes that the Divestment Business is being sold in a manner consistent with the Commitments.
45. This decision only constitutes approval of the proposed purchaser identified herein and of the Proposed Agreements. This decision does not constitute a confirmation that the Parties have complied with their Commitments.
46. This decision is based on Section D of the Commitments attached to the Commission Decision of 5 April 2017.

For the Commission

(Signed)

Johannes LAITENBERGER
Director-General