

EN

***Case No IV/M.1167 - **
ICI / WILLIAMS***

Only the English text is available and authentic.

**REGULATION (EEC) No 4064/89
MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 29/04/1998

*Also available in the CELEX database
Document No 398M1167*



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 29.04.98

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying party

Dear Sirs,

Subject: Case No IV/M. 1167 - ICI / Williams

Notification of 26.03.98 pursuant to Article 4 of Council Regulation N 4064/89

I. THE PARTIES AND THE OPERATION

1. The case was notified on 26 March 1998. The proposed operation consists of the acquisition by Imperial Chemical Industries PLC (ICI) of the largest part of the Home Improvements Division (the Acquired Business) of Williams PLC (Williams).
2. ICI is a UK public company active in chemicals and in particular coatings, specialty products, industrial chemicals and other materials.
3. Williams is a publicly quoted UK firm, active in fire protection, security systems and home improvement products, including decorative coatings. The Acquired Business comprises 17 companies from 13 EU and non-EU Countries, active in the decorative coatings and fillers / adhesives areas.

II. CONCENTRATION. COMMUNITY DIMENSION

4. The proposed transaction will result in ICI acquiring the whole of the Acquired Business and thus sole control within the meaning of article 3(1) (b) of the Merger Regulation.
5. The combined aggregate worldwide turnover of the undertakings concerned exceeds ECU 2 500 million (ICI 11 870 MECU, the Acquired Business 267 MECU). The aggregate Community wide turnover of each party exceeds ECU 100 million (ICI 5 224 MECU, the Acquired Business 239 MECU). In each of

the UK, France and Germany, each of ICI and the Acquired Business have turnover in excess of ECU 25 million, and in each of those Member States the combined aggregate turnover exceeds ECU 100 million. The undertakings concerned do not achieve more than two-thirds of their turnover in one and the same Member State. The operation has therefore a Community dimension.

III. THE RELEVANT MARKETS

A. Relevant product markets

6. The only significant combination of the parties' activities would be in decorative coatings. These products include various types of decorative and protective coatings for walls, ceilings, floor, furniture and other surfaces, which are normally used on-site during the construction or refurbishment of architectural structures. The parties argue that those products constitute one market by themselves, because of both demand and supply side considerations.
7. According to the parties, the demand-side substitutability would stem from the similar properties and function of decorative paints and decorative woodcare products. However, in a previous decision in this sector¹, the Commission indicated that from the demand-side viewpoint a distinction between these products could be drawn.
8. In this line, the Commission has found during the course of its investigation in the present case clear indications that from the demand side decorative paints and woodcare products could be considered as different groups of products, by reason of their different properties and intended final use. This was confirmed by the majority of the customers who answered to the Commission's inquiry. They confirmed that in the case of a small but significant permanent price increase for one of these products, the final consumers would not switch to the other product to any significant extent. Other technical difficulties were mentioned as preventing decorative paint consumers from switching to woodcare products (e.g. the intensive work needed to strip down the old paint).
9. However, supply-side considerations militate in favour of one single product market. In the notification, the parties stressed the importance of supply-side substitutability (technical similarities, common manufacturing processes, marketing, distribution channels...). This is in line with the above referred Akzo/Nobel decision, where the Commission acknowledged the possible existence of such high degree of supply-side substitutability for these products. The decision mentioned, among other reasons, the ease with which production could be switched and the fact that the same equipment is used for the manufacture of these products. This was confirmed in the present case by the Commission's investigation, during which most competitors contacted confirmed the feasibility and relative easiness of switching production from one group to the other. In addition to that, it has to be considered that the same large manufacturers are present in both areas, and that it is not unusual that the same brand be used to market both types of products.

¹ Decision IV/M.390 - Akzo/Nobel

10. In any case, it is not necessary to further delineate the relevant product market because, in all alternative product market definitions considered, effective competition would not be significantly impeded in the EEA or any substantial part of that area.
11. Apart from the above, both parties have also a presence in the area of fillers. Fillers include wall fillers and wood fillers. Since ICI does not manufacture any of these products and its presence is limited to a very small amount at the distribution level in Germany, it is not necessary to further analyze the sector.

B. Relevant geographic market

12. The geographical market definition was also left open in the Akzo / Nobel decision. In the present case, the parties state that the markets tend to be national in character with a relatively low proportion of cross-border sourcing by distributors and other customers. They also submitted a price comparison showing significant price differences between Member States. On a national basis, the only affected markets identified in the notification are the UK and Ireland.
13. The answers of third parties to the Commission's investigation also suggest that the relevant geographical market could be national. However, for the purposes of the present case it is not necessary to further delineate the relevant geographic markets because, in all alternative geographic market definitions considered, effective competition would not be significantly impeded in the EEA or any substantial part of that area.

IV. ASSESSMENT

14. If one considered the relevant geographic market to be the EEA, the parties would have a combined market share of less than 20% for decorative coatings under all possible product market definitions. Their combined market share would be <15% both for all decorative coatings and for paints, and <20% for decorative woodcare products.
15. On a national basis, the parties would only have combined market shares exceeding 15% in the UK and in Ireland. The following table shows the market shares of ICI, the Acquired Business (AB) and their main competitors.

UK 1997 market shares (value) in%	<i>ICI</i>	<i>AB</i>	<i>ICI+AB</i>	<i>Akzo</i>	<i>Private label(1)</i>	<i>Ronseal</i>
Paints	[...] ²	[...] ³	[...] ⁴	<[...] ⁵	<[...] ⁵	-
Woodcare	[...] ⁶	[...] ⁷	[...] ⁸	<[...] ⁹	<[...] ⁷	<[...] ⁹
Total decor. coatings	[...] ⁵	[...] ⁶	[...] ¹⁰	<[...] ¹⁰	<[...] ⁵	<[...] ⁶

Note: (1) ICI does not produce private label products, while AB does so on a limited scale. Most of these products seem to be produced by Kalon.

Ireland 1997 market shares (value) in %	<i>ICI</i>	<i>AB</i>	<i>ICI+AB</i>	<i>Akzo</i>	<i>Fleet-wood</i>	<i>Ronseal</i>
Paints	[...] ⁴	<[...] ³	[...] ⁴	<[...] ⁴	<[...] ⁷	-
Woodcare	[...] ⁶	[...] ³	[...] ⁶	<[...] ⁷	<[...] ⁴	<[...] ⁴
Total decor. coatings	[...] ¹⁰	[...] ³	[...] ⁴	<[...] ⁵	<[...] ⁹	<[...] ¹¹

16. Although the parties are approaching a combined market share of [...]²% both in paints and overall decorative coatings, they are faced with important large competitors both in the UK (Akzo, Kalon) as well as in Ireland (Akzo, Fleetwood). Besides, the acquired business represents only a relatively small increment to ICI's existing market shares, particularly in Ireland. In woodcare paints the parties will acquire market leadership in the UK but still face large competitors (Ronseal, Akzo) with similar market shares, while in Ireland their combined market share would be below 10%.
17. In addition, the parties' customers, especially the national DIY (do it yourself) multiple retailers, seem to possess a certain degree of countervailing power. They have especially been the driving force behind the growing importance of private

² Deleted for publication : between 30 and 40

³ Deleted for publication : between 0 and 5

⁴ Deleted for publication : between 35 and 45

⁵ Deleted for publication : between 25 and 35

⁶ Deleted for publication : between 0 and 10

⁷ Deleted for publication : between 10 and 20

⁸ Deleted for publication : between 20 and 30

⁹ Deleted for publication : between 15 and 25

¹⁰ Deleted for publication : between 30 and 40

¹¹ Deleted for publication : between 5 and 15

¹² Deleted for publication : between 35 and 45

label products in the UK and Ireland. In the UK in 1997, private label products accounted for around 30% of the paint market and around 15% of the woodcare market. Especially in woodcare, the retailers expect that the share of private labels will rise in the future. In Ireland, the level of own-label penetration is lower (around 10%) but expected to rise in the future.

18. The barriers to entry, which have historically been low, have increased considerably in the last years. While newly introduced environmental and health and safety regulations have increased the technical skills necessary in the industry, the major barriers to entry are present on the level of marketing and distribution. To enter the market with a branded product would require relatively large investments in advertising and distribution. The most likely entrants would be producers active with branded products in other Member States. Market entry would however be relatively easy as a producer of private label products. At least one German producer has recently entered the UK market in this way.
19. Based on the above, it can be concluded that the operation does not threaten to create competitive problems in decorative coatings in the UK or in Ireland.
20. Concerning fillers, the only actual overlap would be in Germany. However, ICI is not active in the manufacture of these products and only distributes a very small amount, so that the addition of market shares would only be of around 1 % and only at the distribution level (less than ECU 200 000). The operation therefore does not threaten to create a competition problem in this area.

V. **ANCILLARY RESTRICTIONS**

21. The parties have requested that the Commission approves certain arrangements as ancillary to the concentration. These arrangements are the following:
 - a) Williams will not compete with the Acquired Business during a period of 3 years from completion, subject to certain exceptions to enable the retained part of Williams to carry on its business.
 - b) Williams will not disclose or use Confidential Business Information in any way which may be detrimental to the business of the Acquired Business, for as long as that information remains confidential and subject to certain exceptions.
 - c) Williams undertakes not to solicit the custom, in relation to goods or services sold to any person by the Acquired Business in the year before completion, of that person in respect of the same goods and services, during a period of 3 years from completion.
 - d) Williams will not solicit the employees of the Acquired Business (except those who answer a public advertisement or who are approached when they are no longer employed by the Acquired Business), during a period of 2 years from completion.
22. The non-compete provisions included in provisions (a) and (c) are directly related and necessary to the implementation of the concentration. They aim to ensure that the full value of the Acquired Business is transferred to ICI, and are in line with the Commission's previous practice as regards their duration. They only cover the

business of the Acquired Business as it is carried out today. Therefore, they do not prevent Williams from competing in other geographic markets where the Acquired Business is not presently active. Restriction (b) can be accepted as ancillary with respect to technical know-how, but not as regards the general commercial information (e.g. customer details, price and quantity information...)¹³. Such a provision would have the result of effectively prolonging the protection of the acquirer from competitive acts of the vendor beyond the three year period of the non-competition clause. Accordingly, the ancillary character of this restriction should be limited to 3 years. The restriction on soliciting employees for 2 years (d) is also directly related and necessary to the implementation of the concentration.

23. In addition, ICI has undertaken certain arrangements with respect to Tintas Robbialac of Portugal (Robbialac), a firm which will not be acquired, in order to enable it to carry on its business:

e) ICI will make available to Robbialac the technical information, intellectual property and know-how to assist it in the manufacture of decorative paint in Portugal, for a period of [...]⁴;

f) Robbialac will be granted a [...]⁵ exclusive trade mark licence by Cuprinol Limited (renewable for a further [...]⁶ for Portugal and certain non-EEA territories; it will also receive technical assistance in the production of woodcare products from Cuprinol for a period of [...]⁷ (renewable for a further [...]¹⁷);

g) Hammerite Products Ltd. and Alabastine (parts of the Acquired Business) will each enter into an exclusive distribution agreement with Robbialac for Portugal and certain non-EEA territories, for a period of [...]⁴. These agreements include a licence of all relevant trade marks to enable Robbialac to perform its obligations under the agreements.

24. It is noteworthy that Provisions (e), (f) and (g) are assumed by the acquirer rather than the vendor. However, they may be considered as ancillary to the concentration to the extent that they are necessary to ensure for Williams the full value of the business which it retains while allowing the transfer of the full value of the Acquired Business to ICI.¹⁸ This is the case for the trademark licence contemplated in provision (f). As regards provision (g), it is to be observed that, as stated in its Notice on ancillary restrictions,¹⁹ certain purchase and supply obligations, which may be restrictive of competition, may be considered as ancillary to a concentration to the extent that they are necessary to guarantee a smooth transition from a relation of dependency to autonomy in the market when the economic unity of the vendor's group is broken up. However, only in

¹³ See Decision IV/M.197 Solvay-Laporte/Interox.

¹⁴ Deleted for publication : less than 10 years

¹⁵ Deleted for publication : less than 25 years

¹⁶ Deleted for publication : less than 15 years

¹⁷ Deleted for publication : less than 5 years

¹⁸ See Decisions IV/M.554 Dalgety plc / The Quaker Oats Company. para. 24-25, IV/M.437 Matra Marconi Space / British Aerospace Systems, at para. 36.

¹⁹ OJ C 203, 14.8.1998, par. III.C.3.

‘exceptional circumstances’, which have not been shown to be satisfied in the present case, would an *exclusive* distribution agreement be necessary for that purpose. The trade mark licences mentioned under point (g) can be considered as ancillary to the concentration in so far as they may contain restrictions of competition.

As to the arrangements on future cooperation under (e) (transfer of technical information, intellectual property and know-how) and (f) (as to technical assistance), in so far as they may contain restrictions of competition, they are considered as ancillary to the extent and for the duration necessary to guarantee a smooth transition from a relation of dependency to autonomy in the market.

25. Finally, Hammerite UK (part of the Acquired Business) will also be the subject of certain arrangements:

h) Hammerite UK will assign its US trade mark to Parker Paint Manufacturing Co Inc. (part of the group retained by Williams). It will grant a perpetual licence of know-how and intellectual property relating to products manufactured by or on behalf of Parker Paints. This licence will be exclusive in respect of know-how and intellectual property relating to a recently developed water-based form of Hammerite and non-exclusive in respect of other products. Hammerite UK will, for a period of [...]²⁰, provide technical assistance.

i) Kidde (a subsidiary of Williams) will enter into an exclusive distribution agreement with Hammerite in respect of portable fire extinguishers for use in the UK automotive sector, under which Hammerite will be granted the exclusive right to continue distributing these products in the UK for an initial period of [...]²¹.

26. Provision (h) does not seem to include restrictions of competition which may affect trade between EEA Member States. In any event and to the extent that it could contain such restrictions, those could be considered as ancillary to the concentration, as they ensure for Williams the full value of the business which it retains. As regards provision (i) the exclusive distribution agreement does not meet the conditions referred to in paragraph 24 above, and accordingly can not be considered as ancillary to the concentration.

VI. CONCLUSION

27. 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 (EEC) No 4064/89.

For the Commission,

²⁰ Deleted for publication : less than 5 years

²¹ Deleted for publication : less than 2 years.