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*Case No IV/M.354 -
AMERICAN CYNAMID
/ SHELL*

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

Article 6(1)(b) NON-OPPOSITION
Date: 01.10.1993

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Brussels, 1.10.1993

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)b DECISION

To the notifying party

Dear Sirs,

Subject: Case No. IV/M.354 - American Cyanamid/Shell
Notification of 31 August 1993 pursuant to Article 4 of Council Regulation No. 4064/89

1. This operation concerns the acquisition by American Cyanamid Company (Cyanamid) of the shares and assets of the worldwide crop protection, animal health and public health products businesses of The Shell Petroleum Company Limited (Shell).
2. After examination of the notification the Commission has concluded that the proposed operation falls within the scope of Council Regulation No. 4064/89 and does not raise serious doubts as to its compatibility with the common market.

I. THE PARTIES AND THE TRANSACTION

3. Cyanamid is a US biotechnology and chemicals company, whose principal activities include the development and production of medical, chemical, agricultural and consumer products, which it markets in 135 countries. [...] ⁽¹⁾
4. Shell is a company within The Royal Dutch/Shell Group of Companies and is incorporated in the United Kingdom. Shell is primarily engaged in the oil, natural gas, chemicals, coal and metals businesses.

The Shell crop protection businesses (SCPB) to be acquired by Cyanamid are assets that are currently held by several Shell companies. The EC assets to be transferred are those of SCPB in Belgium, France, Germany, Italy, the Netherlands, Denmark, Spain, the UK,

⁽¹⁾ Deleted for publication.

Ireland and Portugal. These assets include the research and development, manufacture, formulation, licensing and marketing of crop protection, animal health and public health products.

5. The products concerned by the concentration are primarily crop protection products, or agrochemicals, whose function it is to protect crops from harmful agents such as weeds, insects and fungi. In addition, the SCPB operations sells small quantities of animal health and public health products (such as rodenticides and insect sprays).

II. CONCENTRATION

6. The acquisition of Shell's SCPB operations by Cyanamid is a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

III. COMMUNITY DIMENSION

7. The proposed operation has a Community dimension. The combined aggregate worldwide turnover of Cyanamid and SCPB in the last financial year exceeded 5000 million ECU [...] ⁽²⁾; the aggregate Community turnover of each exceeded 250 million; and the parties did not achieve more than two-thirds in one and the same Member State.

IV. COMPATIBILITY WITH THE COMMON MARKET

8. Of the businesses to be sold to Cyanamid, the principal horizontal product overlaps occur in the manufacture and sale of certain herbicides (chemicals used to control weeds).

In addition, an insignificant level of aggregation would occur within the manufacture and sale of insecticides (chemicals used to control insects), nematicides (used to control eel worms), plant growth regulators and fungicides. However, the acquisition would not have any appreciable effect on competition within these latter segments. Finally, no aggregation would occur within the animal health and public health product businesses.

9. Within the category of herbicides, there are two markets in which Cyanamid and SCPB compete: cereal graminicides and maize broad spectrum herbicides. As a result, for purposes of analysing this operation, this decision deals with cereal graminicides and maize broad spectrum herbicides.
10. Nevertheless, the precise delineation of the relevant product markets need not be determined in the present case because even on the basis of these narrower markets, the operation does not raise serious doubts as to its compatibility with the common market.

A. Relevant Product Markets

11. Herbicides may be differentiated from other crop protection products by virtue of their common function of controlling weeds. These products may be further categorised based on several factors, including (a) the type of crops that they protect and (b) the type of weeds that they attack. From the viewpoint of the end-use customer, the farmer, the type of crop with which a herbicide is used is one of the most important factors in determining product substitutability. The customer chooses a product by evaluating the relative effectiveness of its selectivity and spectrum of activity in protecting a given crop.

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12. Farmers also consider the particular weed types against which the crop needs protection at a given time. In some cases, a herbicide may only be effective against weeds within one of the two principal categories of weeds: (1) broadleaf weeds and (2) grass (gramineous) weeds. Thus, a broadleaf weed herbicide may not be a substitute for a grass weed herbicide (called a graminicide), when a crop has specific protection needs.

However, for certain crop types (eg, maize), broader spectrum herbicides may be adequate to deal with the range of weeds involved. Consequently, weed type is not necessarily a reliable indicator of substitutability in all situations.

13. In addition, herbicidal products differ to the extent that they are based on different chemical active ingredients; and they are marketed by the manufacturer and distributor based on the particular protective characteristics and uses of the chemicals contained.
14. Other important selection criteria include the time of application of the product (relative to emergence of the crop or weeds) and procedures for treatment, including the number of applications and the feasibility of using combination products to achieve a broader range of protection. Thus, herbicides for different categories of crops are generally not substitutable.
15. Cereals and maize may be said to constitute separate crop categories for the use of herbicides for reasons of product selectivity and efficacy. In the case of cereals, a number of graminicidal herbicides are used almost exclusively with cereal crops (which comprise primarily wheat, barley and oats), due to the specialised protection needs of these crops. In addition, some combination products are available, such as winter residual herbicides, which provide protection primarily against broadleaf weeds but also offer limited protection against some grasses.
16. In the case of maize, farmers often use only one product and this is frequently a combination product which gives protection against both broadleaf and grass weeds. The fact that a combination product is not necessarily as effective as separate applications of two specialised herbicidal products appears to be balanced against time and cost considerations.

B. The relevant geographic market

17. The parties submit that the relevant geographic market in which to assess the competitive impact of this acquisition is the EC as a whole, citing a number of factors to support their position, including the following: (a) centralised production facilities for manufacturing active chemical ingredients (and a trend towards centralised formulating facilities to produce the finished product); (b) the presence of a large number of major multinational producers throughout the EC; (c) the use of international brand names rather than national names (whenever trademark rights permit); and (d) low transport costs relative to the high value of products (generally less than 1% of manufacturers' selling prices).
18. While such indicia may often be support for the finding of a Community-wide market, certain countervailing factors in this case point to the possible existence of national relevant geographic markets for competition analysis of the proposed transaction.
19. Although manufacturing is centralised, marketing and distribution operations in this industry are generally organised at the national level. In addition, based on different crop patterns throughout the Community, the range of products sold, and their individual chemical formulations, may vary accordingly.

20. Furthermore, the industry regulatory scheme that was in effect until July 1993 tended to encourage national marketing of products, because separate authorisation was required in each Member State in which a particular product was to be sold. Each Member State retained its own certifying standards in granting a national marketing authorisation for a particular product; and as a result, chemical formulations of a product frequently varied from Member State to State. While manufacturers generally obtained such authorisations in each Member State in which demand for a product existed, such authorisation procedures were nonetheless costly and time-consuming.
21. Since 25 July 1993, the marketing of crop protection products has been subject to a combination of national and Community rules through implementation of Council Directive 91/414/EEC concerning the placing of plant protection products on the market (O.J. (1991) L 230/1) and Commission Regulation No 3600/92 (O.J. (1992) L 366/10), as well as directives regarding product classification, labelling and packaging.
22. While the new regulatory system, when fully operational, will facilitate Community-wide trade in crop protection products pursuant to the principle of mutual recognition of national product marketing authorisations, this is not likely to occur in the short term.

The Directive provides that all active ingredients currently sold in the EC (approximately 600) must be re-evaluated (subject to the same standards as those to be used in evaluating new active ingredients) before they will be subject to the principle of mutual recognition. Until such time, the current system of national product authorisation continues to operate.

23. As discussed below in the assessment of this transaction, it is not necessary to decide in the present case whether the geographic reference market is national or Community-wide since even on the narrower market definition no dominant position is created or reinforced.

C. Assessment of the Transaction

24. Whether measured at the level of the Community as a whole or within each Member State, the crop protection industry is characterised by a large number of strong multinational producers. Indeed, one large distributor, who sells products for over 20 major manufacturers, compared the structure of the crop protection market to that for pharmaceuticals, noting the presence of numerous strong, intensely research-driven international chemical companies who aggressively compete for market share.
25. Industry participants interviewed indicated that the combination of Cyanamid and SCPB would likely create a more viable competitor, enabling the combined entity to offer a fuller product line and to increase market penetration through the utilisation of Shell's distribution network. Cyanamid has been described as a committed research-oriented competitor in this business, while Shell is seeking to exit from a market that is not part of its core energy businesses.
26. If the markets are analysed on a Community-wide basis, Cyanamid would hold approximately the following market shares after the proposed transaction: in cereal graminicides, [...] ⁽³⁾; and in maize herbicides, [...] ⁽³⁾. Cyanamid is not the market leader in either of these segments: in cereal graminicides, Hoechst holds a commanding position

⁽³⁾ Less than 25%.

with [...] ⁽⁴⁾; and in maize herbicides, Cyanamid is in second place behind Ciba-Geigy, which has [...] ⁽⁵⁾ of that market.

27. In individual Member States, the combined firm would have a market share in excess of 25% in the following markets with approximately the following market shares: (a) in cereal graminicides, in Greece [...] ⁽⁶⁾, in Italy [...] ⁽⁶⁾, and Spain [...] ⁽⁶⁾; and (b) in maize herbicides, in Germany [...] ⁽⁷⁾.
28. Because of the age and technological level of certain cereal graminicide products that would be sold by Cyanamid after the transaction, it appears that the company's market shares in this market may overstate the competitive strength of the combined firm.
29. Within the Greek and Italian markets for cereal graminicides, it appears that Cyanamid and Hoechst would be the only major competitors present in the market after the transaction. While the two firms currently have approximately equal shares of these markets, the competitive situation is not accurately reflected by those data. Two of the three products that would be sold by Cyanamid after the transaction [...] ⁽⁸⁾. In contrast, Hoechst's product, Puma, is a new generation cereal graminicide and its market share has grown dramatically in every Member State in which this product has been introduced since its launch in 1989-90.
30. Historically, Cyanamid has sold two brands of cereal graminicides in these markets - Assert and Avenge - and SCPB has offered one product, Suffix. [...] ⁽⁹⁾ [T]he portion of market share accounted for by this product will gradually be lost; [...] ⁽¹⁰⁾.

[...] ⁽¹¹⁾ [O]nly one of Cyanamid's three products, Assert, appears to have a stable market position in these affected markets.

31. In the Spanish market for cereal graminicides, Hoechst and Cyanamid again hold equal shares of the market, with each company offering the same products as those sold in Greece and Italy. The competitive picture is slightly different in Spain, where Monsanto has a small presence; in addition, it is believed that Ciba-Geigy is positioned to enter the Spanish market with its new product, Topik, possibly as early as this autumn. Topik is a product compared to Hoechst's product Puma in terms of its superior range and flexibility.

[...] ⁽¹²⁾. Based on scientific papers published after completion of testing, ICI's product is believed to be superior for certain grass weeds that are common in the southern Mediterranean region, weeds for which both Cyanamid's Assert product and Hoechst's product have limited effectiveness. [...] ⁽¹³⁾.

⁽⁴⁾ More than 50%.

⁽⁵⁾ More than 25%.

⁽⁶⁾ Between 45% and 55%.

⁽⁷⁾ Less than 35%.

⁽⁸⁾ Deleted for publication; read: "have sales that are steadily diminishing."

⁽⁹⁾ Deleted for publication.

⁽¹⁰⁾ Deleted for publication; read: "market shares for Suffix in Greece and Italy have been steadily declining in recent years."

⁽¹¹⁾ Deleted for publication.

⁽¹²⁾ Deleted for publication; read: "In addition, ICI is expected to introduce another new graminicide product (Grasp) into Spain."

⁽¹³⁾ Deleted for publication.

32. In the German market for maize herbicides, Cyanamid will account for [...] ⁽¹⁴⁾ of the market, ranking behind the market leader Ciba-Geigy with [...] ⁽¹⁴⁾. Rhone-Poulenc and BASF are also present in this market, with each appearing to hold [...] ⁽¹⁵⁾ a 10% market share in Germany. In addition, the availability of lower-priced generics appears to exert downward pricing pressure.
33. Moreover, an analysis focusing on market shares alone is not particularly probative in a dynamic and R&D-intensive industry such as this, where market shares may be volatile because new products and, indeed, new technologies are being introduced by the large number of international competitors. There are several companies with new products in the pipeline, as well as the use of new combinations of products. Manufacturers already active in the industry continue to introduce new products as a result of ongoing product development.
- Furthermore, the structure of demand in this market moves on a continuum. As a particular weed problem becomes controllable by the introduction of new active ingredients and combinations, then the next most successful weed emerges as a problem to be dealt with. Thus, competitive strength in a given product is no guarantee of a company's future competitive position in this industry.
34. Although barriers to entry into the development and manufacture of these products are substantial, the market structure of the industry appears to be competitive at this time because of the substantial number of large competitors already present with strong R&D capabilities and substantial financial resources to meet the requirements of this type of research-driven business. Further, at least two manufacturers have entered the EC crop protection business by acquisition since 1988: Atochem, a subsidiary of Elf-Aquitaine (through its purchase of Pennwalt Corp.) and Tomen Corp. (through the purchases of several products from Chevron Corp.).
35. In addition to the large number of competitors already present, EC distributors and manufacturers are also involved in distributing products for non-EC producers, such as a number of Japanese chemical companies (eg, Sumitomo and Nissan) who have begun to penetrate the EC market with crop protection products already being sold in their home markets.
36. Finally, the current economic climate in the agricultural industry may also put constraining pricing pressure on crop protection products. Partly as a result of reforms in the Community's Common Agricultural Policy (CAP), there is evidence that farmers are increasingly experimenting with cost-saving techniques such as (a) the combined use of lower-priced generic or off-patent products to dilute dependence on higher-priced newer products and (b) combination products to provide protection against a broader spectrum of weeds with a somewhat less effective, but also less costly, alternative.

⁽¹⁴⁾ Between 25% and 35%.

⁽¹⁵⁾ Approximately.

Conclusion

37. In light of the factors discussed above, it appears that the market share aggregations that will result from this transaction are not likely to create or strengthen a dominant position in any affected market.

V. ANCILLARY RESTRAINTS

38. A non-competition agreement has been concluded whereby Shell agrees that its affiliates will abstain from operating in any of the markets of the transferred businesses for a period of [...] ⁽¹⁶⁾. Shell affiliates would also not solicit any Cyanamid employee for a period of [...] ⁽¹⁶⁾. The geographic scope of the non-competition clause covers all the Member States of the EC, in each of which SCPB products are sold.
39. Under two supply agreements, the Nematrap agreement and a general supply agreement, a Shell subsidiary will supply certain necessary chemicals for a transitional period until such time as Cyanamid has established its own arrangements for the manufacture of these products, with the aim that Cyanamid can ensure continuity of supply of these products during the transitional period. The agreements are limited in duration, [...] ⁽¹⁷⁾.
40. Certain Shell intellectual property rights have not been assigned to Cyanamid, but exclusively licensed for a period of 10 years, at the end of which time Cyanamid has an option to purchase these rights. [...] ⁽¹⁸⁾.

In addition, the intellectual property agreements include standard obligations as to the disclosure and use of confidential information.

41. These agreements are directly related and necessary to the implementation of the concentration and are, therefore, ancillary within the meaning of the Regulation.

VI. CONCLUSION

42. Based on the above findings, it appears that the proposed transaction does not raise serious doubts as to its compatibility with the common market.

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For the above reasons, the Commission has decided not to oppose the notified concentration and to declare it compatible with the common market. This decision is adopted in application of Article 6(1)(b) of Council Regulation 4064/89.

For the Commission

TEXTE RECONSTITUÉ ÉLECTRONIQUEMENT / ELECTRONICALLY RE-CREATED TEXT / ELEKTRONISCH NACHGEBILDETER TEXT

⁽¹⁶⁾ Not greater than 5 years.

⁽¹⁷⁾ Deleted for publication.

⁽¹⁸⁾ Deleted for publication.