

***Case No COMP/M.4042 -
TOEPFER / INVIVO /
SOULÈS***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 22/12/2005

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 22/12/2005
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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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 parties

Dear Sir/Madam,

**Subject: Case No COMP/M.4042 – Toepfer / InVivo / Soulès
Notification of 18 November 2005 pursuant to Article 4 of Council
Regulation No 139/2004¹**

1. On 18 November 2005, the Commission received a notification of a proposed concentration by which the undertakings Union InVivo (“InVivo”) and Alfred C. Toepfer International Netherlands B.V. (“ACTI”), a subsidiary of Archer Daniel Midlands Company (“ADM”), acquire within the meaning of Article 3(1)(b) of the Council Regulation joint control of the business of Soulès CAF S.A. (“Soulès”, France).
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation No 139/2004 (“EC Merger Regulation”) and does not raise serious doubts as to its compatibility with the common market and the EEA Agreement.

I. THE PARTIES AND THE OPERATION

3. InVivo is a French union of cooperatives and active as a purchasing, sales and service company in agriculture, operating in areas such as seeds, agricultural supplies, storage, trading, animal nutrition and health.
4. ACTI is a Dutch-based company heading a group of companies specialised in world-wide trading in agricultural commodities (grain, oilseeds, and other feedstuffs). Its ultimate parent company ADM is active in the procuring, processing and merchandising of agricultural products world-wide.

¹ OJ L 24, 29.1.2004 p. 1.

5. Soulès is a French company active in the import and distribution of feedstuffs rich in proteins, mostly soybean meal. Its shares are currently owned by InVivo (40%) and Mr. Pierre Caillau (60%).
6. The operation consists in the setting-up of a new company, Soulès CAF SAS, the shares of which are jointly owned by InVivo (50%) and ACTI (50%) and to which the entire business operations of the current company Soulès will be transferred.

II. CONCENTRATION

7. The operation consists in the acquisition of joint control over the business of Soulès by InVivo and ACTI.
8. Soulès CAF SAS constitutes a full function joint venture within the meaning of Article 3(4) of the EC Merger Regulation. The company will continue to purchase and sell NGFI in the market. The joint venture will have its own budget and management and will not depend on the parent companies for its day-to-day business.
9. Therefore, the operation is a concentration within the meaning of Article 3 of the EC Merger Regulation.

III. COMMUNITY DIMENSION

10. The undertakings concerned² have a combined aggregate world-wide turnover of more than EUR 5 billion³ (InVivo [...], ADM [...]). Each of InVivo and ADM have a Community-wide turnover in excess of EUR 250 million (InVivo [...], ADM EUR [...]). InVivo but not ADM achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension within the meaning of Article 1(2) of the EC Merger Regulation.

III. COMPETITIVE ASSESSMENT

1. Market definition

11. The future joint venture will be active in the import and distribution of oilseed meals (more than [90-100%] of the Soulès 2004 turnover), and citrus and beet pulp pellets. These feedstuffs, which cater for the livestock needs of proteins, are distributed by Soulès to compound feed manufacturers and farmers' cooperatives, exclusively in France.
12. ACTI has trading and distribution activities with regard to oilseed meals, and by-products of the starch and ethanol industry, also used as protein sources.

² Although InVivo currently holds a minority stake (40%) in Soulès, Soulès is currently jointly controlled by InVivo and Pierre Caillau. As a result, Soulès is not an undertaking concerned in the proposed operation.

³ Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25).

13. Furthermore, InVivo's presence in oilseed meals or other protein-rich feedstuffs is limited to its brokerage activities in France, which volume represents less than [0-10%] of the total volume of sales of these products in France.

Relevant product market

14. As Soulès has no trading activities, the relevant product market definitions concern the feedstuff distribution activities of the parties to compound feed manufacturers, farmer cooperatives, and farmers⁴.
15. The parties submit that by-products of the oil milling industry (i.e. oilseed meals), fish meal, and by-products of the starch, and ethanol industry (corn gluten feed, corngerm meal, distillers dried grain) are a single relevant product market, the market for non-grain feed ingredients ("NGFI"). Other ingredients of animal feed are feed grains as well as vitamins, enzymes, minerals and amino acids.
16. In previous cases⁵, the Commission left the question open whether specific NGFI, i.e. oilseed meals or the various types of oilseed meals, animal meal⁶, and pulp should each be considered a separate relevant product market.
17. According to the parties, all NGFI are used to meet the protein requirements of livestock diets and are therefore interchangeable. Soybean meal is the meal that has the highest protein content of all NGFI and is therefore the most valuable one. Prices of other NGFI are highly correlated—in accordance with their protein content—with the price of soybean meal, which is quoted on the Chicago Board of Trade ("CBOT"). Compound feed manufacturers can use a different mixture of NGFI to produce a compound feed with a specific content of nutrients.
18. In the course of the market investigation in the present case, some respondents confirmed the parties' view, while many pointed out that in particular soybean meals constitute an indispensable ingredient for producing compound feed. However, for the purpose of this decision, the question whether the market for NGFI should be segmented can remain open as, under all alternative market definitions, no competition concerns can be identified.

⁴ For a description of trading activities of oilseed meals, see cases COMP/M.3725—Cargill / Pagnan, decision of 22 March 2005; COMP/M.2693—Archer Daniels Midland Company / Alfred C. Toepfer GmbH, decision of 11 February 2002; COMP/M.1376—Cargill/Continental Grain, decision of 3 February 1999.

⁵ Cases COMP/M.3725 – Cargill / Pagnan, decision of 22 March 2005; COMP/M.2886 – Bunge / Cereol, decision of 20 September 2002; COMP/M.2693 – Archer Daniels Midland Company / Alfred C. Toepfer International GmbH decision of 11 February 2002.; COMP/M.2271 – Cargill / Agribands, decision of 19 February 2001; COMP/M.1348 – Archer Daniels Midland Company / Alfred C. Toepfer International GmbH / InTrade N.V., decision of 9 November 1999; IV/M.1376 – Cargill / Continental Grain, decision of 3 February 1999; IV/M.1126 – Cargill / Vandemoortele, decision of 20 July 1998; IV/M.941 – ADM / Acatos & Hutcheson / Soya Mainz, decision of 11 August 1997; IV/M.866 – Cereol / ÖSAT / Ölmühle, decision of 2 February 1997.

⁶ Only fish meal, since the use of other types of animal meal has been prohibited following the BSE crises.

19. In some previous decisions⁷, the Commission has considered whether a wider relevant product market encompassing all types of feedstuffs—in particular including grains—could be defined, concluding that a segmentation was more relevant. The parties submit that, essentially, grains supply the majority of the starch and fibre needs, and that NGFI products supply the necessary content in proteins. Consequently, according to the parties, both grains and NGFI are required to produce compound feed that fulfils the nutritional needs of different animal species.
20. The market investigation has overwhelmingly confirmed this view. Customers consider that the level of substitutability of grains, minerals, vitamins, etc. with NGFI products is very low. It has also shown that purchases of NGFI are completely disconnected from purchases of grains, or other feedstuffs. This confirms the line adopted previously by the Commission.
21. However, as the parties' activities overlap only on NGFI products, the question of whether a product market encompassing all feedstuffs could be defined can be left open.
22. As regards genetically modified (GM) and non-genetically modified (non-GM) NGFI products, the parties submit that no other GM NGFI products than GM soybean meal is sold in Europe.⁸ According to the parties, demand for non-GM soybean meal constitutes a minor share of the market at the European level (5% of the total European demand for soybean meal) but a more significant share in France (30% of the total demand for soybean meal in France)⁹.
23. The relevant Community legislation¹⁰, which applies since April 2004, has laid out traceability rules that oblige the operators concerned (e.g. companies who place a product on the market) to identify their supplier and the companies to which the products have been supplied (traceability of "supply chain"). However, it does not require that products stemming from livestock (meat, eggs, etc.) fed with GM products be labelled as GM.
24. Concerning the differences in the supply-chain of non-GM soybean meal, the parties submit that to guarantee that the content of GM in soybean meal stays below the EU threshold of 0.9 %, traders and processors have to take a higher level of precaution. In fact, a strict segregation of the flows of non-GM soybean meal and GM soybean meal is necessary. This segregation leads to reversed economies of scale as, in many cases, silos, elevators, trucks, rail cars and even ships can no longer be used at full capacity. In addition, documentation requirements are increasing, resulting in extra time and costs.

⁷ See COMP/M.2693 – Archer Daniels Midland Company / Alfred C. Toepfer International GmbH decision of 11 February 2002 for a detailed discussion on this matter.

⁸ However, according to some third parties, other GM NGFI products may be introduced shortly.

⁹ The market investigation has provided somewhat different estimates: competitors' estimates of the demand for non-GM soybean meal range from 10% to 25% for the EEA, and 20% to 30% for France.

¹⁰ Regulation (EC) No. 1829/2003 of the European Parliament and the Council on genetically modified food and feed, Regulation (EC) No. 1830/2003 of the European Parliament and the Council concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms.

25. This specificity of non-GM soybean meal is currently strained by the fact that Brazilian producers, the usual suppliers of non-GM soybeans, are now allowed by their government to grow GM soybeans. As a result, the cost of non-GM soybean is increasing for two reasons: first, the farmers need to receive a premium to have the incentive to grow the more costly non-GM soybeans, and, second, segregation is becoming more expansive as GM soybean is becoming pervasive in Brazil.
26. As a consequence, the parties explain that the premiums for non-GM soybean meal had to be increased considerably. The Brazilian processor who supplied Soulès CAF with non-GM soybean meal at a premium of [8-10] USD/ton has - like the other suppliers of non-GM soybean meal - to increase the premiums they used to demand. Currently, premiums of up to [10-20] USD/ton are being discussed between Brazilian suppliers and EU importers¹¹.
27. In any case, despite these differences of prices and logistics, the question whether non-GM and GM soybean meals are part of the same product market can remain open for the purpose of this decision as under all alternative market definitions no competition concerns can be identified.

Relevant geographic market.

28. In line with previous decisions of the Commission in the relevant sector¹², the parties state that the relevant geographic market is at least EEA-wide. From the supply-side, prices are essentially determined on international commodity markets which is therefore a major factor of homogeneous conditions of competition at least at the EEA-level. Furthermore, from the demand-side, the parties argue that feed processors can procure their raw material from companies not located in their country. For example, many quantities of NGFI are shipped from the Netherlands to Germany, Denmark, Ireland, and the UK.
29. However, the Commission's investigation in the present case has provided certain indications that for the specific activity of the parties (i.e. distribution of the relevant products to compound feed manufacturers, cooperatives and farmers), the geographic scope of the market might be narrower.
30. According to information provided by the parties and confirmed by the market investigation, the market(s) in question is/are characterised by traditional supply relationships between compound feed manufacturers (until very recently to a large extent cooperatives of farmers) and their suppliers. In order to be present as a distributor

¹¹ 20 USD/ton amounts to about 10% of the overall price of soybean meal.

¹² Cases COMP/M.2886 – Bunge / Cereol, decision of 20 September 2002; COMP/M.2693 – Archer Daniels Midland Company / Alfred C. Toepfer International GmbH decision of 11 February 2002.; COMP/M.2271 – Cargill / Agribands, decision of 19 February 2001; COMP/M.1348 – Archer Daniels Midland Company /n Alfred C. Toepfer International GmbH / InTrade N.V., decision of 9 November 1999; IV/M.1376 – Cargill / Continental Grain, decision of 3 February 1999; IV/M.1126 – Cargill / Vandemoortele, decision of 20 July 1998; IV/M.866 – Cereol / ÖSAT / Ölmühle, decision of 2 February 1997. However, in other decisions the exact geographic market definition was left open as even in a national market no competition concerns were identified; see cases IV/M.941 – ADM / Acatos & Hutcheson / Soya Mainz, decision of 11 August 1997, and COMP/M.31725 – Cargill / Pagnan, decision of 22 March 2005.

of NGFI to compound feed manufacturers in a given country a competitor needs market knowledge, goodwill and a physical presence (port infrastructure, sales offices) in that country.

31. Indeed, the example of ACTI, which tried unsuccessfully to enter the French market a couple of years ago and subsequently closed down the operations of its French subsidiary in 2000, confirms these indications that the market(s) in question may still be national in scope.
32. The market investigation has also found that even though customers can technically buy their raw material from outside their country, most of them prefer to have close suppliers, as, generally, they have to provide the transportation to their facilities. Reliability of delivery and availability of a truck transport company are also reasons for customers to prefer close suppliers.
33. The Commission already noted in some previous decisions that transport considerations might lead to define narrower geographic market definition than the EEA-level¹³.
34. In any event, whether the geographic scope of the relevant product market(s) is EEA-wide or national can be left open as under any alternative geographic market definition, no competition concerns would arise.

2. Competitive assessment

Possible French markets for NGFI or various possible NGFI products

35. Whatever the exact definition of the relevant product market, due to ACTI's limited presence in France the operation will only lead to a limited change on a possible French market for NGFI or on any other possible product markets comprising one or more individual NGFI products. ACTI is present in France only with soybean meal and rapeseed meal.
36. ACTI's share of the overall market for NGFI amounts to only [0-5%]¹⁴ compared to that of Soulès (21%). In addition, it has to be noted that [10-15%] of ACTI's sales are made with other trading / distributing companies. The parties' combined market share of [20-25%] will also be smaller than that of the two other main competitors, Cargill (33%) and Bunge (28%). Other competitors are Solteam, Agrenco France, and Agrifeed.
37. On the basis of a market for oilseed¹⁵, the market positions would be the following: Soulès ([25-30%]), ACTI ([0-5%]), Cargill ([30-40%]), and Bunge ([10-20%]). The increment is therefore limited and the market share of the merged entity would still be smaller than that of Cargill.

¹³ See cases COMP/M.1126—Cargill / Vandemoortele, decision of 20 July 1998; COMP/M.941—ADM / Acatos & Hutcheson / Soya Mainz, decision of 11 August 1997.

¹⁴ Market share data for the NGFI market quoted in this decision are estimates by the parties. The market shares on narrower market definitions have been calculated by the Commission on the basis of its market investigation.

¹⁵ There are no overlaps on other NGFI products.

38. As regards a market for soybean meal, the market share increment would also be very limited (ACTI [0-5%], Soulès [35-40%], combined [35-40%]). The parties' main competitors would be Cargill and Bunge with market shares of respectively [30%-40%] and [20%-30%]. Soulès distributes both GM and non-GM soybean meal with similar market shares on both segments (to [35-40%]). ACTI exclusively sells GM soybean meal, with a market share of about [0-5%].
39. As regards rapeseed meal, the combined market share of the new entity would be lower than [10-15%] with an increment of 0.5%.

Possible EEA markets for NGFI or various possible NGFI products

40. If the market(s) were to be considered EEA-wide, the change brought about by the merger would likewise be limited (all NGFI: ACTI [25-30%], Soulès [0-5%], combined [30-35%]; all oilseed meals: ACTI: [30-35%], Soulès: [0-5%], combined: [30-35%]; soybean meal: ACTI [30-35%], Soulès [0-5%], combined [35-40%]; palmkernel meal: ACTI [50-55%], Soulès [0-5%], combined [50-55%]). The parties' main competitors in the EEA are Bunge (23% share of the all NGFI market), Cargill (20%), Cefetra (10%), Louis Dreyfus (7%) and Nidera (5%).
41. However, as noted above, Soulès is exclusively active in France, and this increment of market shares at the European level only stems from Soulès' position in France. Furthermore, Soulès was very unlikely to expand its operations to other European countries, in particular in view of its financial difficulties.

General considerations

42. On the basis of the above, the notified concentration does not raise serious doubts as to its compatibility with the common market in the French or EEA market(s) for NGFI through non-coordinated effects.
43. The investigation has also shown that the operation, by integrating Soulès, one of the three main importers of NGFI in France, into the ADM group, is not likely to cause any coordinated effects in the French market(s) for NGFI, as this/these market(s) is/are economically unstable and present(s) a low degree of transparency.
44. This is due to the fact that the production cost structure—the total cost comprises essentially the cost of raw material and freight¹⁶—can vary by a great deal across distributors and over time.
45. As regards raw material, its price is determined on the Chicago Board of Trade (CBOT). Distributors can buy it on both the spot and forward markets. With highly volatile CBOT quotations, distributors have therefore to speculate on the evolution of raw material prices to achieve the lowest expected cost.
46. For example, as the parties submit, if, in March, a distributor has the opportunity to sell 10,000 tons of soybean meal to a feed manufacturer for delivery in September, the distributor sells this quantity at the March price, even though it does not own the soybean meal and has to buy it between March and September. This is because the

¹⁶ For the specific example of soybean meal, raw material and freight amount to respectively 85% and 15% of the total cost.

distributor expects prices to decline between March and the delivery date in September, for example as a result of an anticipated huge crop production in the USA¹⁷. If the distributor's market opinion is correct, it achieves a high margin as a result of the deferment of the sale coverage.

47. As a result of the uncertainties surrounding the prices of raw material, costs and selling prices are very volatile and very difficult to predict, making the economic environment unstable. The fact that the cost structure and the margins of distributors depend on expectations of future CBOT quotations makes the market even less transparent.
48. In its assessment of coordinated effects, the Commission already noted in a previous case¹⁸ that, even though oilseed meals are commodities, the low transparency and the volatility of the market make coordination difficult.
49. Thus, the Commission considers that coordinated effects on the market(s) for NGFI are unlikely to arise as a consequence of the merger.
50. In its reply to the market investigation, one customer expressed the view that the operation might affect competition to the extent that InVivo is also a compound feed manufacturer and therefore could take advantage of its vertical integration at the expense of other compound feed manufacturers. However, the claim that InVivo is also active as a compound feed manufacturer is incorrect so that this risk does not exist. Furthermore, no customers voiced any concerns and several customers welcomed the operation on the ground that the operation would increase the financial strength of Soulès by enabling it to compete more effectively on a highly speculative market.

V. CONCLUSION

51. For the above reasons, the notified operation does not raise serious doubts with regard to a significant impediment to effective competition in any affected market.
52. The Commission has therefore 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)
Andris PIEBALGS
Member of the Commission

¹⁷ However, to reduce the incurred risk, the distributor also buys futures contracts at the CBOT as a hedge.

¹⁸ See case COMP/M.2886—Bunge/Cereol, decision of 20 September 2002.