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Case No IV/M.464 - BMSC / UPSA

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REGULATION (EEC) No 4064/89 MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 06/09/1994

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 06.09.1994

MERGER PROCEDURE
ARTICLE 6(1)b DECISION

PUBLIC VERSION

To the notifying parties

Dear Sirs,

Subject: **Case N° IV/M.464 - BMSC / UPSA**
Notification of 04.08.1994 pursuant to Article 4 of Council Regulation No 4064/89.

1. The above mentioned notification concerns the proposed acquisition by Bristol-Myers Squibb Company (BMSC) of sole control of the UPSA Group (UPSA), currently controlled, directly or indirectly, by Doctor Nicole BRU.

2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of application of Council Regulation N° 4064/89 and does not raise serious doubts as to its compatibility with the common market.

I. THE PARTIES

Bristol-Myers Squibb Company (BMSC)

3. BMSC, the notifying party, is an American company with interests all over the world. The principal activities of BMSC are the production and sale of medicines, nutritional products, medical devices and consumer products such as hair care, hair colour, deodorant and skin care.

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The UPSA Group (UPSA)

4. UPSA is a French company specialized in the production and sale of effervescent analgesic and other pharmaceutical products as well as a limited amount of fine chemicals. Mainly active in France, UPSA has interests in several European countries.

5. The UPSA Group, currently controlled, directly or indirectly by Dr. Bru, is constituted by:

   1) UPSA Investissements SA (UPSA-I): a holding company for the UPSA Group with no independent activity.
   2) Laboratories UPSA S.A. (Labo UPSA): a company specialized in manufacturing and supplying effervescent analgesic products and pharmaceutical products.
   3) Recherche et Propriété Industrielle SARL (RPI): a company owning certain of the intellectual property of the UPSA Group.
   4) Halisol S.C. (Halisol): a French "société civile" of which Dr. Bru is the manager and to which Dr. Bru transferred 1000 shares in UPSA-I in 1994.

II. THE OPERATION

6. In 1990 BMSC acquired 45% of the outstanding shares of the UPSA Group, including UPSA-I and Labo UPSA. This acquisition did not give rise to an acquisition of control of the UPSA Group by BMSC.

7. In the framework of the current operation BMSC will acquire through one of its wholly owned subsidiaries within the EC the remaining 55% of the UPSA Group along with 100% of the shares of RPI.

III. CONCENTRATION

8. The notified operation constitutes a concentration within the meaning of Article 3 of Regulation N° 4064/89. After the completion of the proposed operation, BMSC will acquire sole control of the UPSA Group through its 45% stake in UPSA and through one of its European subsidiaries which will hold a 55% stake in UPSA.

IV. COMMUNITY DIMENSION

9. The aggregate worldwide turnover of the parties exceeds 5.000 million ECU. The aggregate Community wide turnover of each party exceeds 250 million ECU. They do not achieve more than two-thirds of their turnover in one and the same Member State. The operation has therefore a Community dimension.

V. COMPATIBILITY WITH THE COMMON MARKET

A) Market Definition

Relevant product markets

a) Medicine markets

10. In Council directive (EEC) 65/65 a medicine is defined as "any substance or combination of substances presented for treating or preventing disease in human beings or animals; any substance or combination of substances which may be administered to human beings or animals with a view to making a medical diagnosis or to restoring, correcting or modifying physiological functions in human beings or in animals"[1].

11. Medicines can be broken down into therapeutic classes according to the Anatomical Therapeutic Classification (ATC) which is recognized and used by the World Health Organization. This classification, previously used by the EC Commission[2], enables medicines to be grouped according to their composition and therapeutic properties.

The third level classes of the ATC classification provide a grouping of medicines according to their therapeutic properties, that is, their intended use, and therefore may be accepted as an operational market definition. It may be necessary, however, to carry out analyses at other levels of ATC classification where it is appropriate to group particular 3rd level categories together or to descend to narrower classes at the 4th level.

Within the framework of the notified operation, the parties overlap in the production and sales of the following products, classified according to the third level classes of the ATC classification.

A13A: Tonics
M2A: Antirheumatic topical
N2B: Non-narcotics and antipyretics
R2A: Throat preparations
R5C: Expectorants

Furthermore, medicines may be subdivided into different segments on the basis of different criteria which may lead to distinctions, essentially from a demand-side point of view. A distinction may be made between medicines which are subject to medical prescription ("prescription only" medicines) and medicines which are not subject to medical prescription ("sold freely" medicines)[3]. A distinction may also be made between medicines which are wholly or partially reimbursed under the health insurance system and medicines which are not reimbursed. These segments overlap to a certain extent. Most of "prescription only"

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1 Council directive of 26.1.1965 (65/65 EEC) on the approximation of provisions laid down by law, regulation or administrative action relating to proprietary medicinal products.

2 Decision IV/M.072 - Sanofi / Sterling Drug (10.06.91)
Decision IV/M.323 - Procordia / Herbamont (29.04.93)
Decision IV/M.426 - Rhône Poulenc / Cooper (18.04.94)

3 Council Directive of 31.03.1992 (92/26/EEC) concerning the classification for the supply of medicinal products for human use.

medicines are reimbursed and most of "sold freely" medicines are not reimbursed. Moreover, the presence of a medicine in one of these segments is not permanent to the extent it is linked to decisions of national authorities, often at the request of companies, which can lead to switches between these segments.

However, it is not necessary to decide whether these segments constitute or not separate product markets because the assessment of the current operation would not be modified accordingly.

b) Sector of intermediate distribution of medicines

12. The systems for intermediate distribution of medicines vary from one Member State to another, notably with regard to the final distribution of these products.

13. In France, the geographic market primarily affected by this transaction, medicines, are supplied to patients through two separate channels, the hospital network and the network of pharmacies. These networks are supplied by the pharmaceutical laboratories, either directly or through intermediaries.

14. French pharmacies are establishments which both prepare medicines (preparations magistrales) and sell medicines to the public (Article L 568 of the French Public Health Code). Pharmacies obtain supplies of medicines from two different sources, wholesaler-distributors and laboratories or their agents.

15. A French wholesaler-distributor is an intermediate between the pharmaceutical industry and pharmacies, the status of which is fixed by law (Article R 5106, Paragraph 2 of the French Public Health Code). In particular, the wholesaler-distributor must:

- keep a range of products representing two thirds of the number of presentations of all the medicines effectively marketed in France;

- keep an average of one month's supply in stock;

- be in a position to ensure delivery to the pharmacies in his sector within 24 hours;

- not discriminate against clients in function of the nature of their orders (for example, clients who only order small amounts);

- apply a margin regulated by law on medicines on which patients covered by health insurance may claim a reimbursement.

These obligations, which correspond to the public health requirements, have led the wholesaler-distributors to develop their own logistics (stock capacity, computerized management of orders, rapidity of delivery), enabling them to ensure a system of distributing medicines to the pharmacies. The wholesaler-distributors generate about 90% of their turnover from sales of medicines. They distribute about 80% of the products of the French pharmaceutical industry. The wholesaler-distributor network is the most important network for the distribution of "prescription only" medicines and handles 80% of their sales in France.

16. The second medicines distribution circuit is by direct sale by a pharmaceutical laboratory to the pharmacies, either through a division or branch belonging to the laboratory or through a third party which has the status of an agent. A number of pharmaceutical laboratories, whether or not they belong to powerful groups, have their own distribution structures which deliver their products to the pharmacies. There can be integrated divisions or branches, which may enjoy agent status and, as a result, have the possibility of distributing the products of more than one laboratory.

    In addition, direct sales may also be carried out by means of independent pharmaceutical industry agents (Article R 5106 of the French Public Health Code) which are quite distinct from the wholesaler-distributor. They are not subject to the legal obligations relating to stocking, they do not own the goods they distribute; and they are remunerated by means of freely negotiable commissions.

    The direct sales network represents 7.4% of the intermediary distribution of medicines in France. Only 3.9% of the distribution of "prescription only" medicines are carried out by this circuit whereas 51% of the "sold freely" medicines are distributed.

    It is not necessary to decide whether these different distribution networks constitute or not separate markets to the extent the operation will not lead to the creation or strengthening of a dominant position in the narrowest market.

    Geographic markets

17. From the point of view of scientific and technical requirements, the harmonisation of legislation within the Community and the entry into force on 1.1.95 of the new Community marketing authorisation procedures, will lead pharmaceutical companies to operate at reseach and development and production stages, on a Community-wide basis.

    However, the geographic reference markets for the sale of medicines remain essentially national, for the following reasons.

    The conditions of prescription and reimbursement of medicines depend on various legislative and regulatory measures and vary from one Member State to another.

    The prices of most medicines are directly or indirectly regulated by national legislation. The differences in the pricing and reimbursement mechanisms result in wide disparities in medicine price levels among different Member States.

    Within the framework of the notified operation, the geographic reference markets for the sale of medicines are Belgium, France, Greece, Italy and Spain.

18. Similarly, the systems for intermediate distribution of medicines remain essentially national because of the existence of national legislation.

B) Dominance

19. Taking into account the market definitions given above, the only markets where the combination of the activities of the parties will lead to an appreciable market share after completion of the proposed concentration are the following:

Affected country + Product	BMSC	UPSA	TOTAL
Belgium (N2B)	0,1%	19,9%	20,0%
France (R5C)	12,1%	0,5%	12,6%
Greece (N2B)	19,1%	0,7%	19,8%
Spain (R2A)	1,1%	10,8%	11,9%

20. There is an overlap on two other markets, defined according to the ATC classification, but these markets cannot be considered as affected markets because of the low market shares resulting from the concentration (8.8% and 5.6%).

21. The combination of the market shares of BMSC and UPSA in the affected markets does not lead to the creation or the strengthening of a dominant position because of the relatively low level of these combinations and because of the presence of big pharmaceutical companies such as Bayer (N2B), Synthelabo (R5C, N2B), Parke Davis (N2B, R2A), Boots (R2A, N2B).

22. Besides, the operation will give BMSC access to UPSA's distribution network to pharmacies in France. Despite the fact that neither BMSC nor UPSA distribute products from third parties and the fact that they have separate distribution activities, the acquisition of UPSA's distribution network to pharmacies in France by BMSC will give BMSC access to an existing network which represents 10.7% of direct sales to pharmacies. However, the concentration will not lead to the creation or the strengthening of a dominant position in the direct sales to the pharmacies sector in France, given the the relatively low market share of UPSA in this sector and the very limited presence absence of BMSC.

VI. CONCLUSION

23. On the basis of these findings, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the functioning of the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation No 4064/89 and Article 57 of the EEA Agreement.

For the Commission,