EN

Case No COMP/M.4738 - OEP / MSP-STIFTUNG / DVG / DAILYCER GROUP

Only the English text is available and authentic.

REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 31/10/2007

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COMMISSION OF THE EUROPEAN COMMUNITIES

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)b DECISION

To the notifying parties:

Dear Sir/Madam,

Subject: Case No COMP/M.4738 - OEP / MSP-STIFTUNG / DVG / DAILYCER GROUP

Notification of 18/06/2007 pursuant to Article 4 of Council Regulation No 139/2004[1]

1. On 26 September 2007, the Commission received notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No. 139/2004 ("the Merger Regulation") by which the undertakings One Equity Partners II, ("OEP", USA), indirectly controlled by J.P. Morgan Chase & Co, ("JPMS", USA) and MSP Stiftung ("MSP", Germany) acquire within the meaning of Article 3(1)(b) of the Council Regulation joint control over the undertakings De-Vau-Ge Gesundkostwerk Gesellschaft mit beschrankter Haftung, ("DVG", Germany), Delicia B.V. (The Netherlands), Dailycer S.A.S (France), Dailycer Ltd (UK) and Dailycer B.V. (The Netherlands) (together the "Dailycer Group"), by way of purchase of shares.

I. THE PARTIES

2. *OEP* is a private equity fund controlled by JPMS, a global financial services firm. *Dailycer Group*, controlled currently by OEP, is a French-based company active in the manufacturing, distribution and marketing of ready-to-eat cereals such as cornflakes, muesli, puffed rice, etc, as well as other cereals and cereal bars. Its Dutch subsidiary Delicia B.V. is active in the production and sales of chocolate decorations.

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1 OJ L 24, 29.1.2004 p. 1.

3. *MSP* is a foundation under German law, holding certain assets for the benefit of the members of the Seventh-Day Adventists Church**.** *DVG,* controlled currently by MSP**,** is a German-based company active in the manufacturing and distribution of various food products. The company's current product portfolio includes ready-to-eat cereals "RTEC", bars, soya drinks, baby food etc.

II. THE OPERATION AND THE CONCENTRATION

4. On 27 June 2007 the parties signed a share and purchase agreement. As a result of the transaction, Dailycer Group and DVG will combine their activities in a full-function joint venture controlled jointly by OEP and MSP. The operation therefore constitutes a concentration within the meaning of Article 3(1)(b) of the Merger Regulation.

III. COMMUNITY DIMENSION

5. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million (EUR […] million for JPMC, EUR […] million for DVG, EUR […] for Dailycer Group). The Community - wide turnover of JPMC and DVG is more than EUR 250 million (EUR […] million for JPMC, […] million for DVG) and they do not achieve more than two thirds of their Community-wide turnover within one and the same Member State. The proposed transaction therefore has a Community dimension within the meaning of Article 1(2) of the Merger Regulation.

IV. RELEVANT MARKETS

6. Both DVG and Dailycer produce ready-to-eat cereal "RTEC" products and cereal bars. They are mainly active in the manufacture and sales of these products to retailers to be marketed under retailers' own brands (private labels RTEC and cereal bars).

A. THE RELEVANT PRODUCT MARKETS

Ready-to-eat cereal ("RTEC")

7. The Commission has not examined in the past any concentrations that specifically relate to RTEC products. RTECs are made of *different grains* – corn, wheat, oats or rice – and other ingredients such as nuts, dried fruits, sweeteners and other additives which are processed into the final product. RTEC products can take *various product forms* such as flaked cereals, extruded flaked cereals, gun-puffed whole grains, extruded gun-puffed cereal, extruded cereals, shredded whole grains, extruded shredded cereals, oven-puffed cereals and muesli. RTEC products might also be segmented according to *different target groups*: adult/family, healthy and children.

8. The notifying parties submit that the relevant product market consists of all RTEC products. According to the parties, *on the demand side*, customers tend to purchase a wide range of RTEC products and switch regularly across the sub-segments, regardless of product form and target group. Therefore a distinction according to type of grains or target groups would not reflect distinct product markets for competition law purposes. The notifying parties also submit that there is no agreed industry standard to categorise these products. As regards *muesli*, the notifying parties consider this product as part of the overall RTEC segment arguing that the delimitation

between muesli and other RTEC products is not sufficiently clear-cut. Muesli is served like all other RTEC variants quickly after mixing it with milk or yogurt, and is displayed together with other types of RTEC in retail outlets.

9. The majority of respondents suggested during the market investigation[2] that consumers indeed switch regularly among RTEC products regardless of their physical characteristics, although most of them suggested that even in case of a permanent 10% price increase on muesli, muesli consumers would not switch to other RTEC products. A vast majority of customers suggested distinguishing among RTEC products based on *target groups* suggesting that the "healthy" category RTEC and RTEC for children form distinct markets from adult/family category. On the other hand, most of the respondents recognised that there is no common classification of RTEC product in the industry.

10. When looking at the *supply side perspective*, the market investigation confirmed the notifying parties' submission that most manufacturers of RTECs produce and supply all kinds of RTECs, including muesli. Supply-side substitutability is even more obvious when distinguishing among target groups. All products cannot, however, be manufactured on the same production lines.

11. As indicated above, the market investigation indicates a further segmentation of the RTEC market. However, even based on the narrower product market definition, the transaction does not raise serious doubts as to the compatibility with the common market. Therefore the question whether RTEC products should be further segmented can be left open.

12. Finally, the notifying parties consider *branded and private label RTEC products* as one and the same product market, substitutable at both wholesale and retail level. Most retailers present branded and private label RTEC products on the same shelves and these products compete directly at retail level. Private label products have gained market shares in the EEA to the detriment of branded products. Additionally, there is a complete supply-side substitutability between these products and manufacturers often produce both, branded and private label RTEC. Therefore the notifying parties indicate that the indirect competition at retail level and the supply-side substitutability suggest that the wholesale market includes both branded and private label RTEC products.

13. In previous consumer good cases, the Commission has considered such distinction between branded and private label products at the wholesale level[3], notably on the basis of differences in procurement patterns: for branded products, a retailer chooses to stock a brand depending on different factors related to the brand's downstream position, (such as consumer loyalty, price and promotional activity) whereas for private label products a retailer determines the quality and quantity of the product and the supplier produces to order. The notifying parties recognise that these differences

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2 Article 11 letters of the Commission to the major European, Italian German and Spanish competitors and customers of the parties of 2 October 2007.

3 See for example decisions COMP/M.2337 Nestlé/Ralston Purina of 15 June 2001 and COMP/M.2522 SCA Hygiene Products/Cartoninvest of 21 March 2002.

in procurement are valid in the RTEC industry[4]. On the supply-side, it is noted that a large number of producers, including the parties, are almost exclusively active in the private label sector whereas others (Kellogg's, Bioquelle) are only branded product suppliers.

14. Based on the practice of the Commission and the elements identified above, the current transaction is assessed separately with regard to the supply of branded products and the supply of private label products.

15. For the reasons outlined above, for the purpose of this decision the Commission assesses the effects of the concentration for the wholesale markets for supply of private label (i) RTEC products, (ii) RTEC products excluding muesli, (iii) muesli, (iv) RTEC products in "health" category, (v) RTEC products for children (vi) and RTEC products in adult/family category.

C*ereal Bars*

16. Cereal bars are defined by the notifying parties as "on-the-go" products that are made of different cereals (typically oat), nuts and additives (such as fruit and chocolate). They come in chewy, baked and crunchy styles depending on the main ingredients, additive used and coating/decoration. Cereal bars can be sold individually and in form of multi-packages.

17. The notifying parties submit that cereal bars belong to the category of snack products that are generally consumed between meals, such as cake bars, chocolate bars, bread substitutes, yogurt and fruit. However, the exact product market can be left open as the transaction does not raise serious doubts as to the compatibility with the common market under any alternative market definition.

B. GEOGRAPHICAL SCOPE

18. In line with the Commission's previous practice, the notifying parties submit that at the retail level RTEC and cereal bars markets are still national in scope, not only because retail chains have a strong national focus regarding the marketing and the presentation of their goods but also because consumers' interests generally varies according to the nutrition habits and background of different countries.

19. At the wholesale level the parties submit that competition may occur both at European and national level. At the European level, the notifying parties contend that a number of RTEC customers are pan-European retailers ([…]) which hold accounts covering a number of countries with one RTEC producer. However the notifying parties recognize that other factors argue in favour of national markets, including national variations in the market positions of the parties and their competitors, existence of country-specific suppliers or variations of wholesale prices of RTEC across countries.

20. The market investigation is not conclusive with regard to the geographic scope of the market. Whereas a number of customers do not consider location as an aspect

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4 Form CO, paragraph 149, page 46.

when assessing tenders, many competitors, including the parties, focus their sales to one or a limited number of countries. Often, even international retail chains have different suppliers in different countries. Also some respondents suggested that there are differences in consumption patterns among different countries. For instance per capita RTEC consumption in certain countries is 5-6 times bigger than in others. In any event, for the purpose of assessing the present transaction the geographic market definition for RTECs as well as for cereal bars at the wholesale level can ultimately be left open.

V. COMPETITIVE ASSESSMENT

21. The combination of Dailycer and DVG will create the leading European private label manufacturer and supplier of RTEC products. However, there are strong differences between the two companies in terms of geographic focus, main customers and the business model they are relying on. Therefore, the areas of overlap between the parties' activities are limited, as it will be discussed further below.

22. Both parties have also very small branded RTEC activities but their combined market share does not exceed [0-5]% under any alternative geographic market definition. In the EEA, DVG supplied [below 10 000] tons of branded RTEC under its brands *GranoVita*, *Fit&Aktiv* and *Fit&Vital* whereas Dailycer had sales of [below 500] tons of branded products under its brand *Harrisons*. The market size in the EEA amounted to 696,000 tons in 2006 and *Kellogg's* is the undisputed leader in this segment with a share of [35-45]%. Accordingly, the competitive assessment will focus to the upstream private label market.

A. MARKET FOR PRIVATE LABEL RTEC PRODUCTS

EEA-level

23. The combined market share of the parties in volume for all private label RTEC (including traditional muesli) would be [25-35]% (Dailycer: [5 -15]%, DVG: [10-20]%) for a market size of 390,702 tons in 2006[5]. Their main competitors would be Brüggen ([10-20]%), CPW[6] ([5-15]%), Weetabix ([5 -10]%), Nordgetreide ([5 -10]%) and several smaller competitors with a market share between [0-5]% and [0-5]%. If muesli is excluded, the market structure would not really change: the parties would hold a [30-40]% share and would face competition from Brüggen ([5-15]%), CPW ([5-15]%) Nordgetreide ([5-10]%) and Weetabix ([5-10]%). Finally, considering a potential separate market for private label muesli, the parties would hold a combined

5 Source: Parties' estimates, broadly confirmed by the market investigation. Market shares are in volume since the volume-based approach is in line with the way RTEC producers' management teams routinely assess their position and other suppliers' on the market. The most important competitive factor in the private label RTEC industry is the physical capacity and know-how to manufacture a particular volume of product, which is clearly independent of the unit price of the said product.

6 CPW (Cereals Partners Worldwide) is a joint-venture between General Mills and Nestlé.

market share of only [10-20]% in the EEA and it would be below [10-20]% at the national level[7]. Hence in the following muesli will be not be discussed more in detail.

24. If a distinction was made according to different target groups (adults, children and health), the combined market share of the parties would be as follows: [25-35]% in the adults segment (Dailycer: [5-10]%, DVG: [20-30]%), [35-45]% in the children segment (Dailycer: [15-25]%, DVG: [15-25]%) and [15-25]% in the health segment (Dailycer: [5-15]%, DVG: [5-10]%).

25. Despite these market shares in some segments, it appears that the transaction has rather limited competitive impact at the EEA level. First, there is a clear difference between Dailycer and DVG in terms of geographic focus: on a national basis, around [80-90]% of DVG's RTEC sales volume is to customers in Germany where Dailycer is hardly active. Similarly around [75-85]% of Dailycer's RTEC sales is to customers in France, Spain and the UK where DVG' sales are limited (Spain) or negligible (France, UK). The market investigation confirmed that even if the parties have comparable product range, product quality and capacities, they have been historically operating in different countries[8].

26. As a result, the parties had few common customers in the EEA in the last three years. There are six retailers supplied by both Dailycer and DVG during the period 2004-2006, namely […],[…],[…],[…],[…] and […]. However, as will be explained below, when the parties supply the same retailers, they do so in different countries.

27. Retailers questioned during the market investigation indicated that they generally conclude contracts with RTEC producers on the basis of formal tenders (normally opened to all RTEC suppliers) or informal request for offers where a limited number of producers are invited to participate, followed by a selection procedure. The available data on procurement show that the parties rarely compete against each other in these tenders. According to information provided by the notifying parties, out of 66 tenders in which one of the parties submitted bids during the period 2004-2006, the other party participated in eight of them.

28. Respondents to the market investigation do not view Dailycer and DVG as close competitors in the context of these tenders[9]. They indicated that besides the fact that they are not active in the same countries, their strategic objectives are different: Through its relationship with discounters in Germany and especially […], DVG is focused on large volumes in order to achieve a leading position in its home market (Germany). On the other hand, due to the demand of its main customers ([…],[…],[…],[…]), Dailycer provides a broader product range which is comparable to branded products suppliers' offering.

29. As explained above there are indications that markets for private labels RTEC may be national. The Commission has therefore also analyzed the market position of

7 [0-5]% in Portugal and [5-10]% in Spain, which are the two countries where the parties' activities overlap.

8 Answer to Question 34 in questionnaire sent by the Commission to competitors on 02.10.2007.

9 Answer to question 28 in questionnaire sent by the Commission to customers on 02.10.2007.

the parties at national level. In the following only national markets where the combined market shares are more than 15% with an overlap above 1% will be discussed.

National level: Belgium

30. The combined market share of the parties in volume for all private label RTEC (including traditional muesli) would be [40-50]% (Dailycer: [15-25]%, DVG: [20-30]%) for a market size of 7,992 tons/ 23,389 thousand EUR in 2006. This share would be higher ([45-55]%) if muesli is excluded from the market as well as on some specific segments (adults: [50-60]%, children: [45-55]%). Their main competitors would be Nordgetreide ([10-20]% without muesli), Hahne ([5-10]%) and Brüggen ([5-10]%). However, given that the delimitation between the different target groups are not based on commonly acknowledged industry standards and customers might tend to switch among the products addressed to different target groups, these data might overstate the parties' market position.

31. More importantly, according to the data submitted by the parties they have not participated in the same tenders.[10] Indeed, parties have no common customers in Belgium. In fact, […] is the sole customer of DVG in Belgium[11], whereas Dailycer supplies […],[…],[…],[…] and […][12]. Following the merger these customers will have the possibility to switch to competitors active in the Belgian market (Brüggen, Mulder, Nordgetreide, Hahne, Cedar, Quaker). Indeed, with the exception of one retailer, Belgian customers did not express concerns as regards the competitive impact of the transaction.

National level: Italy

32. Given the strong brand orientation, the RTEC private label market in Italy is in its infancy and accounts for only 4,766 tons in 2006. With or without muesli, the market share of the new entity would be [40-50]% (Dailycer: [30-40]%, DVG: [5-10]%). The parties combined market share in the children segment would be [50-60]% and in the health segment [60-70]%. Competitors include mainly local players, such as Lameri ([15-25]%) and Molino Nicoli ([15-25]%).

33. As in Belgium, tender data submitted by the notifying parties do not show that the companies participated in the same tenders. Indeed, Dailycer and DVG do not supply the same customers in the country. Retailers purchasing from Dailycer are […],[…],[…],[…] and […] whereas DVG supplies only […] and […]. Following the transaction retailers in Italy would have a number of alternative suppliers such as Lameri, Molino Nicoli, Kentaur, Hahne, Cedar Group, Brüggen. Indeed, Italian customers did not voice concerns on the competitive impact of the transaction.

National level: the Netherlands

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10 Form CO, paragraph 167, 168 and Annex 19 a) and b). See also answer from the notifying parties of 19 October 2007 to Article 11 letter of the Commission.

11 Dailycer supplied also a very small amount of RTEC to […] in 2006 ([below 10] tons).

12 Dailycer supplied also a very small amount of RTEC to […] in 2006 ([below 10] tons).

34. The parties' activities in the Netherlands overlap only to a notable extent with regard to the health segment, where the new entity would hold a market share of [15-25]% (Dailycer: [0-5]%; DVG: [10-20]%). The market leader is Brüggen with a [30-40]% share (all RTEC excluding muesli) and the parties would face competition from Mulder ([10-20]%) and Nordgetreide ([10-20]%). Hence the merger does not raise serious doubts as to the compatibility with the common market in the Dutch market for RTEC private label products.

National level: Portugal

35. The parties activities in Portugal overlap only to a notable extent with regard to the adult segment where the new entity would hold a market share of [15-25]% (Dailycer: [5-10]%; DVG: [10-20]%). The market leader is local player, Nacional with a [20-30]% share (all RTEC excluding muesli) and its main competitors are Cedar group ([5-15]%) and Brüggen ([5-10]%). Also a number of smaller competitors are present, such as Nordgetreide, Hahne and Weetabix. In Portugal, DVG supplies […] and […], which are not ([…]) or no longer ([…]) customers of Dailycer. Consequently the transaction does not raise serious doubts as to the compatibility with the common market on the Portuguese RTEC private label market.

National level: Spain

36. The combined market share of the parties in volume for all private label RTEC (including traditional muesli) would be [50-60]% for a market size of 22,440 tons in 2006 and [55-65]% if muesli is excluded. These market shares are of the same range on the basis of the segments identified above (adults, children, and health). However, the increment caused by the transaction is rather small ([0-5]%) since DVG has a limited activity in Spain. Main competitors are Brüggen ([10-20]% without muesli), Hahne ([5-15]%) and Cedar group ([5-15]%). Further, smaller competitors are also present, such as Nordgetreide and Kentaur.

37. Also for Spain, the set of customers that both parties supply with private label RTEC products is distinct. DVG's sales are exclusively to […] and […], to which Dailycer does not sell. Dailycer customers are […],[…],[…],[…] and […]. Considering also that the parties did not participate in the same tenders in Spain, the merger would not lead to any change for these customers. Indeed, with exception of one customer, retailers did not express any concerns as regards the impact of the merger in Spain.

38. In the light of the above, the transaction does not raise serious doubts as to the compatibility with the common market on the RTEC private label market, either at EEA and or national levels.

B. MARKETS FOR PRIVATE LABEL CEREAL BARS

39. Both parties supply private label cereal bars to retailers. As regard these products, branded products still account for a considerable share of total sales and private label bars are still a novelty. As a result, the parties have not been in a position to estimate market shares of their competitors. Nevertheless, the market investigation highlighted that RTEC producers are also active in the cereal bars segment and that retailers include generally cereal bars in their tenders for RTEC.

40. At EEA level, the parties' combined market share would not exceed [5-10]%[13] and face competitors such as Hero AG, Mc Vities, Jordans Weetabix, Brüggen, Hahne, Nordgetreide etc. At national level, the only affected markets as regards private label cereal bars are Spain and Portugal. Their combined market share in volume would be [20-30]% in Portugal and [30-40]% in Spain, albeit with a small overlap ([0-5]%). Given the number of RTEC cereal bar suppliers active in these countries and the fact that the parties supply different customers in Spain and Portugal, the transaction does not raise serious doubts as to the compatibility with the common market on any of the private label cereal bars markets.

VI. CONCLUSION

41. Consequently, 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 (EC) No 139/2004.

For the Commission
signed
Günter VERHEUGEN
Vice president of the Commission

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13 Parties best estimates, Form CO paragraph 294, p. 100.