

*Case No IV/M.556 -
Zeneca / Vanderhave*

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 09/04/1996

*Also available in the CELEX database
Document No 396M0556*



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 9.4.1996

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sirs,

**Subject : Case No IV/M.556 - ZENECA /VANDERHAVE
Notification of 1 March 1996 pursuant to Article 4 of Council
Regulation No. 4064/89**

1. On 1 March 1996 the Commission received a notification of an operation whereby Zeneca Limited and Cooperative Suiker Unie U.A. plan to establish a joint venture, to be named Zeneca VanderHave BV (Newco), in which they will merge their respective seeds businesses. This includes the seeds businesses of Zeneca Limited and the whole of Koninklijke VanderHave Groep BV (VDH), a subsidiary of Suiker Unie.
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of application of Council Regulation No. 4064/89 and does not raise serious doubts as to its compatibility with the common market and the functioning of the EEA Agreement.

I. THE PARTIES

3. Zeneca Limited (Zeneca), a wholly-owned subsidiary of Zeneca Group PLC, has three main businesses: agrochemicals and seeds; specialities; and pharmaceuticals. Through its agrochemicals and seeds activities it carries on the business of developing, manufacturing and marketing herbicides, insecticides and fungicides, and of breeding, producing, processing and marketing seeds and plant material for agricultural and horticultural purposes.
4. Cooperative Suiker Unie U.A. (Suiker Unie) owns four businesses each of which functions as a separate unit: sugar; seeds; fruit and vegetables; and spices. Through its subsidiary, VDH, it is involved in the same range of seeds activities as Zeneca, specifically, breeding, producing, processing and marketing seeds and plant material.

II. CONCENTRATION

5. Newco is to be established as a 50/50 joint venture, with the rights of Zeneca and Suiker Unie to participate in the share capital, voting rights and profits of Newco being shared equally. The principle of equality between the parties is maintained in the composition of the Supervisory Board and the Management Board. The right to appoint the Chairman will rotate, and all members will have an equal number of votes with decisions being taken by a simple majority, subject to a quorum of a minimum and equal number of members of each party. A casting vote is offered to the President of the Management Board, but such a casting vote will not be made without prior consultation with the Supervisory Board, which will ultimately decide.
6. Newco will perform, on a lasting basis, all the functions of an autonomous economic entity. The parents will transfer to Newco the assets and intellectual property rights necessary to carry on its operations; further, Newco will be responsible for its own ongoing financing. Although the possibility of secondment from Zeneca and Suiker Unie exists, the joint venture will employ its own staff.
7. Newco will take over the entire seeds businesses of both parties. Zeneca will not keep any substantial vertical link with Newco; however, it is retaining Zeneca Plant Science (ZPS), which is Zeneca's food biotechnology business. ZPS does not breed or produce seed but co-operates with seed companies, which provide the germplasm (genetic material) for its genetic modifications. ZPS seeks to exploit the downstream value added from genetically-modified crops. Article [...] ⁽¹⁾. This provision in no way affects the fully-functional autonomous role of Newco in relation to the business transferred to it as a result of the transaction.
8. Suiker Unie operates downstream of Newco in the sugar business, and is expected to continue being an important customer in The Netherlands. However, this relationship is not considered materially important (accounting for less than 4% of Newco's sales) for the overall joint venture operations. It presently operates on an arm's length basis vis-à-vis the seed business which is the subject of the concentration.
9. Zeneca and Newco intend to establish a technical cooperation committee with the aim of exchanging technical information, pursuant to Article 9 of Newco's Intellectual Property Rights Agreement. The establishment of this committee is not a vehicle for cooperation between the parents of Newco, as only Zeneca (and not Suiker Unie) will sit on the committee. Thus, no coordination of the competitive behaviour between Zeneca and Suiker Unie will result from the operation. The operation is therefore a concentration within the meaning of Article 3 of the Merger Regulation.

⁽¹⁾ Deleted business secret.

III. COMMUNITY DIMENSION

10. The undertakings concerned have a combined aggregate worldwide turnover in excess of 5,000 million ECU (Zeneca 5,773.9 million ECU, Suiker Unie 925.6 million ECU). Both Zeneca and Suiker Unie have a Community-wide turnover in excess of 250 million ECU, but do not achieve more than two-thirds of their aggregate Community turnover within one and the same Member State. The notified operation therefore has a Community dimension.

IV. COMPATIBILITY WITH THE COMMON MARKET

Relevant product markets

11. The joint venture will be active in several seeds businesses: sugar beet, maize, wheat, barley, sunflower, oilseed rape, and grasses, each of which constitute separate relevant product markets. It appears that the operation will only have an appreciable impact on sugar beet seeds and a relatively small impact on maize seeds. No material product overlaps exist between the parties in other seeds.
12. The seed industry can be described as a two-stage industry: breeding and commercial production of seeds. The first stage comprises the breeding and bio-technology programmes leading to the development of seed varieties that are produced as "parent seeds." Breeders attempt to develop new varieties with desirable characteristics -- low production cost, high yield, low impurities, and resistance to disease. Breeding activities are highly specialised and the minimum efficient scale (MES) is large relative to total demand.
13. The second stage comprises production of commercial quantities of the seed, including cleaning and processing, chemical treatment and pelleting, marketing and distribution. These activities are less specialised and can be successfully carried out on a smaller scale by producer firms under licence agreements or contracts with breeders. In some instances, parent seed is licensed by breeders to other seed companies which may reproduce the original seed or produce their own hybrids. There is a considerable degree of vertical integration by all seed breeders - including Zeneca and VDH - who are both also active as producers. In addition, some sugar refiners have their own production facilities. Thus, seed production is carried on by various categories of producers -- breeders; stand-alone producers; and, in the case of sugar beet seed, sugar refiners.

Relevant geographic market

14. Prices and supply conditions of both sugar beet seed and maize seed to final consumers differ in various Member States. Commercial seed is, to a substantial degree, customised (eg, disease resistance, chemical treatments, size of seeds, etc.) to suit the conditions of each country or regional area. In the case of sugar beet seed, the seeds chosen are those designed to meet the specifications of the national refiners who effectively guide farmers in their choice of seed variety. Furthermore, pricing reflects the applicable terms of sale -- the payment terms under which seed is sold and the extent to which customers may return unused seed -- both of which vary from country to country.
15. In addition, the ministries of agriculture in the respective Member States conduct official trials according to EU regulations to assure quality control. Before seeds can be sold, they must pass two series of tests:

- (i) DUS: distinctness, uniformity and stability; and
- (ii) VCU: value for cultivation and use.

The statistical results of these trials are made available to national industry associations which will (on behalf of farmers) carry out further trials from which they produce "Recommended Lists" indicating preferred varieties based on their performance characteristics. Sugar refiners and growers' associations (for both sugar beets and maize) in virtually all Member States rely on these Recommended Lists. As a result, customers normally buy seeds that are adapted to local soil and climatic conditions from producers operating in their own Member State.

16. Thus, there are indicators that the relevant geographic market for sugar beet seed and maize seed production could be viewed as national. However, for the purposes of assessment of the present case it is not necessary to provide a definitive delimitation of the relevant geographic market since, on the basis of the assessment set out below, a dominant position would not be created or reinforced even under the narrowest geographic market definition.

Assessment

Sugar Beet Seeds

17. In addition to the newly created joint venture, there are four other major European-based suppliers of sugar beet seeds. Together these five firms are estimated to supply approximately 91% of the EEA sugar beet seed market:

	<u>Units</u> *	<u>Share</u>
Hilleshog	[...] ⁽¹⁾	[...] ⁽²⁾
KWS	[...] ⁽¹⁾	[...] ⁽³⁾
S&D	[...] ⁽¹⁾	[...] ⁽³⁾
Zeneca+VDH	[...] ⁽¹⁾	[...] ⁽³⁾
Danisco	[...] ⁽¹⁾	[...] ⁽³⁾
Others combined	[...] ⁽¹⁾	9.2%

* A unit is 100,000 seeds.

18. In addition to the fact that there are six (going to five) firms listed above, there are at least two significant commercial links among these firms. [...] ⁽¹⁾ As a result, the creation of the joint venture would leave essentially three major entities funding approximately 90% of sugar beet seed R&D programmes in Europe.

⁽¹⁾ Deleted business secret

⁽²⁾ Over 25%

⁽³⁾ Less than 25%

19. If we amalgamate the market shares of [...] ⁽¹⁾ and [...] ⁽¹⁾ with their respective partners in these association arrangements, the estimates of overall EEA market shares would be:

	<u>Units</u>	<u>Share</u>
Hilleshög plus [...] ⁽¹⁾	[...] ⁽¹⁾	[...] ⁽²⁾
Zeneca+VDH plus [...] ⁽¹⁾	[...] ⁽¹⁾	[...] ⁽³⁾
KWS	[...] ⁽¹⁾	[...] ⁽⁴⁾
Others combined	[...] ⁽¹⁾	9.2%

20. Consequently, on a European scale, the proposed operation would combine the two firms ranking third and fourth in the industry and create a new number two firm.

However, current market shares in this business should be considered as only one indicator of market power. It appears that market shares for any given crop seed are quite volatile within a medium-term time frame (three to five years). New varieties can spring up to account for large shares of sales in a relatively short period of time. Firms compete through their breeding programmes to develop a variety that will be the sole choice of a set of farmers until another breeder develops a better variety. Brand loyalty does not appear to be important in this industry. While the price of the seed represents less than 5% of, for example, the sugar beet farmer's cost, the quality of that seed is absolutely critical to the farmer's crop and his final return.

21. To a certain extent, market power derives from the size of a firm's breeding and biotechnology programme. This in turn is a direct function of the total revenues accruing to the firm from sales all over the world. The parties estimate the combined breeding programme of Hilleshög (a subsidiary of Sandoz) and [...] ⁽²⁾ generates [...] ⁽⁵⁾ of world sales of sugar beet seed, while KWS accounts for [...] ⁽⁶⁾. Thus, the parties argue that in the sugar beet seed market, both Hilleshög and KWS have stronger R&D programmes than the new entity.
22. There appears to be a degree of countervailing power on the part of sugar refiners and growers' associations. In most Member States, the degree of concentration among sugar refiners is very high, with a small number of refiners accounting for virtually all seed purchases in some countries. For example, the parties state that in Austria, Denmark, Sweden, and the United Kingdom, there is in each case a single national sugar refiner that accounts for 100% of seed purchases.

⁽¹⁾ Deleted business secret

⁽²⁾ Over 35%

⁽³⁾ Over 25%

⁽⁴⁾ Over 15%

⁽⁵⁾ Over 40%

⁽⁶⁾ Over 30%

23. It appears that sugar beet is grown on an allocated quota basis in which refiners, in effect, appoint farmers to grow sugar beets for their needs. When allocating a quota, the refiner may dictate the specific crop to be planted, while in other cases farmers may choose which seed variety to use from the Recommended List. Sugar refiners are often large companies, sourcing from several suppliers at the same time, and they thus exercise a considerable influence over the industry.
24. For the above reasons it is unlikely that the operation will create or strengthen any dominant position in the sugar beet seed market in a European-wide context. Given the characteristics and complexity of the product and the structure of the market, it is also likely that the risk of oligopolistic dominance can be ruled out.
25. If market shares are examined at the national level, the affected markets under assessment would be: Austria [...] ⁽¹⁾, Belgium [...] ⁽²⁾, Finland [...] ⁽²⁾, France [...] ⁽¹⁾, Germany [...] ⁽¹⁾, Italy [...] ⁽¹⁾, The Netherlands [...] ⁽¹⁾, and Spain [...] ⁽¹⁾. However, market shares at the Member State level do not give a fully accurate picture of the competitive situation in the market, because, as noted earlier, shares may fluctuate materially from year to year (due to a low degree of brand loyalty). If any breeder were to become the sole supplier of a niche variety, or a geographical area (such as a country), and tried to exploit its position by raising prices, the other breeders would observe a profitable opportunity and would direct efforts towards developing the next generation of seed to undercut the market. This phenomenon appears to have been borne out by past industry behaviour.
26. Thus, the parties' combined high market shares in Finland and Belgium should be considered in the context of the above discussion. While the parties' post-merger market share in Finland is high, it is a result of VDH's prior strong position there, with a very small increment (approximately 2%) being added by Zeneca's presence. In Belgium, the experience of the parties is an example of the volatility of market shares in seed markets. The combined market shares of the parties in Belgium have dropped from [...] ⁽²⁾ in 1992 to [...] ⁽²⁾ in 1994, as a result of the introduction of improved varieties by competitors. Finally, sugar refiners in each of the above-noted Member States were surveyed and none expressed any concerns with the operation under assessment. Thus, it may be concluded that the operation will not create or reinforce any dominant position at Member State level.

⁽¹⁾ Between 25% and 50%

⁽²⁾ More than 50%

Maize Seeds

27. In addition to Newco, there are seven other major European-based suppliers of maize seed. On a European scale, the proposed joint venture represents a concentration of two firms ranked eighth and ninth in the industry accounting for a total of [...] ⁽²⁾ of the European supply of maize seed. The parties have a combined market share of over 15% at Member State level only in Belgium [...] ⁽¹⁾. In addition, Newco will face competition in Belgium from other strong players, such as Pioneer [...] ⁽²⁾, Limagrain [...] ⁽²⁾, Pau/Rustica [...] ⁽²⁾, KWS [...] ⁽²⁾, and Ciba-Geigy [...] ⁽²⁾. Thus, the operation will not create or strengthen a dominant position either at the European or national level for maize seed.

IV. ANCILLARY RESTRAINTS

28. Article 2.1 of the Non-compete Agreement, pursuant to Article 10 of the Foundation Agreement, contains standard covenants on the part of the parties not to compete with Newco in relation to any commercial breeding programme in any crop or to produce, sell or license seed or propagating material; not to solicit or entice away from Newco any employee, officer or manager; and not to do or say anything harmful to the reputation of Newco. These provisions reflect the lasting withdrawal of the parents from the market assigned to Newco and may be considered as directly related and necessary to the implementation of the concentration.
29. As discussed earlier at paragraph 7, Article 2.3 of the Non-compete Agreement deals with a commitment of co-operation between Newco and Zeneca. The Commission considers that these provisions are not directly related or necessary to the implementation of the concentration, and accordingly they are not covered by this decision.

V. CONCLUSION

30. In light of the above assessment, it is concluded that the proposed concentration would not create or strengthen a dominant position as a result of which competition would be significantly impeded in the common market or in a substantial part of it.
31. 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 functioning of the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation No 4064/89.

For the Commission,

⁽¹⁾ Between 25% and 50%

⁽²⁾ Deleted business secret