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***Case No COMP/M.5846 -  
SHELL/ COSAN/ JV***

Only the English text is available and authentic.

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

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Article 6(1)(b) NON-OPPOSITION  
Date: 03/01/2011

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EUROPEAN COMMISSION

Brussels, 03/01/2011

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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 Where possible the information omitted has been replaced by ranges of figures or a general description.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.5846 - SHELL/ COSAN/ JV  
Notification of 18 November 2010 pursuant to Article 4 of Council  
Regulation No 139/2004<sup>1</sup>**

1. On 18 November 2010, the European Commission received a notification of a proposed concentration by which the undertakings Shell Brazil Holding B.V. belonging to the Shell group ("Shell", UK) and Cosan S.A. Indústria e Comércio belonging to the Cosan group ("Cosan", Brazil) acquire joint control of ([Name of the joint venture], Brazil) by way of purchase of shares in this newly created company constituting a joint venture, "the proposed transaction".

**I. THE PARTIES**

2. Shell is a global group of energy and petrochemical companies. The parent entity, Royal Dutch Shell plc, is incorporated in England and Wales and has its headquarters in the Hague. Shell companies are active in oil and gas exploration and production; production and marketing of liquefied natural gas and gas to liquids; manufacturing, marketing and shipping of oil products and chemicals; and renewable energy projects.

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<sup>1</sup> OJ L 24, 29.1.2004, p. 1 ("the Merger Regulation"). With effect from 1 December 2009, the Treaty on the Functioning of the European Union ("TFEU") has introduced certain changes, such as the replacement of "Community" by "Union" and "common market" by "internal market". The terminology of the TFEU will be used throughout this decision.

3. Cosan is primarily active in Brazil in the manufacturing and trading of sugar, ethanol and co-generation of electricity from sugarcane, as well as fuels distribution, the production and distribution of lubricants in Brazil, sugar transportation and real property holdings in Brazil.
4. [Name of the joint venture] (also referred to as the "JV") is intended to be active in the production, sale and trading of sugar (and sugar by-products) and bio-ethanol (and bio-ethanol by-products) in Brazil and worldwide; the further development (and licensing) of certain bio-ethanol technologies; the production and sale of co-generation power at [Name of the joint venture]'s sugar and bio-ethanol facilities; and the supply, distribution, commercialisation and sale of transportation fuels (including as an agent for the sale of retail and aviation lubricants) in Brazil.

## **II. THE OPERATION AND THE CONCENTRATION.**

5. The proposed transaction consists in the creation of a joint venture between Shell and Cosan<sup>2</sup>. The governance of [Name of the joint venture] will be shared on a 50:50 basis between Shell and Cosan. Each of them will hold veto rights with respect to the budget, business plan and appointment of senior management of [Name of the joint venture]. As a consequence the parties will ultimately have joint control over [Name of the joint venture].
6. The joint venture will be fully functional in nature. It will have its own management as well as its own assets and sufficient financial resources in order to independently operate on the market. The joint venture will source the majority of its inputs from third parties and achieve the majority of its turnover with third parties. Commercial relations with its parents will be on an arm's length basis<sup>3</sup>.
7. It follows from the foregoing that the operation consists in a concentration within the meaning of Article 3(4) of the Merger Regulation.

## **III. EU DIMENSION**

8. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million<sup>4</sup>. Each of them has an EU-wide turnover in excess of EUR 250 million, but they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The notified operation therefore has an EU dimension.

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<sup>2</sup> Under the terms of the Framework Agreement, Cosan will contribute certain existing Brazilian assets to [Name of the joint venture] while Shell will contribute a total of approximately EUR [...] in cash as well as its shareholdings in Iogen and Codexis. Shell and Cosan will have equal economic interests in [Name of the joint venture].

<sup>3</sup> The trading companies of the Shell Group will have the right of "first look", "last look", to export any volumes of ethanol produced by [Name of the joint venture] that [Name of the joint venture] will offer for sale outside Brazil, as well as sell ethanol to [Name of the joint venture] for import into Brazil to meet [Name of the joint venture]'s domestic requirements. However, the parties expect the latter to be [...] in the early years and the former to be less than [5-10]% of the total ethanol sales of [Name of the joint venture] in the early years and unlikely to grow to more than [20-30]% in the foreseeable future.

<sup>4</sup> Turnover calculated in accordance with Article 5(1) of the Merger Regulation.

#### IV. RELEVANT MARKET DEFINITION

9. The parties' activities overlap horizontally only to a limited degree with respect to the market for production, supply and trading of bio-ethanol. The transaction, however, does not give rise to any horizontally affected markets. The transaction only gives rise to vertically affected markets due to a vertical relationship between [Name of the joint venture]'s supply of bio-ethanol and Shell's downstream markets for ex-refinery, non-retail, and retail sales of motor fuels.

##### *Production, supply and trading of bio-ethanol (upstream)*

10. Bio-ethanol is a form of ethanol that is produced from the fermentation of sugars derived from plants ("biomass")<sup>5</sup>, e.g., corn, wheat, sugarcane and sugar beet.<sup>6</sup> Bio-ethanol is essentially the same across producers but there are different grades to meet local legislation and specific customer requirements<sup>7</sup>. Bio-ethanol can be sub-divided into bio-ethanol for specific uses such as motor fuels, beverages and chemicals<sup>8</sup>. To be used as motor fuel, bio-ethanol is blended with base gasoline to create bio-gasoline.
11. Cosan produces and supplies bio-ethanol to be blended into fuels, as well as bio-ethanol used for beverages and chemicals. Shell produces and supplies an insignificant quantity of cellulosic bio-ethanol through its subsidiary Iogen Energy ("Iogen")<sup>9</sup>, which is exclusively used to be blended into Shell motor fuels. Following completion of the proposed transaction, both Cosan's bio-ethanol production and supply activities<sup>10</sup> and Shell's interest in Iogen will be transferred to [Name of the joint venture].
12. Cosan trades bio-ethanol on its own and through its subsidiary Vertical UK LLP ("Vertical")<sup>11</sup>. The bio-ethanol traded by Cosan/Vertical is used mainly for fuel-blending. Shell trades bio-ethanol exclusively for bio-fuel end uses.

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<sup>5</sup> Biomass is an organic material that can be used to produce energy – in the case, sugar and sugarcane used to produce bio-ethanol. Only Cosan is active in the production of sugar and sugarcane (and not any of the other biomass components) for its own production of bio-ethanol. Cosan only produces and supplies biomass in Brazil as the product cannot be stored or transported long distances. The market is also very fragmented. With regard to the technology for the production of bio-ethanol, it is at the development stage, and neither Shell nor Cosan are active in the licensing of any technologies with respect to the production of bio-ethanol.

<sup>6</sup> Cellulosic bio-ethanol is produced in a similar manner to bio-ethanol, but the feedstock is subject to enzymatic conversion before being fermented and distilled.

<sup>7</sup> As an example, European regulation requires higher purity (less water) than countries outside Europe and industrial customers have different needs than other customers.

<sup>8</sup> On a world-wide level, approximately 12.5% of the total bio-ethanol volumes relate to end uses other than bio-fuels (i.e., to chemicals and beverages). On an EEA-level, approximately 5% relate to beverages and approximately 20% to chemicals. Only Cosan (and not Shell) is active in the supply and trading of bio-ethanol for other uses than motor fuels. Cosan will contribute its entire bio-ethanol activities including with respect to chemicals and beverages to [Name of the joint venture]. The parties envisage that [Name of the joint venture] will attribute approximately [20-30]% of its production, supply and trading to non-fuel bio-ethanol.

<sup>9</sup> Iogen is a biotechnology firm specializing in cellulosic ethanol. Iogen built and operates a demonstration scale facility to convert biomass to cellulosic ethanol using enzyme technology. For more information: <http://www.io-gen.ca>.

<sup>10</sup> With the limited exception of the supply of bio-ethanol based on non-sugarcane.

<sup>11</sup> Vertical is Cosan's trading arm. More information on Vertical: <http://www.verticaluk.com>.

13. In previous cases, the Commission considered a distinct market for the production and supply of bio-ethanol<sup>12</sup>, which could be separate from the market for the production and supply of biobutanol<sup>13</sup>, another blending component for bio-fuels<sup>14</sup>. The parties submit that, in the absence of a specific precedent on the issue, the production and supply of bio-ethanol and the trading of bio-ethanol could be considered as constituting separate product markets.
14. With regard to the geographic scope of the market, the parties, following the Commission precedents, submit that the market for production, supply and trading of bio-ethanol is global or at least EEA-wide<sup>15</sup>.

***Ex-refinery, non-retail and retail sales of motor fuels (downstream)***

15. Shell is present in the downstream supply chain of motor fuels in the EEA<sup>16</sup>. Bio-ethanol as a component in motor fuels is supplied via a number of different possible channels including motor fuel retailers (*e.g.*, oil companies or supermarkets which own integrated blending facilities as well as service stations) and independent blenders/resellers.
16. The Commission has considered that the market for the sale of motor fuels – and by analogy for the sale of bio-fuels<sup>17</sup> – can be further sub-divided in a market for retail sales of motor fuels (fuels distributed by producers in their own integrated retail network) and a market for non-retail sales of motor fuels (fuels sold to non-integrated retailers, independent resellers or major industrial and commercial customers)<sup>18</sup>. With regard to non-retail sales of motor fuels, the Commission has previously found that these should be further divided into sales of gasoline, diesel, fuel oil and liquefied petroleum gas (LPG)<sup>19</sup>.
17. In previous decisions<sup>20</sup>, the Commission has also stated that motor fuels can be sold directly from the refinery to third parties in cargo (*ex-refinery sales*) and they can then be re-sold to retailers and other large industrial customers (*non-retail sales*) usually in quantities equivalent to one tanker lorry. The Commission found that *ex-refinery sales* and *non-retail sales* constitute two separate product markets<sup>21</sup>.
18. In line with Commission's precedents with respect to retail sales of motor fuels, the parties consider that retail sales of motor fuels constitute a single relevant product market and that there is no need for a further segmentation between gasoline, diesel and

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<sup>12</sup> See Case COMP/M.4798 - *BP/Associated British Foods/JV* of 30 August 2007.

<sup>13</sup> The distinction does not affect the outcome of the present case, since neither of the parties is active in the production, supply or trading of biobutanol. Therefore should the market be defined as that of the production, supply or trading of both bio-ethanol and biobutanol the market share of the parties would be even lower and no competition concerns would arise.

<sup>14</sup> See Case COMP/M.5550 - *BP/DuPont/JV* of 8 July 2009, recital 15.

<sup>15</sup> See Case COMP/M.4798 – *BP/Associated British Foods/JV* of 30 August 2007

<sup>16</sup> Cosan is only active in these markets in Brazil and there is no overlap between the parties' activities.

<sup>17</sup> See Case COMP/M.4798 - *BP/Associated British Foods/JV* of 30 August 2007.

<sup>18</sup> See Case COMP/M.1383 - *Exxon/Mobil* of 29 September 1999.

<sup>19</sup> See Case COMP/M. 1628 - *Totalfina/Elf* of 9 February 2000 and case COMP/M.1859 - *ENI/GALP* of 29 June 2000.

<sup>20</sup> See Case No COMP/M.4588 – *Petroplus/Coryton Refinery Business* (decision of 26/04/2007).

<sup>21</sup> See Case COMP/M.5005 – *GALP Energia / Exxonmobil Iberia* of 31 October 2008.

LPG<sup>22</sup>. However, in some countries, the Commission previously considered fuel retailing on motorways as a possible separate product market<sup>23</sup>.

19. The parties submit that the market for non-retail sales of motor fuels is at least EEA-wide due to the relatively low transportation costs and similarity of prices throughout the EEA<sup>24</sup>. The Commission has held in previous decisions that this market could be narrower than national in scope as resellers and end-users seek to economize on transportation costs<sup>25</sup>. In other decisions, however, the Commission took the view that the geographic market could be national<sup>26</sup> or even regional<sup>27</sup> but ultimately left this question open.
20. In accordance with the Commission's decisional practice, the parties submit that the geographic market for retail sales of fuels is national in scope due to the overlapping catchment areas of service stations<sup>28</sup>.
21. In any event, it is not necessary for the assessment of the present case to conclude on the exact scope of the relevant product and geographic markets concerned as the transaction does not raise competition concerns under any alternative market definition.

## V. COMPETITIVE ASSESSMENT

### *Horizontal overlaps in the upstream market(s)*

22. Given that Cosan has no relevant downstream activities within the EEA, the parties' activities overlap horizontally only with respect to the upstream markets for the production, supply and trading of bio-ethanol. The parties' modest market shares are set out below.

<b>Table 1: Production, Supply and Trading of (fuel) Bio-Ethanol – 2009</b>		
	<b>Worldwide</b>	<b>EEA</b>
	<b>Volume share %</b>	<b>Volume share %</b>
Cosan	[0-5]	[0-5]
Vertical	[0-5]	[0-5]
Shell	[5-10]	[0-5]
<b>Combined</b>	[10-20]	[5-10]
Others <sup>29</sup>	[80-90]	[90-100]

<sup>22</sup> See e.g., Case COMP/M.1383 - *Exxon/Mobil* of 29 September 1999 and case COMP/M.4798 - *BP/Associated British Foods/JV* of 30 August 2007.

<sup>23</sup> See Case COMP/M.1383 – *Exxon/Mobil* of 29 September 1999, recital 437.

<sup>24</sup> See e.g., Case COMP/M.4798 - *BP/Associated British Foods/JV* of 30 August 2007.

<sup>25</sup> See e.g., Case COMP/M.5637 - *Motor Oil (Hellas) Corinth Refineries / Shell Overseas Holdings* of 15 March 2010 and COMP/M.1383 - *Exxon/Mobil* of 29 September 1999, recitals 443, 445.

<sup>26</sup> See e.g., Case COMP/M.5005 – *Galp Energia/ExxonMobil Iberia* of 31 October 2008.

<sup>27</sup> See e.g., Case COMP/M.3291 – *Preem/ Skandinaviska Raffinaderi* of 1 December 2003, recitals 16 and 17.

<sup>28</sup> See e.g., Case COMP/M.1383 - *Exxon/Mobil* of 29 September 1999 and case COMP/M.4798 - *BP/Associated British Foods/JV* of 30 August 2007.

Total	100	100
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23. The market shares are even lower should the upstream market be defined as the production and supply of bio-ethanol only (i.e. excluding trading). Only a very small part of Cosan's production is supplied outside Brazil, amounting to less than [0-5]% of the world-wide supply and less than [0-5]% of the EEA supply. Shell's market share for the production and supply of bio-ethanol is minimal (less than [0-5]% of the total world-wide production and [0-5] in the EEA). As regards the potential upstream market for trading of bio-ethanol used for bio-fuels, the parties' activities are also minor, as Shell market share in the EEA is [0-5]% and world-wide [5-10]%, while market share of Cosan (including Vertical) does not reach [5-10]% in either EEA or world-wide.
24. It follows that horizontal overlaps between the parties' activities do not raise any competition concerns.

***Vertical relationship(s)***

25. With respect to the markets for ex-refinery and non-retail sales of motor fuels, Shell's market share does not exceed 25% on a world-wide level, the EEA-wide level or in any relevant EEA Member State. On the basis of national markets for overall retail sales of motor fuels, Shell's market share in terms of volume does not reach or exceed 25% in all countries where Shell is active with the exception of Norway ([20-30]%) and the Netherlands where Shell's volume share only slightly exceeds 25%.
26. The following table sets out the competitive structure of the retail motor fuels market in the Netherlands and Norway in 2009:

<b>Table 2: Retail Sales of Motor Fuels – 2009</b>		
<b>Company</b>	<b>Volume Share %</b>	
	<b>Norway</b>	<b>the Netherlands</b>
Shell	[20-30]	[20-30]
Statoil	[30-40]	-
BP	-	[10-20]
TOTAL	[0-5]	[10-20]
Esso	[20-30]	[10-20]
Texaco	-	[10-20]
Gulf (Gulf / Tinq / BIM / ANWB)	-	[5-10]
Kuwait (Tango / Q8)	-	[5-10]
Avia	-	[0-5]
Uno-X	[10-20]	-
Jet	[0-5]	-
Tamoil	-	[0-5]
Brand Oil	-	[0-5]
Hypermarkets	-	[0-5]

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<sup>29</sup> "Others" include: ADM, Cargill, Valero, BP and traders like Morgan Stanley, Vitol, ED+F Mann and Biourja.

Others	[0-5]	[5-10]
<i>Source: Datamonitor 2009 and 2010</i>		

27. With regard to the possible further sub-division of the market into retail sales of motor fuels through motorway stations / non-motorway stations, Shell has more than 25% volume shares on the motorway service station segment in Germany, Hungary, the Netherlands and the UK. The table below shows Shell's and its competitors' network shares for retail sales of motor fuels on motorway stations in these four countries, based on the number of motorway retail stations for the year 2009:

<b>Table 3: Retail Sales of Motor Fuels Through Motorway Stations – 2009</b>				
	<b>Germany</b>	<b>Hungary</b>	<b>The Netherlands</b>	<b>United Kingdom</b>
<b>Agip</b>	[0-5]%	[10-20]%	-	-
<b>Aral</b>	[20-30]%	-	-	-
<b>Avia</b>	[0-5]%	-	-	-
<b>BP</b>	-	-	[10-20]%	[40-50]%
<b>Esso</b>	[5-10]%	-	[10-20]%	[10-20]%
<b>Jet</b>	[5-10]%	[0-5]%	-	-
<b>MOL</b>	-	[20-30]%	-	-
<b>OMV</b>	[0-5]%	[20-30]%	-	-
<b>PKN Orlen</b>	[0-5]%	-	-	-
<b>Q8 (Kuwait)</b>	-	-	[5-10]%	-
<b>Shell</b>	[20-30]%	[30-40]%	[20-30]%	[30-40]%
<b>Statoil</b>	-	-	-	-
<b>Texaco</b>	-	-	[10-20]%	[0-5]%
<b>Gulf</b>	-	-	[0-5]%	-
<b>Tamoil</b>	[0-5]%	-	[0-5]%	-
<b>Total</b>	[5-10]%	-	[10-20]%	[0-5]%
<b>Uno-X</b>	-	-	-	-
<b>Others</b>	[10-20]%	-	[0-5]%	[0-5]%
<b>TOTAL</b>	100%	100%	100%	100%

28. As can be seen from the tables, Shell post-merger will continue to be constrained by large multinational players as well as by local competitors regardless of the proposed transaction.
29. Given the parties relatively low combined market share at the upstream market for the production, supply and trading of bio-ethanol and the existence of vigorous competition on the downstream markets, the proposed transaction does not raise any foreclosure concerns.

***Lack of coordinated and spill-over effects***

30. The only market where the activities of the parties overlap is the possible market for the production, supply and trading of bio-ethanol. Following the transaction, Cosan will no



longer be active on this potential market as its existing activities will be transferred to the JV. Shell will also contribute its shareholding in Iogen and Codexis<sup>30</sup> to the JV. In addition, Cosan and Shell have entered into non-compete obligations to the effect that neither party will compete with the JV in the areas in which the JV is operational for the lifetime of the JV. It follows that there is no scope for coordination of the JV's parent companies' competitive behaviour in the JV's product markets.

31. Shell will retain its downstream activities outside Brazil in relation to the retail and non-retail sale of motor fuels, including bio-fuels. However, Cosan, following completion of the proposed transaction, will no longer conduct any activities in any markets upstream or downstream of the JV within the EEA. Therefore, the creation of the JV will not give rise to the coordination of the parent companies' activities in any upstream, downstream or neighbouring markets.

## **VI. CONCLUSION**

32. For the above reasons, the European Commission has decided not to oppose the notified operation and to declare it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation.

*For the Commission*  
*(signed)*  
*Algirdas Šemeta*  
*Member of the Commission*

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<sup>30</sup> Codexis is a developer of clean bio-catalytic process technologies. Its business focuses on the conversion of renewable resources (including non-food biomass feedstocks) into transportation fuels and pharmaceuticals. In bio-fuels, Codexis partners with Shell in the development of advanced liquid transportation fuels. For more information: <http://www.codexis.com/>.