

EN

***Case No IV/M.058 -
BAXTER / NESTLE /
SALVIA***

Only the English text is available and authentic.

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

Article 6(1)(a) INAPPLICABILITY
Date: 06.02.1991

*Also available in the CELEX database
Document No 391M0058*

VERSION FOR THE PUBLIC

MERGER PROCEDURE - ARTICLE 6(1)a DECISION

Registered with advice of delivery

1. Notifying party
2. Notifying party

Dear Sirs,

Subject: Case n° IV/M058 - BAXTER/NESTLE/SALVIA

Your notification of 4 January 1991 pursuant to Article 4 of Council Regulation n° 4064/89

1. On 4 January 1991, Baxter International Inc., a U.S. pharmaceutical company, and Nestlé S.A., a Swiss company mainly active in the field of food products, notified the proposed creation of a joint venture in Germany called CLINTEC SALVIA GmbH & Co OHG ("Clintec Salvia") which will be equally owned by Baxter Deutschland GmbH and Nestlé Deutschland AG and which will take over the clinical nutrition assets of Baxter Deutschland GmbH and of Salvia-Werk GmbH. This latter company was recently acquired by a subsidiary of Baxter called Dialyse Technik GmbH. Until the end of 1990, Salvia-Werk GmbH belonged to Boehringer Mannheim. Salvia-Werk GmbH is a pharmaceutical company with three business activities: dialysis, clinical nutrition and respiratory business. The dialysis business will remain under the sole control of Baxter. The respiratory business will be retransferred to Boehringer Mannheim. The clinical nutrition assets will be transferred to Clintec Salvia.

The transfer to Clintec Salvia is made in the context of a broader agreement between Baxter and Nestlé concluded in 1989 by which these two parties decided to jointly develop, manufacture and market clinical nutrition products on an exclusive worldwide basis. The clinical nutrition market is composed of at least two submarkets, the enteral nutrition market i.e. food products taken orally or by tube, and the

parenteral nutrition market i.e. pharmaceutical preparations delivered directly into the blood. Until 1989, Nestlé was only active in the enteral nutrition field, while Baxter manufactured only parenteral nutrition products but also sold some enteral nutrition products bought from third parties.

2. The broader agreement of 1989 was notified to the Commission under Regulation N° 17 on 19 September 1989. That agreement concerns inter alia the creation of a joint venture between Nestlé and Baxter called N.B. International Technologies to which each parent has granted an exclusive licence in respect of all its non-U.S. technology and trademarks in the field of clinical nutrition. The licence agreements are for an initial period to 2010, but can be terminated before that date by consent between the contracting parties. The broader agreement further created a joint venture between Nestlé and Baxter called Clinical International Operations Ltd., which coordinates the activities of local joint ventures called Clintec. These joint ventures all operate under sublicences of N.B. International Technologies. At present, within the EEC three such local joint ventures are in operation, in the U.K., in Italy and in the Benelux. Though their bylaws include the development, manufacture and sale of clinical nutrition products, these joint ventures are mainly marketing joint ventures because the development and manufacture of the products concerned continues to be carried out to a large extent by Nestlé and Baxter on a sub-contract basis.
3. In Germany, where Baxter and Nestlé had only very limited activities ([deleted] in the parenteral market), the parties decided to penetrate that market through the acquisition of the clinical nutrition business of Salvia-Werk GmbH. This acquisition took place in several stages:
 - first, the acquisition from Boehringer Mannheim of 98,75% of Salvia-Werk GmbH by Dialyse Technik GmbH (Baxter) and of 1,25% by Nestlé Deutschland AG: this acquisition included two business activities not to be transferred to Clintec Salvia and did not meet the thresholds of the EEC Merger Regulation. The parties notified this first transaction to the Bundeskartellamt which cleared the transaction on 21.12.1990;
 - second, the creation of Clintec Salvia GmbH & Co OHG by two subsidiaries of Baxter, i.e. Dialyse Technik GmbH (without capital participation) and Salvia-Werk GmbH: this intra-group transaction was carried out in preparation for the transfer of the clinical nutrition assets of Salvia-Werk GmbH and Baxter Deutschland GmbH to Clintec Salvia and the sale of part of Baxter's interests in Clintec Salvia to Nestlé Deutschland AG;
 - third, the transfer of the clinical nutrition assets of Salvia-Werk GmbH and Baxter Deutschland GmbH to Clintec Salvia;
 - fourth, the sale of 50% of Baxter's interests in Clintec Salvia to Nestlé by a sale of the capital contribution held by Salvia-Werk GmbH in Clintec Salvia to Nestlé Deutschland AG: this last transaction transforms Clintec Salvia into a joint venture between Nestlé Deutschland AG and Baxter Deutschland GmbH.

COMMUNITY DIMENSION

4. The creation of the joint venture of Clintec Salvia through the sale of 50% of Baxter's interests in Clintec Salvia to Nestlé fulfills the three thresholds of Article 1(2) of the Merger Regulation. The aggregate worldwide turnover of Nestlé and Baxter in the last financial year was 33.400 MECU. Although Clintec Salvia itself does not have a turnover of 250 MECU, each parent has more than 250 MECU turnover within the Community. Neither Nestlé nor Baxter achieved more than two thirds of their Community-wide turnover within one and the same Member State. The proposed operation therefore has a Community dimension.

CONCENTRATION

5. After examination of the notification, the Commission has come to the conclusion that the notified operation is not a concentration within the meaning of Article 3(2) subparagraph 2 of Council Regulation n° 4064/89 (the Merger Regulation). It therefore does not fall within the scope of application of the Merger Regulation and thus remains subject to the competition rules of Articles 85 and 86 of the EEC Treaty.
6. The parties' agreement of 1989 to jointly develop, manufacture and market clinical nutrition products is a cooperative agreement which has not created a durable change in the structure of their undertakings and has not created a single economic entity between the parties in the field of clinical nutrition:
 - neither Nestlé nor Baxter has transferred its respective patents and know-how in the field of enteral and parenteral nutrition products to the joint ventures set up in 1989; they have granted an exclusive licence to these joint ventures for the manufacture and marketing of the products concerned; though this licence is granted for a long term period, the parties have not granted an irrevocable licence for the duration of the life of the patents involved but limited the licence rights to a fixed period which can be terminated by mutual agreement at any time;
 - Baxter and Nestlé continue, as sub-contractors, to manufacture most of the parenteral and enteral nutrition products sold by the 1989 joint ventures: the function of these joint ventures is mainly that of a common distribution agency; the 1989 joint ventures are not therefore "full function" joint ventures within the meaning of Article 3(2) subpara. 2 of the Merger Regulation;
 - Baxter and Nestlé also continue to carry out, on a sub-contract basis, most of the research and development in the field of clinical nutrition: the 1989 joint ventures are therefore largely dependent on their parents;
 - the 1989 joint ventures distribute their products under registered trademarks of Baxter and Nestlé; these trademarks are licensed to the joint ventures on an exclusive basis similar to the technology licences.

All these factors taken together indicate that the 1989 joint ventures set up by Baxter and Nestlé and notified to the

Commission under Regulation n° 17 did not bring about a concentration between these two parties in the field of clinical nutrition because the parents did not effect a complete and permanent withdrawal from the enteral and parenteral markets but have kept their joint ventures dependent on access to their research and development, technology, manufacture and trademarks. The parties also have the possibility of reverting at any time to the previous position. This applies in particular to Baxter, which retains the necessary distribution channels to hospitals and pharmacies for its other pharmaceutical products. These distribution channels can at any time be used for the distribution of clinical nutrition products.

7. As regards the German joint venture, Clintec Salvia, notified under the Merger Regulation, it is undoubtedly true that that joint venture will fulfill more than a mere sales function. Clintec Salvia is mainly the emanation of Salvia-Werk GmbH which was a full function undertaking before its acquisition by Baxter. It owns a manufacturing plant in Germany and possesses patents and know-how in the clinical nutrition field. Salvia-Werk GmbH also sells its products under its own trademarks.
8. The assets of the clinical nutrition business of Salvia-Werk GmbH were all transferred to Clintec Salvia i.e. the intellectual property rights, the trademarks, the manufacturing plant, warehousing facilities, the personnel and other logistics used by Salvia-Werk GmbH for its clinical nutrition business.

However, the parties have informed the Commission that:

"The intellectual property rights of Salvia in the clinical nutrition field will be transferred to Clintec Salvia and, thereafter, it is the intention of the parties to transfer the joint ownership of those rights to Baxter and Nestlé which will grant to Clintec an exclusive license under the terms of the license agreement notified in 1989."

This transfer of the intellectual property rights of Salvia-Werk GmbH to Baxter and Nestlé considerably reduces the autonomous status of Clintec Salvia and renders the German joint venture largely dependent on its parents as is the case with the 1989 joint ventures. Clintec Salvia can only continue to manufacture and sell for as long as its parents continue to grant it a licence. In the pharmaceutical field a company can only operate if it has access to technology and patents. The transfer back to Baxter and Nestlé, who are the controlling companies of Clintec Salvia, takes away the autonomous status which this joint venture could otherwise have enjoyed.

9. In addition, the notified operation is likely to give rise to coordination of competitive behaviour between Nestlé and Baxter on the one hand and Clintec Salvia on the other hand, a coordination which is inseparable from the creation of the joint venture itself:
 - Nestlé and Baxter remain active in the field of enteral and parenteral nutrition via their cooperative joint ventures notified in 1989;
 - through their participation in Clintec Salvia, Baxter and Nestlé will be in a position to coordinate the market

behaviour of their cooperative joint ventures of 1989 and Clintec Salvia without there being the need for any express agreements: this coordination could take the form of an allocation of product or geographic markets between these various joint ventures.

- the parents of Clintec Salvia, in particular Baxter, also remain active on the clinical nutrition market in countries where there is no Clintec nutrition entity owned by Nestlé and Baxter: this is still the case in most EEC countries. In such countries, the same risk of market allocation exists;
- 10 Nestlé and Baxter also remain active in market segments which are part of or at least closely related to the enteral or parenteral nutrition markets and which they have excluded from the field of activity of Clintec Salvia. The market segments concerned are:
- enteral nutrition products for infant feeding or nutritional supplements for pregnant or nursing mothers;
 - enteral or parenteral nutrition products delivered to private homes and services other than hospitals i.e. home care and alternate site services;
 - enteral products sold at retail or food service outlets.

These exclusions constitute in themselves an allocation of markets between the parents and Clintec Salvia. Before its acquisition by Baxter and its transfer to Clintec Salvia, Salvia-Werk GmbH was not limited in the scope of its activities in the enteral and parenteral nutrition field.

11. Even if the Commission considered the notified transaction as a joint acquisition of Salvia-Werk GmbH by Baxter and Nestlé, such a joint acquisition would only be concentrative if after the joint acquisition Nestlé had integrated the enteral assets of Salvia-Werk GmbH while Baxter had integrated the parenteral assets of that company. Instead of sharing among themselves the assets of Salvia-Werk GmbH, the parties have transferred all these assets to a jointly owned company without having concentrated their own respective businesses in the clinical nutrition field. In fact the acquisition of Salvia-Werk GmbH was transformed into a joint venture which extends the parties' cooperation of 1989 to the German market. The joint venture Clintec Salvia thus remains essentially of a cooperative nature forming part of a broader cooperative agreement notified in 1989.

*
* *
*

For the above reasons, the Commission has decided that the notified operation does not constitute a concentration within the meaning of Article 3(2) subparagraph 2 of the Merger Regulation and consequently does not fall within the scope of application of that Regulation. This decision is adopted in application of Article 6 para 1(a) of the Merger Regulation.

For the Commission,

**TEXTE RECONSTITUÉ ÉLECTRONIQUEMENT / ELECTRONICALLY RE-CREATED
TEXT / ELEKTRONISCH NACHGEBILDETER TEXT**