EN

Case No COMP/M.6454 - LIMAGRAIN / KWS / GENECTIVE JV

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REGULATION (EC) No 139/2004
MERGER PROCEDURE

Article 6(1)(b) NON-OPPOSITION
Date: 27/06/2013

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EUROPEAN COMMISSION

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

Brussels, 27.6.2013
C(2013) 4167

PUBLIC VERSION

MERGER PROCEDURE

To the notifying party:

Dear Sir/Madam,

Subject: **Case No COMP/ M.6454 - LIMAGRAIN/KWS/GENECTIVE JV**
Commission decision pursuant to Article 6(1)(b) of Council Regulation No 139/2004[1]

(1) On 23.05.2013, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which the undertakings Vilmorin & Cie SA ("VCO"), controlled by the Limagrain Group ("Limagrain"), and KWS SAAT AG ("KWS") acquire within the meaning of Article 3(1)(b) of the Merger Regulation joint control of Genective SA ("Genective" or "the JV") by way of purchase of shares.[2]

(2) Limagrain and KWS will be jointly referred to as "the Parties".

1. THE PARTIES

(3) Limagrain is mainly active in the agro-industrial business and is specialized in field seeds, vegetable seeds and cereal products. VCO is the Limagrain holding company for its Seed Division specialized in research, breeding, production and sale of seeds.

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1 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.

2 Publication in the Official Journal of the European Union No C 153, 31.05.2013, p.7

(4) KWS is specialized in research, breeding, production and sale of seeds for agricultural crops of the temperate climatic zones. KWS focuses its activities on sugar beet, maize, cereals, oil-and energy crops.

(5) Genective is active in the research and will be active in the marketing of transgenic traits to be used in the production of genetically modified ("GM") seeds. The developed transgenic traits will be protected by patents. The use of those traits will be licensed out to the Parties and to interested third parties. Genective's activities initially focus on maize, i.e. on "GM maize traits", to improve the plants' qualities in terms of herbicide tolerance, insect resistance and water use efficiency. In the future, the JV will also develop traits for other crop varieties.

(6) The Parties have set up a consortium open to third parties to contribute to the financing of the approval ("deregulation") of any developed transgenic traits.[3] At present, the Parties as well as the agricultural group Euralis and Bayer Crop Science, active in crop protection, seeds and traits, are members of the consortium.

(7) According to the Parties, the rationale for the transaction is to allow the Parties to conduct long-term and expensive research, which they are not able to carry out separately, to enter the GM traits licensing market in competition with Monsanto, Syngenta, Dow AgroSciences and DuPont-Pioneer, to diversify the sources for transgenic traits and to maintain independence.

2. THE CONCENTRATION

(8) Genective was incorporated by VCO as a wholly-owned subsidiary in 2009. KWS acquired a non-controlling stake of 24.9% in Genective pursuant to the terms of a Joint Venture Agreement signed between VCO and KWS on 23 May 2011.[4] On 25 October 2011, under the terms of that Agreement, KWS declared its binding commitment to acquire an additional 25.1% of the shares from VCO.

1. Joint control

(9) After the proposed transaction, KWS will hold 50% of the shares and voting rights in Genective while Limagrain will hold 40% of the shares and 50% of the voting rights. The remaining 10% of the shares without voting rights will be held by Euralis.

(10) Limagrain and KWS will hold equal voting rights in the JV and will have the right to appoint half of the board members of the JV. Among other things, the board will decide on the appointment of the senior management and on the approval of the budget and business plan, and none of the board members will have a casting vote.[5] The Parties will have the possibility of exercising decisive influence over the JV by

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3 The cost for the deregulation of the first three transgenic traits to be developed by the JV is estimated at EUR 65 million.

4 The Joint Venture Agreement was subsequently modified on 25 October 2011 and on 28 February 2012.

5 Part V and VII of the Joint Venture Agreement of 23 May 2011, modified on 25 October 2011.

rejecting proposed strategic decisions and will thus acquire joint control over the JV.[6]

2. Full-functionality

(11) The JV will have a management dedicated to its day-to-day operations and access to sufficient resources including finance, staff and assets to conduct its business activities on a lasting basis. The JV will have control over all aspects of the development of the transgenic traits and will own the intellectual property products it develops.

(12) The JV will have access to the market by licensing out the use of its transgenic traits to interested customers. Given that the licensing out does not generate any variable costs but supports the funding of the fixed costs, the JV will have incentives and is set up to license out its products to third parties. Responses by competitors in the market investigation confirmed that licensing in and out between trait developers is common in the industry. The JV will pursue its own business strategy and will be free to decide to which customers it will license out its products. It is thus geared to play an active role on the market and can be considered economically autonomous from an operational viewpoint.[7]

(13) The JV will thus perform on a lasting basis all the functions of an autonomous economic entity and constitutes a full-function joint venture.

3. EU DIMENSION

(14) The concentration does not have a Union dimension pursuant to Article 1 of the Merger Regulation. However, by way of a reasoned submission of 20 January 2012, the Parties informed the Commission that the concentration is capable of being reviewed under the national competition laws of at least three Member States, namely Bulgaria, France, Germany, The Netherlands, Poland and Romania. None of the Member States concerned expressed a disagreement with the case being referred to the Commission within the 15 working days period laid down by the Merger Regulation. The notified operation therefore is deemed to have a Community dimension pursuant to Article 4(5) of the Merger Regulation.

4. COMPETITIVE ASSESSMENT

(15) The JV will be active in the development and marketing of transgenic traits for maize and other crops. The transgenic traits developed by the JV and protected by patents are added on to ("introgressed into") germplasm of maize seeds derived from breeding activities. The breeding of seed varieties aims at developing new plants with desirable characteristics. The introgression of transgenic traits can be followed by further breeding activities to develop GM maize seeds which are protected by plant breeder rights in the same way as conventional seeds. Similar to conventional

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6 Commission Consolidated Jurisdictional Notice, OJ C95, 16.04.2008, p1, paragraphs 62–64.

7 Ibid, paragraphs 91–105.

maize seeds, GM maize seeds are then produced in commercial quantities and marketed to customers who generally pay a premium for GM seeds.

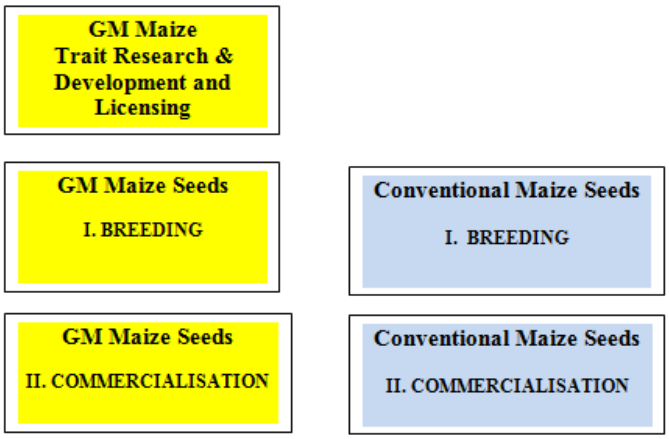

Figure 1 Illustration of the business activities in the value chain of GM and conventional maize seeds, Source: Form CO, page 33, adapted by the European Commission

1. Market definitions

(16) In previous decisions, the Commission has defined the breeding and commercialisation of each of the various kinds of seeds, including maize, as separate product markets since the seeds are not mutually substitutable.[8] Regarding maize seeds in particular, the Commission has found that the relevant product market is the market for maize seeds without further differentiations according to regional seed types or seed classes because of supply-side substitutability considerations.[9]

a. Development and marketing of GM maize traits

(17) The GM maize seeds industry is evolving in Europe and its future development is uncertain. Spain is currently the only EEA member state where GM maize seed is commercialized to a considerable extent.[10] The Parties report that the total surface area of cultivated maize in the EU amounted to 13.8 million hectares in 2010 while only 91,500 hectares or 0.66% related to genetically modified maize with 76,500 hectares located in Spain, 4,500 hectares in Portugal, and 4,000 hectares in the Czech Republic. However, the Parties expect the production of GM maize seeds to break through in other Member States by 2018/2019.

(18) Before a GM product is allowed onto the European market, it must go through a risk assessment by the European Food Safety Authority and obtain authorization by the European Commission in conjunction with the Member States. In addition, as is the case for conventional seed varieties, newly-bred varieties of GM seeds will be

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8 Case No IV/M.1512 - *DuPont / Pioneer Hi-Bred International*, paragraph 7; Case COMP/M.5675 - *Syngenta / Monsanto's sunflower seeds business*, paragraph 93.

9 Case No IV/M.1512 - *DuPont / Pioneer Hi-Bred International*, paragraph 9; the Commission reached a similar conclusion for sunflower seeds in case COMP/M.5675 - *Syngenta / Monsanto's sunflower seeds business*, paragraphs 94-98.

10 According to the Parties, GM maize cultivated in Germany, Portugal, Czech Republic, Slovakia and Romania is mainly exported for sale or planted for research and development purposes.

technically examined at the member state level and registered in the European Common catalogue of varieties of agricultural plant and vegetable species.

(19) Monsanto is currently the only company with a transgenic maize trait approved for cultivation in the EU, the "MON 810" trait, and thus the only licensor of transgenic maize traits currently being planted in the EU.

(20) The Commission has not yet defined the relevant markets for research, development and licensing of GM maize traits for introgression into GM maize seeds.

Relevant product market

(21) According to the Parties, the development and marketing of GM maize traits constitutes a separate product market from the downstream GM maize seed markets. They submit that the development of GM maize traits is a separate step leading to certain seed characteristics which are then used as an input in the breeding and development process. According to the Parties, developing a GM organism and in particular GM maize traits requires distinct know-how, research processes and material compared to conventional crop breeding. They also argue that the high investment necessary constitutes a barrier to entry and underlines that the development of GM maize forms a separate product market.

(22) Respondents in the market investigation overall confirmed that the development and licensing of GM maize seeds is a distinct technical activity from the breeding of maize seeds, as it involves different technical skills, investments, expertise, and regulatory review processes. There also appear to be specialized businesses which are active in the development and licensing of transgenic traits without being active in the breeding and commercialization of seeds. Moreover, the market investigation suggests that transgenic traits for maize seeds constitute a separate input product to the breeding of genetically modified maize seeds although respondents also found that the two activities are closely interrelated.

(23) It can be left open in this decision if the licensing of transgenic traits constitutes a separate product market upstream of the breeding of seeds or if the licensing of transgenic traits belongs to the same product market as the breeding of seeds. The proposed transaction does not lead to serious doubts as to its compatibility with the internal market under any alternative product market definition.

Relevant geographic market

(24) According to the Parties, GM maize traits are developed for general use at least at the EU level. Moreover, they submit that the commercial use of GM maize traits may be restricted due to political reasons by certain EU Member States, but that the introgression of GM maize traits is generally not limited to the EU because GM maize traits developed in Europe can be introgressed into all the maize grown worldwide.

(25) According to the market investigation, the licenses for transgenic traits are normally granted either at national, EU or global level. The market investigation suggests that the geographic scope of licenses may often reflect the scope of the licensee's

operations. Monsanto's licences, which are currently the only licenses granted in the EEA, generally already cover the whole of the EU.[11] There also appears to be an expectation among trait developers that licenses for any future deregulated transgenic traits will be granted on a wider than national basis in the EEA.

(26) The Commission thus concludes that there is evidence suggesting that the market for the licensing of GM maize traits is wider than national in scope. However, as no serious doubts arise under even the narrowest reasonable market definition, the geographic market definition can be left open in this decision.

b. Breeding and marketing of conventional and GM maize seeds

Relevant product markets

(27) In 2010, the Commission defined the breeding and the commercialization of seeds as two separate product markets for the conventional sunflower seed market because, among other things, (i) the breeding and commercialization activities fulfil different market demands, (ii) the relevant actors are different on the demand and the supply side, (iii) the activities are organised separately and (iv) the geographic focus of the activities is different.[12] However, in previous decisions concerning different conventional seed markets, the Commission considered that those two stages of the seed industry are included in one single relevant product market.[13]

(28) The Commission has not yet defined the relevant products markets for the breeding or commercialization of GM maize seeds.

(29) The Parties argue that the breeding of seeds should not be considered to constitute a separate product market because licensing of breeding results is generally limited. Furthermore, they consider that the GM maize seed market is different from the market of conventional maize seeds. GM maize seeds have to undergo a special approval process concerning e.g. environmental safety, feed and food safety which is much more costly than the registration process for conventional seeds. Furthermore, the use of GM maize seeds is significantly restricted in many parts of Europe. Accordingly, the Parties submit that from a farmer's perspective conventional maize seeds cannot be substituted by GM maize seeds.

(30) As GM maize seeds are currently only cultivated to a limited extent in the EEA and remain banned in a number of Member States, many respondents to the market investigation found that the two types of seeds are not substitutable at present. However, the results of the market investigation also tend to show that it is difficult to predict how the breeding and commercialization of conventional and GM maize seeds will interact in the future. Substitutability will depend to a large degree on the

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11 Note that the cultivation of GM crops is banned in a number of member states, and the licenses only enable sales when and where the traits are approved for sale or planting.

12 Case COMP/M.5675 - *Syngenta / Monsanto's sunflower seeds business*, paragraphs 76 - 89.

13 Case No COMP/M.3465 – *Syngenta CP /Advanta*, paragraph 12; See Case No. IV/M.556 - Zeneca/Vanderhave, paragraphs 12-13, Case No. IV/M.1497 - Novartis/Maïsadour, paragraph 7, and Case No. IV/M.1512 - *DuPont/Pioneer Hi-Bred International* Commission, paragraph 7.

future deregulation and overall regulatory environment for GM maize seeds in the EEA.

(31) However, as no serious doubts arise as to the proposed transaction's compatibility with the internal markets under the alternative market definitions, the product market definitions for the breeding and commercialization of conventional and GM maize seeds can be left open in this case.

Relevant geographic markets

(32) In 2010, the Commission concluded that the market for the breeding of conventional sunflower seeds is Union-wide in scope because, among other things, licenses are usually granted on an at least Union-wide basis, most of the customers are large seed companies active throughout the Union and breeders do not focus their activities on particular Member States but operate on a broader scale.[14] The Commission also noted that as a result of specific climatic conditions in the EU, the existing licensing patterns and a specific regulatory framework in the EU, the relevant product market was not larger than EU-wide in scope.

(33) As regards the commercialization of conventional seeds, the Commission has found that the relevant market for different types of seeds should be viewed as national.[15] The Commission has found with respect to sunflower seeds that, among other things, the conditions of sales differ significantly across Member States due to differences in product profiles and local distribution requirements, that national seed registration still play a role and that price levels differ across member states.[16]

(34) The Parties argue that the geographic scope for the breeding and commercialization of (GM) maize seeds is at least Union-wide in scope since seeds are grown for customers in several member states.

(35) The Commission has not found significant evidence in the market investigation to question its previous findings. In particular, the results of the market investigation generally confirmed that there are a number of factors pointing towards the definition of national markets for the commercialization of maize seeds in the EEA although market respondents also noted a tendency of internationalization.

(36) However, as no serious doubts arise under the alternative market definitions, the geographic market definitions for the breeding and commercialization of conventional and GM maize seeds can be left open in this decision.

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14 Case COMP/M.5675 - *Syngenta / Monsanto's sunflower seeds business*, paragraphs 111 - 118.

15 Case COMP/M.5675 - *Syngenta / Monsanto's sunflower seeds business*, paragraphs 120 - 131; see also Case No COMP/M.3465 – *Syngenta CP /Advanta*, paragraph 26, where the product market was still defined as including both breeding and commercialization activities; in cases No IV/M.1512 - *DuPont / Pioneer Hi-Bred International*, paragraph 10, Case No. IV/M.556 - *Zeneca/Vanderhave*, paragraph 16, the geographic market definition was left open.

16 Case COMP/M.5675 - *Syngenta / Monsanto's sunflower seeds business*, paragraphs 120 – 131.

2. Competitive assessment

a. Upstream market for the development and licensing of GM maize traits

(37) The JV will only start to be active on the upstream market for the licensing of GM maize traits and is expected to market its first products in 2018/2019. Outside of the JV, the Parties are not active in the development and licensing of GM maize traits.[17]

(38) The JV initially focuses its activities on genetically engineered herbicide tolerance, insect resistance and water use efficiency traits. According to the Parties, such traits cover mainly fields in which the main competitors of the Parties have already developed comparable traits which are commercialized in different countries outside of the EEA. The Parties submit that regarding insect resistance, customers currently have the choice between Monsanto, Dow AgroSciences/DuPont-Pioneer and Syngenta and that regarding herbicide tolerance, customers have the choice between Monsanto, Syngenta and Bayer CropScience.

(39) At the moment, Monsanto is the only competitor active in the EEA with one product because only its MON 810 trait has been authorised for cultivation by the European authorities. However, the Parties submit that Syngenta, Dow AgroSciences and Du-Pont Pioneer currently have products in the deregulation procedure. Websites quoted by the Parties list more than 60 GM maize traits currently in the deregulation procedure in the EU, mostly relating to herbicide and insect resistance.[18]

(40) The JV's success in the market is yet uncertain and will depend on its successful development of maize traits and subsequent successful deregulation. In the JV's business plan, the Parties assume that in Europe (including Eastern Europe) the GM Maize traits developed by the JV could reach a market share of up to [20-30]%, based on the downstream market shares of the companies taking part in the consortium. In those business plan calculations, the Parties assumed that there would be four providers of GM maize traits in the European market in the future, namely Monsanto, DuPont-Pioneer, Syngenta, and the JV.

(41) No substantiated competition concerns were raised in the market investigation as regards the upstream market for the development and licensing of GM maize traits.

(42) In the light of the fact that the JV will enter the upstream market to offer additional products, that one strong competitor is already active in the market in the EEA and that there is evidence to assume that other competitors will enter the market, the Commission concludes that no input foreclosure or other competition concerns arise from the proposed transaction with respect to the JV's activities on the market for the development and licensing of GM maize traits.[19]

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17 The Parties use licensed trait technology from third parties but have no own transgenic trait technology for maize yet.

18 See http://www.gmo-compass.org/eng/gmo/db/ and http://www.transgen.de/zulassung/gvo/ (both last retrieved on 17 June 2013).

19 This finding is without prejudice to the application of Article 101 of the TFEU in relation to the consortium to finance the JV's deregulation costs between the parties, their current consortium partners and possibly other market players in the future.

b. Downstream markets for the breeding and commercialization of conventional and GM maize seeds

(43) The Parties have separate activities in the breeding and commercialization of conventional and GM maize seeds to customers in Europe on the downstream markets.

(44) However, the Parties' activities in the breeding of maize seeds for the merchant market are limited (Limagrain: EUR […] annual turnover; KWS: EUR […] annual turnover). The Parties are conducting their breeding activities almost exclusively for internal use as 98% of their parental lines are used internally. The Parties only license out maize parental lines on specific request of another breeding company to add a parental line from a different genetic pool to its own breeding process. Furthermore, the licensing-out is most often done in the form of a cross-licensing swap of parental lines. Therefore, a licensing-out only occurs if both parties to the transaction have a sufficient interest in the respective other parental lines.

(45) In the light of the Parties' limited activities on the merchant market, the Commission finds that the proposed transaction will not have any significant effect on the market for the breeding of maize seeds in the EEA.

(46) As regards the market for the commercialization of maize seeds, the Parties' combined market share in the commercialization of all types of maize seeds at the EEA level was [30-40]% by volume (Limagrain: [10-20]%; KWS: [10-20]%) and [30-40]% by value (Limagrain: [10-20]%; KWS: [10-20]%) in 2012. The most important competitors were DuPont-Pioneer ([20-30]%), Monsanto ([10-20]%) and Syngenta ([5-10]%) while a number of smaller competitors together accounted for the remaining market share of [20-30]%.[20]

(47) The market shares were almost identical in the commercialization of only conventional maize seeds as the market for GM maize seeds in the EEA is very small. As regards national market shares, the Parties' combined market shares by volume reached [80-90]% in the Netherlands, [60-70]% in Denmark, [60-70]% in Belgium [50-60]% in the UK, [50-60]% in Germany, [40-50]% in the Czech Republic and [30-40]% in France in 2011. Combined national market shares by value were slightly lower.

(48) Although national market shares in the commercialization of conventional maize seeds are high at the national level, the Commission notes that the proposed transaction will not give rise to vertical links between the activities of the JV and the activities of the Parties in the commercialization of conventional seeds. The JV will develop and market transgenic traits that are only needed in the breeding and commercialization of GM seeds. Therefore, the breeding and commercialization of only conventional maize seeds is not an affected market under the Merger Regulation.

(49) Furthermore, the Parties have explained that they will continue to run their breeding and commercialization businesses separately and will continue to compete in those markets. The Commission considers this to be plausible because the JV's activities

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20 All market shares by volume. The market shares by value do not differ considerably.

are highly technical and different in nature from the breeding and commercialization of seeds as explained in paragraph (22). Moreover, the Parties' use of the JV's products will not create a common cost for the Parties' breeding and commercialization of conventional seeds and will thus not lead to relevant spill-over effects on those markets.

(50) As regards the market for the commercialization of only GM maize seeds in the EEA, the Parties' combined market share in Spain and consequently in the EEA was [5-10]% by volume and value (Limagrain: [5-10]%[21]; KWS: [0-5]%[22]) in 2012. Competitors active on this market were DuPont-Pioneer ([60-70]%) and Monsanto ([20-30]%) while other competitors together accounted for the remaining market share of [5-10]%.[23]

(51) No substantiated competition concerns were raised in the market investigation as regards the downstream markets. Concerns raised were based on a misconception of the proposed transaction and related to a scenario where the Parties would combine their activities in the breeding and commercialization of seeds. This is not the subject of the proposed transaction as explained in paragraph (48).The Parties' cooperation remains limited to the development and licensing of transgenic traits on the upstream market. Some respondents identified pro-competitive effects as the proposed transaction would lead to the creation of a new competitor in the development and licensing of GM maize traits.

(52) As regards potential customer foreclosure concerns, the market investigation showed that seed companies regularly offer seeds incorporating transgenic traits of their competitors to meet customer demand. In particular, there is a trend towards offering dual mode traits, including by combining different transgenic traits of different trait developers. Those industry practices show that trait developers normally do not have incentives to market GM seeds incorporating exclusively their own transgenic traits.

(53) Furthermore, the Parties' combined market shares of [5-10]% in the commercialization of GM maize seeds and of [30-40]% in the commercialization of conventional seeds at the EEA level limit the JV's ability to successfully engage in customer foreclosure. Competition for the marketing of transgenic traits is likely to occur across all member states where the use of GM seeds is deregulated and thus is likely to be wider than national. Competing trait developers will thus have access to a sufficient alternative EEA customer base further reducing the Parties' incentives to engage in a customer foreclosure strategy.

c. Overall conclusion

(54) In the light of the presence of strong competitors on both the upstream and the downstream markets and the results of the market investigation on the impact of the transaction, the Commission concludes that the proposed transaction does not raise serious doubts as to its compatibility with the internal market and with the EEA Agreement.

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21 Limagrain's market share by volume was [0-5]% in 2011 and [10-20]% in 2010.

22 KWS' market share by volume was [0-5]% in 2011 and [0-5]% in 2010.

23 All market shares by volume. The market shares by value do not differ considerably.

5. CONCLUSION

(55) 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

Janez POTO• NIK
Member of the Commission