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Case No COMP/M.6891 - AGROFERT/ LIEKEN

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

Article 6(1)(b) NON-OPPOSITION
Date: 15/05/2013

***In electronic form on the EUR-Lex website under document
number 32013M6891***



EUROPEAN COMMISSION

Brussels, 15.5.2013

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

C(2013) 2930 final

PUBLIC VERSION

MERGER PROCEDURE

To the notifying party:

Dear Sir/Madam,

**Subject: Case No COMP/M.6891 – AGROFERT/ LIEKEN
Commission decision pursuant to Article 6(1)(b) of Council Regulation
No 139/2004¹**

- (1) On 8 April 2013, the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which the undertaking AGROFERT Holding a.s. ("Agrofert", Czech Republic) acquires within the meaning of Article 3(1)(b) of the Merger Regulation sole control over LIEKEN AG ("Lieken", Germany), currently controlled by Barilla group, by way of purchase of shares.² Agrofert and Lieken are jointly referred to as the "Parties".

1. THE PARTIES AND THE CONCENTRATION

- (2) Agrofert is a Czech company with a wide range of activities which can be attributed to four different sectors: (i) agriculture, (ii) food, (iii) chemicals, and (iv) "diverse" activities, such as media. In the food business Agrofert is active, among others, in the production and sale of industrial bakery products and, to a limited extent, in

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 107, 13.04.2013, p. 19.

bakery retail business. The activities of Agrofert are related predominately to the Eastern European markets and it does not have any activities in the industrial bakery products market in Germany.

- (3) Lieken is a German food manufacturer and supplier of bread products and cake products. The products of Lieken are sold as packaged or bake-off solutions. Its activities are predominately concentrated on the German market, with sales in other European countries representing less than [10-20]% of its total sales.
- (4) The proposed transaction involves an acquisition of sole control by Agrofert over Lieken, within the meaning of Article 3(1)(b) of the Merger Regulation.

2. EU DIMENSION

- (5) The undertakings concerned have a combined aggregate worldwide turnover of more than EUR 5000 million.³ (Agrofert: [...] million, Lieken: [...] million). Each of them has an EU-wide turnover in excess of EUR 250 million (Agrofert: [...] million, Lieken: [...] 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 within the meaning of Article 1(2) of the Merger Regulation.

3. COMPETITIVE ASSESSMENT

3.1. Relevant market

3.1.1. Relevant product markets

a. Bakery products

- (6) In the sector of manufacturing of bread and cake products the Commission has previously⁴ considered the following main product groups: (i) fresh bread, (ii) industrial and pre-packaged bread, (iii) bread substitutes, (iv) cakes, (v) morning goods, (vi) biscuits, (vii) bake-off products. The market investigation in the present case has largely confirmed that prices of products in these segments are indeed different⁵ and that switching production between the segments would require longer time and/or significant investment,⁶ which suggests that these products might constitute separate product markets.

³ Turnover calculated in accordance with Article 5 of the Merger Regulation.

⁴ Case No COMP/M.5286 *Lion Capital Foodvest*, Commission decision of 18 September 2008; Case No COMP/M.6430 *Oaktree / Panrico*, Commission decision of 19 December 2011, par. 16.

⁵ See responses to question 5.3 of the Questionnaire to Customers and responses to question 5.3 of the Questionnaire to Competitors.

⁶ See responses to question 5.4 of the Questionnaire to Competitors.

- (7) Market investigation in a previous case has shown that in the industrial bakery sector a different distribution structure is maintained according to whether the customers are in the retail sector or in food service sector.⁷ In the latter group supplies to the out-of-home eating and to institutional catering were distinguished.⁸ However in the present case the market investigation has not established clearly whether these distinctions are indeed relevant.⁹
- (8) The Parties submit that the distinction between private label and branded products, which has been made by the Commission outside the bakery products sector,¹⁰ is also relevant for packed bread (as opposed to bake-off bread) and for the retail channel (as opposed to the food service channel). The market investigation appears to confirm this view.¹¹
- (9) However, the exact market delineation of the relevant product market(s) can be left open as the notified operation does not raise doubts as to its compatibility with the internal market under any plausible market definition.

b. Vertically related markets

- (10) The Parties submit that butter, eggs, flour, and milk powder constitute different product markets with the possibility of some further subdivisions.
- (11) The Commission has previously considered that the butter used as input in bakery is bulk butter, different from retail packet butter.¹² Market investigation has confirmed relevance of such segmentation.¹³ With respect to eggs, the Parties submit that they are widely used for a high number of food products and are also sold directly to end customers. Similarly flour is the main input good for industrial bakery products, it is used in many other food industry applications and it is also directly sold to end customers. The Parties maintain that milk powder is primarily used for baby food, chocolate and confectionary, or as an ingredient for food manufacturing.

⁷ Case No COMP/M.5286 *Lion Capital Foodvest*, Commission decision of 18 September 2008, par. 14.

⁸ Case No COMP/M.1990 *Unilever / Bestfoods*, Commission decision of 08 March 2000, par. 9.

⁹ See responses to question 6 of the Questionnaire to Customers and responses to question 6 of the Questionnaire to Competitors.

¹⁰ Case No COMP/M.5046 *Friesland / Campina*, Commission decision of 17 December 2008, par. 1013.

¹¹ See response of a customer to question 7 of the Questionnaire to Customers and responses to question 7 of the Questionnaire to Competitors.

¹² Case No COMP/M.5046 *Friesland Foods/Campina*, Commission Decision of 17.12.2008, paras. 812, 816.

¹³ See responses to question 8 of the Questionnaire to the Competitors.

- (12) The Parties submit that the retail bakery activities belong to a separate downstream market. The Commission has not yet considered the market for retail bakeries.
- (13) Given the absence of competition concerns under any alternative market definition the exact delineation of the vertically related market(s) can be left open in the present case.

3.1.2. Relevant geographic market

- (14) In the previous cases the Commission has considered that the relevant geographic market for bakery products was national in scope.¹⁴
- (15) The Parties submit that the relevant geographic market for flour is national or smaller, the market for eggs appears to be wider than national, while the market for milk powder is at least EEA – wide. As for the retail bakery activities the Parties claim that the market is either national or local.
- (16) The Commission has not yet analysed the markets for flour, eggs or retail bakery activities. As to the market for bulk butter the Commission has previously considered it as EEA-wide.¹⁵ For milk powder the Commission has acknowledged the arguments in favour of the EEA-wide scope of the market although ultimately left the market definition open.¹⁶
- (17) For the purposes of the assessment of the notified operation, the exact delineation of the geographic scope of the vertically related market(s) can be left open as the notified operation does not raise competitive concerns even under the narrowest market definition.

3.2. Competitive assessment

3.2.1. Bakery products

- (18) The Parties' activities in the sales of bakery products only overlap to a very limited extent. As a result the transaction would lead to the following technically affected markets: production and sale of packaged bread in the Czech Republic and the Slovak Republic, including the potential sub segments of private label and branded products; as well as the production and sale of bake-off bread in the Czech Republic and the Slovak Republic. The market shares of the Parties for these technically affected markets are presented in Table 1 below.

¹⁴ Case No COMP/M.6430 *Oaktree / Panrico*, Commission decision of 19 December 2011, par. 22; Case No COMP/M.5286 *Lion Capital Foodvest*, Commission decision of 18 September 2008, par. 16.

¹⁵ Case No COMP/M.5046 *Friesland Foods/Campina*, Commission Decision of 17.12.2008, par. 837.

¹⁶ Case No COMP/M.6119 *Arla / Hansa*, Commission Decision of 01 April 2011, par. 41; Case No COMP/M.3535 *Van Drie / Schils*, Commission Decision of 08 December 2004, par.20; Case No COMP/M.6627 *Arla / MUH*, Commission Decision of 28 September 2012, par. 92.

Table 1 – Total sales (retail and foodservice) - market shares in volumes (%)

	<i>Packaged bread Czech Republic</i>		<i>Packaged bread Slovak Republic</i>		<i>Bake-off bread Czech Republic</i>		<i>Bake-off bread Slovak Republic</i>	
Agrofert	[10-20]		[10-20]		[20-30]		[20-30]	
	<i>Thereof private label:</i>	<i>Thereof branded</i>	<i>Thereof private label:</i>	<i>Thereof branded</i>				
	[10-20]	[10-20]	[10-20]	[10-20]				
Lieken	[0-5]		[0-5]		[0-5]		[0-5]	
	<i>Thereof private label:</i>	<i>Thereof branded</i>	<i>Thereof private label:</i>	<i>Thereof branded</i>				
	[0-5]	[0-5]	[0-5]	[0-5]				
Combined	[20-30]		[10-20]		[20-30]		[20-30]	
	<i>Thereof private label:</i>	<i>Thereof branded</i>	<i>Thereof private label:</i>	<i>Thereof branded</i>				
	[20-30]	[10-20]	[10-20]	[10-20]				

- (19) Under a segmentation according to the distribution channel, i.e. for foodservice and for retail, including, for the latter, further sub segments of private label and branded products, the market shares of the Parties would be the following:

Table 2 – Retail and foodservice - market shares in volumes (%)

	<i>Packaged bread Czech Republic</i>		<i>Packaged bread Slovak Republic</i>		<i>Bake-off bread Czech Republic</i>		<i>Bake-off bread Slovak Republic</i>	
	<i>Retail</i>	<i>Food service</i>	<i>Retail</i>	<i>Food service</i>	<i>Retail</i>	<i>Food service</i>	<i>Retail</i>	<i>Food service</i>
Agrofert	[20-30] <i>thereof private:</i> [10-20] <i>thereof branded:</i> [20-30]	[5-10]	[10-20] <i>thereof private:</i> [10-20] <i>thereof branded:</i> [10-20]	[10-20]	[30-40]	[0-5]	[20-30]	[0-5]
Lieken	[0-5] <i>thereof private:</i> [0-5] <i>thereof branded:</i> [0-5]	[0-5]	[0-5] <i>thereof private:</i> [0-5] <i>thereof branded:</i> [0-5]	[0-5]	[0-5]	[0-5]	[0-5]	[0-5]
Combined	[20-30] <i>thereof private:</i>	[5-10]	[10-20] <i>thereof private:</i> [10-20]	[10-20]	[30-40]	[0-5]	[20-30]	[0-5]

	[20-30] thereof branded: [20-30]		thereof branded: [10-20]					
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- (20) As it can be seen from the data above, the combined market of the Parties would not exceed [20-30]% (in the market for the production and sale of bake-off bread in the Czech Republic). In the potential narrowest segments of the overlapping markets the market share of Lieken would not exceed [0-5]%. Therefore the transaction will lead to only very limited increases in market shares and will not significantly change the competitive landscape. Respondents in the market investigation indicated that the markets for bakery products are competitive and there are many competitors of different sizes.¹⁷ Furthermore all the respondents to the market investigation confirmed that customers, in particular the retail chains, do have buyer power in these markets.¹⁸ Existence of buyer power coupled with the fact that bakery products are mostly standardised, with limited brand loyalty, makes switching of suppliers relatively easy.¹⁹
- (21) Some respondents in the market investigation did express concerns regarding the position of Agrofert in the markets for bakery products in the Czech Republic and in the Slovak Republic.²⁰
- (22) However first of all, these concerns were not merger specific, since the transaction brings about only a very minor increment in the market shares. Secondly these concerns were not substantiated. One of these respondents confirmed simultaneously that switching suppliers of bakery products is easy and admitted that there are spare capacities in the market.²¹
- (23) In addition the market investigation did not suggest that Lieken can be considered as potential competitor of Agrofert in the Czech Republic or in the Slovak Republic.²² Some of the customers, as well as competitors have not seen any activities of Lieken in the Czech Republic or in the Slovak Republic.²³ Lieken derives only [10-20]% of

¹⁷ See responses to question 11 of the Questionnaire to Customers.

¹⁸ See responses to question 15 of the Questionnaire to Competitors.

¹⁹ See responses to question 11 of the Questionnaire to Customers.

²⁰ See responses to question 12,13 and 14 of the Questionnaire to Customers.

²¹ See response of a customer to question 11 of the Questionnaire to Customers.

²² See responses to questions 9 and 10 of the Questionnaire to Customers and to questions 13 and 14 of the Questionnaire to Competitors.

²³ See responses to questions 9 and 10 of the Questionnaire to Customers and to questions 13 and 14 of the Questionnaire to Competitors.

sales from countries other than Germany and does not have local sales organisation outside this country. Therefore it cannot be concluded, as required in par. 60 of the Guidelines on the assessment of horizontal mergers²⁴, that Lieken already exerts significant constraining influence on Agrofert in the Czech Republic or in the Slovak Republic or that there is a significant likelihood it would grow into an effective competitive force in these markets.

- (24) Additionally, both in the Czech Republic and in the Slovak Republic there is a sufficient number of other potential competitors, which are not capacity constrained and can maintain sufficient competitive pressure after the transaction.²⁵ As it was noted by one of the respondents in the market investigation in some of the segments of the bakery products there are too many players to be able to dictate prices.²⁶ The competitors include both larger companies, such as United Bakeries a.s. (which in the Slovak Republic is active through PEZA a.s.), as well as cooperatives, such as ČEMPEK or MP Produkt, which bring together smaller bakeries. The importance of local tastes and preferences of the final customers increases the degree of competitive pressure exercised by these smaller, local bakeries.
- (25) In the total market for packaged bread in the Czech Republic the market share of United Bakeries a.s amounts to [20-30]% and of MP Produkt to [10-20]% and of ČEMPEK to [5-10]%. In the market for packed bread in the Slovak Republic the market share of VAMEX a.s. is [0-5]%, while of PEZA a.s. it is [0-5]%. In the market for bake-off bread in the Czech Republic La Lorraine has [30-40]% market share, while in the market for bake-off bread in the Slovak Republic Fornetti Slovakia has [20-30]% market share and La Lorraine [10-20]%.
- (26) In view of the above the proposed transaction does not raise serious doubts as to its compatibility with the internal market in the affected markets for packaged and bake-off bread in the Czech Republic or in the Slovak Republic or any of their subsegments.

3.2.2. Vertically related markets

- (27) Agrofert is active upstream in the production and sale of eggs, flour, milk powder and retail packet butter in the Czech Republic, Slovak Republic, and/or Poland but not in Germany. Agrofert is also active downstream in the retail sale of bakery products in the Czech Republic and in the Slovak Republic. Lieken is not active neither in the upstream production and sale of eggs, flour, milk powder and retail packet butter in the Czech Republic, Slovak Republic, and/or Poland nor in the

²⁴ See Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C31, 5.02.2004, p. 5, par. 60.

²⁵ See Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C31, 5.02.2004, p. 5, par. 60 in fine.

²⁶ See response of a competitor to question 17.4 of the Questionnaire to Competitors.

downstream retail sale of bakery products in the Czech Republic and in the Slovak Republic.

- (28) As the combined market share of Agrofert and Lieken in a potential market for bake-off bread in the Czech Republic would very slightly exceed [20-30]%, technically, this would result in vertical affected markets for flour, eggs, milk powder upstream and retail bakeries in the Czech Republic downstream. However, the combined market share on a market for bake-off bread in the Czech Republic would be only [20-30] %, with an overlap of solely [0-5]% (due to sales of approximately EUR [...] by Lieken [...]). In addition the market share of Agrofert in the potential market for eggs in the Czech Republic would be lower than [0-5]%, in the potential market for milk powder in the EEA it would be lower than [0-5]%, while in the potential market for flour in the Czech Republic it would be lower than [5-10]%. As it results from these market shares Agrofert does not have a significant degree of market power in these upstream markets and therefore it has no ability to foreclose access to inputs. In the downstream market for retail bakeries in the Czech Republic, the market share of Agrofert would be below [0-5]%. Therefore Agrofert cannot be considered as an important customer in the downstream market, which implies that customer foreclosure will not occur as a result of the proposed transaction.
- (29) In light of the foregoing the proposed transaction does not raise competitive concerns in any of the technically vertically affected markets.

4. CONCLUSION

- (30) 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)
Joaquín ALMUNIA
Vice-President