



Brussels, 19.12.2013
C(2013) 9762 final

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PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 7(3) DECISION

To the notifying party:

Dear Sir/Madam,

Subject: Case No COMP/M.7120 - ECOM AGROINDUSTRIAL CORPORATION / ARMAJARO TRADING

Commission decision pursuant to Article 7 (3) of Council Regulation No. 139/2004¹ - Request of derogation

1. We refer to your application for a derogation from the suspension obligation provided for in Article 7(1) of the Merger Regulation with regard to the proposed acquisition by Ecom Agroindustrial Corp Limited ("Ecom", Switzerland) of Armajaro Trading Limited ("ATL", United Kingdom), submitted pursuant to Article 7(3) of the Merger Regulation on 13 November 2013.

I. THE PARTIES AND THE OPERATION

2. Ecom is a global commodity merchant and processing company specializing in coffee, cotton and cocoa in major producing and consuming countries, with a small sugar operation and ancillary agricultural operations in oil seeds and hogs. Ecom is

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.

an origin-integrated company, focused on buying from producers at origin. It provides primary processing, logistics and risk management services and sells to the branded product manufacturers. Ecom is involved at all levels of the supply chain, partnering stakeholders from local farmers to primary processors and manufacturers.

3. ATL is a global soft commodity merchant and supply chain manager. It is headquartered in London and has origination and exporting operations in the major cocoa, coffee and sugar growing countries. ATL specialises in the sourcing and delivery of cocoa, coffee and sugar. Its clients include chocolate manufacturers, to whom it supplies cocoa beans and cocoa products, coffee manufacturers and roasters. Sugar trading is a recent addition to the business. ATL is controlled by Armajaro Holding Limited ("AHL"), a company specialised in the management of commodity hedge funds and alternative asset hedge funds.
4. The proposed transaction constitutes the sale and purchase of the entire issued share capital of ATL. As a result of the transaction, Ecom will acquire sole control over ATL. The Sale and Purchase Agreement ("SPA") between [...] and Ecom was signed on 12 November 2013 and executed on the same day. The proposed transaction qualifies as a concentration within the meaning of Article 3 of the Merger Regulation.

II. EU DIMENSION

5. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 000 million² (Ecom: [...] and ATL: [...]). Each of them has an EU-wide turnover in excess of EUR 250 million (Ecom: [...] and ATL: [...]), and they do not achieve more than two-thirds of their aggregate EU-wide turnover within one and the same Member State. The proposed Transaction therefore has an EU dimension within the meaning of Article 1(2) of the Merger Regulation.

III. THE APPLICATION FOR DEROGATION

6. The notifying party (Ecom) submits that ATL is in serious financial distress.
7. At the end of the 2012 financial year, [...].
8. [...]. Commodities companies such as ATL require that consumers, lenders and clients have confidence in their ability to perform. Each lender will take a different position; leverage parameters are narrow and the value of underlying assets depends on confidence of clients and suppliers. A loss of confidence creates immediate and substantial impediments to contract performance and is likely to cause banks to seize what assets they can sell at a fast sale discounted price.
9. ATL became aware of the severity of its financial difficulties in July 2013. It visited all of its major banks in August and September 2013 to appraise them of

* [Should read *ATL*]

² Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Consolidated Jurisdictional Notice (OJ C95, 16.04.2008, p1).

the financial situation and to pre-warn of a potential breach of financial covenants under the company's core working capital facility. ATL informed its banks that it was looking for external investment to increase capital. On 14 October 2013 ATL asked the banks to approve [...] investment by a third party.

10. On 4 November 2013 ATL informed its banks that discussions with the third party investor had collapsed. As a result, almost all banks reacted negatively reducing facilities, tightening conditions, withdrawing flexibility and removing liquidity from the company. ATL took further steps to identify potential alternative investors and/or buyers, some of which had previously shown interest in ATL. However, given:

- the specialised nature of the commodity business and relatively high capital requirements to operate the business;
- lack of interest in investing in / purchasing the whole group, which would not benefit all creditors and would not have left enough assets to support a rump of debt not repaid by the sale of certain parts of the business;
- ATL's financial position and insufficient liquidity;
- the very short timescale in which a negotiation, due diligence, sale and completion of ATL must occur in order to secure its commercial future;

Ecom was the only potential investor or purchaser that ATL was able to identify.

11. In particular, this is because Ecom was the only purchaser with: (i) knowledge of the relevant markets and how to operate the business; (ii) sufficient capital balances for the purposes of operating the business as a going concern; and (iii) the capability of negotiating and completing the acquisition in the time available without needing to undertake a full due diligence exercise and in full awareness of the various commercial and legal risks associated with the proposed acquisition.

12. Ecom was approached on the night of 2 November 2013 by [...], which informed Ecom that ATL was available for sale and asked if Ecom would be interested to purchase ATL. [...] was involved as a shareholder and lender to ATL's parent company. However, ATL declined rapidly during the following week and the time frame that Ecom expected to have to carry out due diligence shrank. It became clear on around 8 November that without an emergency rescue by Ecom, ATL would have entered into administration on 12 November 2013.

13. According to the notifying party, derogation from the standstill obligation would enable Ecom to immediately take the necessary measures. This is necessary in order to minimise further damage to ATL and to its dealings with creditors, employees, customers and suppliers. Without the proposed sale and cash injection, ATL would not be able to meet its liabilities. Therefore granting a derogation would avoid causing irreversible deterioration to ATL's business activities.

IV. THE CONDITIONS FOR DEROGATION PURSUANT TO ARTICLE 7(3) OF THE MERGER REGULATION

14. Pursuant to Article 7(1) of the Merger Regulation, a concentration falling under that Regulation shall not be implemented either before its notification or until it has been declared compatible with the internal market. Pursuant to Article 7(3) of the Merger Regulation, the Commission may, on reasoned request, grant derogation from the obligation imposed in Article 7(1).
15. Article 7(3) of the Merger Regulation provides that, in deciding on the request, the Commission must take into account, *inter alia*, the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration.
16. Derogation from the obligation to suspend concentrations is granted only exceptionally, normally in circumstances where suspension provided for in the Merger Regulation would cause serious damage to the undertakings concerned by a concentration, or to a third party.

(A) THE OPERATION FALLS UNDER THE SUSPENSION OBLIGATION PURSUANT TO ARTICLE 7(1) OF THE MERGER REGULATION

17. The proposed transaction constitutes a concentration within the meaning of Article 3 of the Merger Regulation and has an EU dimension according to Article 1 thereof. Hence the operation falls under the suspension obligation laid down in Article 7(1) of the Merger Regulation.

(B) THE EFFECTS OF THE SUSPENSION ON THE UNDERTAKINGS CONCERNED AND THIRD PARTIES

18. According to the information provided by the notifying party, which appears plausible *a priori*, the derogation is required to avoid significant negative financial effects to the undertakings concerned and third parties.
19. According to the notifying party, once ATL is placed into administration, several adverse consequences will occur as indicated above. Public insolvency would effectively destroy ATL's trading business. Credit lines would be withdrawn. Many of the sale/purchase contracts for physical commodities and all long-term commodity contracts have insolvency exits at no value. According to the notifying party, it is reasonable to assume that all counterparts who are in loss making positions on the contract would try to terminate. Only those counterparts that are in profitable positions on the contract would risk continuing the contract. This means that ATL would likely lose all its profitable contracts but be bound to perform its loss making ones. The result would be a dramatic reduction of receivables.
20. ATL's long-term and spot supply contracts with local suppliers and counterparties would inevitably cease should the company be placed into administration and cause resultant disruption in supply. The collapse of ATL would likely have a negative impact on the global supply of coffee and/or cocoa, as a result of the potential exit of these commodities from the market. ATL's businesses rely on the quality of its primary products and the strong supply relationships it has with often small scale farmers and growers in some of the world's poorest countries. The

collapse of ATL would have a negative impact on these farmers and their communities. ATL employs approximately 1,600 people worldwide, who would face losing their jobs. Of this total, there are more than 120 EU-based employees who would lose their jobs if the transaction does not complete and ATL is placed into administration.

21. According to the information submitted by the notifying party, derogation from the suspension obligation would not have adverse effects on any third party. The notifying party has provided information about the process undertaken to identify a potential purchaser for the businesses of ATL. Other potential buyers/investors have been contacted by ATL, but none of them was in the position to grant ATL the necessary financial resources in the very tight timeframe necessary in order to avoid the administration procedure. Therefore, granting the derogation to Ecom is unlikely to give it an undue advantage over other potential buyers interested in ATL, as no other potential buyer has been identified.
22. The Commission considers that the reasons given for a derogation from the suspension obligations can be regarded as exceptional in the present case. ATL is in serious financial distress and will be placed under administration procedure immanently, which is likely to result in severe deterioration of the value of ATL and the risk for ATL to run out of business. The delay in the implementation of the transaction due to the standstill obligation imposed by the Merger Regulation may cause this disruption to materialize.
23. Against this background, it is possible to conclude that the suspension obligation imposed by Article 7(1) could lead to serious harm to ATL. Furthermore, on the basis of the information submitted by Ecom, a derogation from the stand-still obligation would not have adverse effects on any third party.

(C) THE THREAT TO COMPETITION POSED BY THE CONCENTRATION

24. As both parties to the transaction are active in the procurement and supply of sugar, coffee, cocoa beans as well as cocoa processing, the proposed transaction would lead to horizontal overlaps. On the basis of the information submitted by Ecom, it seems that the market share of the combined entity would not exceed [30-40]% in any potential market. According to the notifying party, the combined entity would become the largest pure trader in the fields of coffee and cocoa products.
25. In identifying the relevant markets, the notifying party distinguishes the following markets: (i) sourcing and merchandising of sugar, (ii) sourcing and merchandising of coffee, (iii) procurement of cocoa beans, (iv) cocoa liquor (v) cocoa butter and (vi) cocoa powder.

Horizontal overlaps

26. The notifying party considers that the relevant product market for sourcing and merchandising of sugar can be defined as encompassing all sugar products (covering white, raw and crystal sugar). In *Intercontinental Exchange / NYSE*

*Euronext*³, the Commission found that derivative contracts for white (or refined) sugar and raw sugar belong to two separate markets. According to the notifying party, given the volume of international trade of sugar as a commodity and the ease of transportation, the relevant geographic market is global, or at a minimum the EEA. The activities of the parties overlap only as regards sourcing and manufacturing of white sugar at worldwide level and the combined market share is approximately [0-5]%.

27. As regards coffee, the notifying party submits that the relevant product market is the sourcing, trading, processing and supply of raw coffee beans, without any further segmentation. In *Intercontinental Exchange / NYSE Euronext*⁴, the Commission found that Arabica and Robusta derivative contracts belong to two separate markets. Given the ease of transporting coffee beans, and the global flows of trade, the relevant geographic market is considered as global. The combined market share at EEA level is [5-10]%. If a segmentation between Arabica and Robusta beans was considered, the worldwide combined share would be [5-10]% for Arabica beans and [10-20]% for Robusta beans.
28. As regards cocoa beans procurement, the notifying party submits that countries of origin are substitutable; customers will switch between cocoa beans of different origins, according to differences in price and quality over time, blending the cocoa beans to obtain the best products at the lowest cost. The Commission has previously⁵ considered that some customers may have a preference for the cocoa beans of a particularly country of origin, nevertheless the Commission left the product market definition open. In *Barry Callebaut / Petra Foods*⁶, the Commission found that West Africa beans are likely to constitute a separate relevant product market but left the exact market definition open. Ecom has also provided market shares of West African cocoa beans on a global basis, as well as the shares of supply of cocoa beans sourced from each of the West African countries (on a global basis), following previous decisional practice of the Commission. As shown in the table below, these shares of supply do not exceed [20-30]%.

³ See Case COMP/M.6873 *Intercontinental Exchange/NYSE Euronext*.

⁴ See Case COMP/M.6873 *Intercontinental Exchange/NYSE Euronext*.

⁵ See Case COMP/M.5431 *ADM/Schokinag*.

⁶ See Case COMP/M.6872 *Barry Callebaut/Petra Foods*.

Country	Cocoa Bean Procurement (000 MT)				Share of Supply		
	Ecom	ATL	Combined	Total market	Ecom	ATL	Combined
Cameroon	[...]	[...]	[...]	[...]	[0-5]%	[0-5]%	[5-10]%
Ghana	[...]	[...]	[...]	[...]	[0-5]%	[10-20]%	[10-20]%
Ivory Coast	[...]	[...]	[...]	[...]	[5-10]%	[5-10]%	[10-20]%
Nigeria	[...]	[...]	[...]	[...]	[5-10]%	[20-30]%	[20-30]%
Others	[...]	[...]	[...]	[...]	[0-5]%	[10-20]%	[10-20]%
West Africa	[...]	[...]	[...]	[...]	[5-10]%	[10-20]%	[10-20]%

Source: ICCO and Parties' estimates

29. As regards cocoa processed products (cocoa liquor, cocoa butter and cocoa powder), these markets have been identified as distinct markets in previous Commission decisions and their geographic scope is EEA-wide.⁷ The notifying party submits that none of these markets are affected, with combined shares of supply in the EEA of [5-10]% (cocoa liquor), [10-20]% (cocoa butter) and [0-5]% (cocoa powder).
30. It can be concluded that, on the basis of the information provided by the notifying party, the likelihood that the transaction would raise serious doubts is not very high, in particular in view of the combined market share below [30-40]% and a due to the relatively large number of competitors left post-transaction, including large companies such as Cargill⁸, Barry Callebaut⁹ and ADM¹⁰.

⁷ See Case COMP/M.5431 ADM/Schokinag and M.6872 Barry Callebaut/Petra Foods.

⁸ According to the notifying party's estimates, Cargill's market share in the overall procurement of cocoa beans would be [10-20]% worldwide and [20-30]% in the EEA; in cocoa liquor it would be [10-20]% worldwide and [20-30]% in the EEA; in cocoa butter it would be [10-20]% worldwide and [10-20]% in the EEA.

⁹ According to the notifying party's estimates, Barry Callebaut's market share in the overall procurement of cocoa beans would be [20-30]% worldwide and [20-30]% in the EEA; in cocoa liquor it would be [10-20]% worldwide and [20-30]% in the EEA; in cocoa butter it would be [20-30]% worldwide and [10-20]% in the EEA.

¹⁰ According to the notifying party's estimates, ADM's market share in the overall procurement of cocoa beans would be [10-20]% worldwide and [20-30]% in the EEA; in cocoa liquor it would be [5-10]%

Conclusion

31. Therefore, on the basis of the information provided by the notifying party, it appears *prima facie* that the likelihood to raise serious doubts is not very high, although without further investigation, the Commission cannot conclude that competition concerns are excluded. Furthermore, the concentration is subject to conditions in order to ensure conditions of effective competition pending the final decision of the Commission and reversibility.

(D) BALANCE OF INTERESTS

32. Based on the above, it appears that whilst the suspension obligation could seriously affect the financial situation of ATL, the likelihood to raise serious doubts is not very high and the derogation does not appear to have adverse effects on one or more of the parties or on any third party. The benefits following from the derogation considerably outweigh any potential adverse effects that it may have on one or more of the parties or on any third party. Therefore, the Commission finds that the derogation can be granted in accordance with the application submitted and with the conditions specified below.

V. TERMS AND CONDITIONS

33. According to Article 7(3), 4th sentence, of the Merger Regulation, a derogation from the suspension obligation laid down by Article 7(1) thereof may be made subject to conditions and obligations in order to ensure effective competition.
34. Until the Commission has adopted a decision on the compatibility of the transaction, this derogation is granted solely insofar as it allows Ecom to take actions that are reasonably necessary to restore the viability of ATL as a going concern following the signing of the SPA.
35. Also on the basis of what Ecom committed itself toward the Commission on 18 December 2013, the necessary actions mentioned in the above paragraph are the following:
 - a. Senior appointments: Ecom is permitted to appoint the two most senior management positions of ATL, as part-time managers;
 - b. Funding: Ecom is permitted to inject capital into ATL;
 - c. Information: Ecom may contact the key customers of ATL to inform them of the change of ownership and Ecom's plans for ATL;
 - d. Costs: Ecom is permitted to introduce only the cost-cutting measures which were already planned by ATL in the 18 months period before the acquisition of ATL by Ecom and which have been submitted to the Commission on 18 December 2013.

worldwide and [20-30]% in the EEA; in cocoa butter it would be [10-20]% worldwide and [10-20]% in the EEA.

Ecom committed not to proceed with any measures implementing the merger until the Commission takes a final decision under the relevant provisions of the Merger Regulation, except those listed above (a to d).

36. The derogation is made subject to the condition that Ecom appoints one of ATL's senior managers as a "hold separate" manager who will be responsible for ensuring that ATL's business is ring-fenced and run independently until the Commission has taken a final decision on the transaction.
37. The derogation is subject to the condition that Ecom does not exercise any voting or other shareholder rights for any purpose other than those mentioned above at recitals 34-35 until the transaction has been declared compatible with the internal market.

VI. CONCLUSION

38. The Commission considers that the reasons given for derogation from the suspension obligations meet the requirements set out in Article 7(3) of the Merger Regulation.
39. Based on the above considerations and in accordance with Article 7(3) of the Merger Regulation, Ecom is granted a derogation from the obligations imposed by Article 7(1) of the Merger Regulation in accordance with the foregoing terms and conditions until the Commission takes a final decision under the relevant provisions of the Merger Regulation.

For the Commission

(signed)

Joaquín ALMUNIA

Vice-President