EUROPEAN COMMISSION
DG Competition

# *Case M.7408 - CARGILL / ADM CHOCOLATE BUSINESS*

Only the English text is available and authentic.

# REGULATION (EC) No 139/2004 MERGER PROCEDURE

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Decision on the implementation of remedies - Art. 8(2) - Purchaser approval
Date: 14.04.2016

EUROPEAN COMMISSION

Brussels, 14.04.2016
C(2016) 2311 final

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

**To the notifying party:**

Dear Sir/Madam,

**Subject: Case M.7408 - CARGILL / ADM CHOCOLATE BUSINESS**
**Approval of the Consortium as purchaser of the Mannheim Divestment Business following your letter of 15 February 2016 and the Trustee's opinion of 18 March 2016**

## I. FACTS AND PROCEDURE

1. By decision of 17 July 2015 (the "Decision") adopted in application of Article 8(2) of the Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings ("the Merger Regulation")[1], the Commission declared the operation by which Cargill, Incorporated ("Cargill") intended to acquire the industrial chocolate business of Archers Daniels Midlands Company ("ADM's industrial chocolate business") compatible with the internal market, subject to full compliance with the commitments annexed to the Decision and the obligations contained therein (the "Commitments").

2. In particular, in order to remove the serious doubts in the market for industrial chocolate sold to customers in Germany or to customers located in the overlap area of the relevant catchment areas of ADM's plant in Mannheim/Germany and

1 OJ L 24, 29.1.2004, p. 1. 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.

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Cargill's plants in Germany, Cargill proposed to divest ADM's industrial chocolate plant in Mannheim ("the Divestment Business"). The Divestment Business also include all tangible assets owned or used by the Mannheim plant, licenses, permits and authorisations, the contracts with suppliers and customers, […] employees, including […] employees designated as key personnel, such as […] to the extent that they work in support of the Divestment Business.

3. By e-mail of 15 February 2016, Cargill proposed the consortium comprised of Nimbus BV, Varova BV and Best BV (the "Consortium" or "the Proposed Purchaser") for approval by the Commission as purchaser of the Divestment Business and submitted the final binding asset purchase agreement (APA) as well as certain ancillary agreements (collectively referred to as the "Transaction Documents"). The Transaction Documents were signed on 11 February 2015.

4. By means of a reasoned opinion of 18 March 2016, Competition RX (the "Trustee"), in its capacity as monitoring trustee informed the Commission that the Consortium fulfils the requirements set out in Section D of the Commitments and may be deemed a suitable purchaser. In this assessment, the Trustee also indicated that, on the basis of the Transaction Documents, the Divestment Business would be sold in a manner consistent with the Commitments.

## II. ASSESSMENT OF THE PROPOSAL

5. The Consortium was formed in 2015 when three Dutch investors, Nimbus, Varova and Best BV ([…]) joined forces to acquire Chocolaterie de Bourgogne ('CdB'), an industrial and consumer product chocolate factory based in Dijon, France.

6. Nimbus and Varova are entrepreneurial investment funds, specialising in reviving European manufacturers of industrial products by injecting capital and providing hands-on management support. Together Nimbus and Varova have invested in approximately 110 companies, all with a similar profile: industrial focus, medium size (annual turnover of €5 to €500 million) and with potential for significant improvement from a supply and demand perspective. Best BV is 100% owned by […].

7. The Consortium has confirmed that all the three parties (Nimbus, Varova and Best B.V.) will have a stake in the Divestment Business. The shareholding will be broken down as follows: […]% Nimbus, […]% Varova and […]% Best B.V. The Consortium also provided an execution version of the shareholder agreement between Nimbus and Varova ([…]).

### (a) Independence from the Parties

8. Pursuant to clause 16 (a) of the Commitments, in order to be approved by the Commission, a suitable purchaser must be independent of and unconnected to Cargill and its Affiliated Undertakings.

9. According to the information provided by the Cargill and the Trustee, there are no structural links between Cargill and the Consortium, no joint-ventures in which Cargill and the Consortium (or any entities thereof) participate and no links through shared executive or non-executive directors.

10. As regards the commercial relationship between Cargill and the Consortium that may arise from the spot sales of […] in […] by Cargill to CdB, the Commission considers, on the basis of information provided by Cargill and in view of the opinion submitted by the Trustee that this relationship is an indirect arm's length relationship which is immaterial for both Cargill and the Consortium Therefore, there are no commercial agreements in place between the Consortium and Cargill.

11. In conclusion, the Commission thus considers in light of the above and of the information provided by Cargill and taking into account the reasoned opinion submitted by the Trustee, that the Proposed Purchaser will be independent from, and unconnected to Cargill and its affiliated undertakings.

**(b) Financial resources, proven expertise and incentive to maintain and develop the Divested Business as a viable and active competitor**

12. Pursuant to clause 16 (b) of the Commitments, in order to be approved by the Commission, a suitable purchaser must have the financial resources, proven expertise and incentives to maintain and develop the Divestment Business as a viable an active competitive force in competition with Cargill and other competitors.

13. In terms of financial resources, the acquisition of the Divestment Business is funded by equity being contributed by the Consortium, and a credit factoring agreement. If further funds are required then each of the Nimbus and Varova funds currently have sufficient uncommitted funds to make additional investments. Both Varova and Nimbus have a strong track record in supporting their companies also in difficult times. In sum, the Consortium can finance the acquisition of the Divestment Business and provide strong financial support for its development.

14. As regards proven expertise, the criteria set out in section D of the Commitments require that a suitable purchaser has (i) proven expertise and capability to source independently raw materials, in particular cocoa raw materials, at competitive prices and in sufficient quantities to operate the Mannheim plant at full capacity, also beyond the expiry of any supply agreement entered into, and (ii) proven commercial expertise in the food ingredients value chain in or around chocolate, chocolate ingredients or chocolate applications.

15. The Consortium's ability to source raw materials at competitive prices and in sufficient quantities is based on three main assets: i) their existing relationships with cocoa suppliers in the European market (notably through CdB); ii) the recent recruitment of an expert in cocoa and chocolate trading, which will enable the Consortium to buy products from alternative suppliers at origin, and iii) the […] supply agreement the Consortium recently signed with […][2], for about […]% of the Mannheim plant's needs. Furthermore, the Consortium can partially use high-quality cacao through CdB's shareholder PLOT, a sourcing and processing company in Côte d'Ivoire and Ghana which exports its products all over the world.

16. The Consortium's experience in food ingredients in or around chocolate is based on the experience of CdB. The position of CdB in most markets is that of a high

2 See Commission's decision M.7510 Olam/ADM Cocoa busines of 10 June 2015.

quality industrial chocolate alternative to large established players and its customers across Europe include both small and large (over […] mt) players. CdB serves midsized local biscuit and chocolate makers that prefer to source chocolate locally, notably in France.

17. In terms of incentives, the Consortium believes that there are certain synergies it can capture between the Divestment Business and its current holding in CdB. The cornerstone to such synergies is driven by adding a second plant to its current portfolio (CdB and now Mannheim). Certain customers view a second plant as advantageous, benefits being additional capacity at busy times and as a potential fall back in emergencies when one plant is faced with enforced downtime. In this respect adding the Divestment Business to CdB would be strategically beneficial to the Consortium. It would also provide CdB with a footprint in Germany. The business plan prepared by the Consortium for the Divestment Business show their commitment to maintain volumes of industrial liquid chocolate whilst at the same time investing in a new solid line to improve the mix.

18. In light of the above, the Commission considers that the Consortium has sufficient financial resources, proven expertise and incentives to maintain and develop the Divestment Business as a viable and active competitor in competition with Cargill and other players.

**(c) Absence of prima facie competition problems**

19. Pursuant to clause 16 (c), the acquisition of the Divestment Business by the Proposed Purchaser must neither be likely to create, in the light of the information available to the Commission, *prima facie* competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed. The Proposed Purchaser must be reasonably expected to obtain all the necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business.

20. The Consortium is not currently active in Germany. Therefore, the acquisition of the Divestment Business is unlikely to raise competition concerns given that the Consortium is effectively a new entrant to the industrial chocolate market in Germany. In terms of other regulatory approvals, approval of the Bundeskartellamt was received on 15 March 2016.

21. In France (where CdB is active), the combined market share of CdB and the Divestment Business in France post-transaction would be between 0-10% in the overall market for industrial chocolate in France (0-5% from CdB [3]and 0-5% from ADM). Given the larger market shares in industrial chocolate in France of Barry Callebaut, Cémoi or the new entity Cargill/ADM, the acquisition of the Divestment Business by the Consortium will not give rise to *prima facie* competition concerns in the market for industrial chocolate in France. No regulatory approvals are required with respect to France.

22. In the light of the above and based on the information provided by Cargill and available to the Commission and taking into account the reasoned opinion submitted by the Trustee,, the Commission concludes that the acquisition of the

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3 Decision, paragraph 309.

Divestment Business by the Consortium does not create *prima facie* competition concerns, nor does it give rise to a risk that the implementation of the Commitments will be delayed.

## III. ASSESSMENT OF THE TRANSACTION DOCUMENTS

23. Also confirmed by the Trustee, the Transaction Documents do not contain any major modifications to the scope of the assets which form the Divestment Business as compared to the Commitments.

24. The Divestment Business is defined so as to exclude any IP right. However, the Transaction Documents provide for the assignment of all rights, titles and interests in a defined list of trademarks such as Schokinag and Schokima. The assignment of these trademarks is therefore outside the scope of the Commitments and has been agreed between the Consortium and Cargill on the basis of a commercial negotiation. The inclusion of this asset is a positive addition to the divestment package which should help to support the viability of the business going forward.

25. In the light of the above and based on the information provided by Cargill and available to the Commission and taking into account the reasoned opinion submitted by the Trustee the Commission concludes that the Transaction Documents are consistent with the Commitments and that, accordingly, the Divestment Business is being sold in a manner consistent with the Commitments

## IV. CONCLUSION

26. On the basis of the above assessment, the Commission approves the Consortium as a suitable purchaser of the Divestment Business.

27. Moreover, on the basis of the Transaction Documents, the Commission further concludes that the Divestment Business is being sold in a manner consistent with the Commitments.

28. This decision only constitutes approval of the Proposed Purchaser identified herein and of the Transaction Documents. This decision does not constitute a confirmation that Cargill has complied with its Commitments.

29. This decision is based on Section D of the Commitments attached to the Commission Decision of 17 July 2015.

*For the Commission*

*(Signed)*
*Johannes LAITENBERGER*
*Director-General*