



EUROPEAN COMMISSION
DG Competition

Case M.8988 – Energizer/Spectrum Brands

Only the English text is available and authentic.

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

Decision on the implementation of the commitments -
Purchaser approval
Date: 3.12.2019



EUROPEAN COMMISSION

Brussels, 03.12.2019
C(2019) 8797 final

PUBLIC VERSION

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

To the notifying party

Dear Sir/Madam,

**Subject: Case M.8988 – Energizer/Spectrum Brands
Approval of VARTA AG as purchaser of (i) the Varta-branded and unbranded household and specialty batteries, chargers and portable lighting, in the Europe, Middle East and Africa region and (ii) the supply and licence agreement for the sale of Rayovac-branded hearing aid batteries to mass retailers following your letter of 5 June 2019 and the Trustee’s opinion of 12 June 2019, as updated**

1. FACTS AND PROCEDURE

- (1) By decision of 11 December 2018 (the “Decision”) based on Article 6(1)(b) in connection with Article 6(2) of Council Regulation (EC) No. 139/2004, the Commission declared the operation by which Energizer Holdings, Inc. (“Energizer”) acquired sole control over Spectrum Brands’ batteries and portable lighting business (“Spectrum”) compatible with the internal market subject to full compliance with the commitments submitted by Energizer, which were annexed to the Decision (the “Commitments”).
- (2) In particular, the Commitments provide that, in order to address the serious doubts raised by the combination of Energizer and Spectrum in a number of EEA countries in several branded product markets for batteries and portable battery chargers, Energizer would (i) divest Spectrum’s entire activities in Varta-branded and

unbranded household and specialty batteries, chargers and portable lighting, in the Europe, Middle East and Africa region (EMEA) (the “Varta Business”) and (ii) enter into an exclusive supply and licence agreement with the purchaser of the Varta business for the sale of Rayovac-branded hearing aid batteries (“HAB”) to mass retailers in EMEA (the “HAB Supply and Licence Agreement”, and together with the Varta Business the “Divestment Business”).¹

- (3) By letter of 5 June 2019, Energizer proposed VARTA AG (“VAG”) for approval by the Commission as purchaser of the Divestment Business and submitted the proposed Sale and Purchase Agreement and related agreements (the “Proposed Agreements”). ING Bank N.V. (the “Trustee”) has submitted an assessment of VAG’s suitability as a purchaser and, in particular, has indicated that it fulfils the criteria of the purchaser requirements in section D of the Commitments attached to the Decision (“Reasoned Opinion”). In this assessment, the Trustee also indicated that, on the basis of the Proposed Agreement as amended in November 2019 (the “Amended Proposed Agreements”), the Divestment Business would be sold in a manner consistent with the Commitments.

2. ASSESSMENT OF THE PROPOSAL

- (4) Pursuant to paragraph 22 of the Commitments, the Commission shall verify that the proposed purchaser fulfils the purchaser criteria and that Divestment Business is being sold in a manner consistent with the Commitments.
- (5) According to paragraph 21 of the Commitments, in its assessment of the proposed purchaser, the Commission shall verify in particular that:
- a. The purchaser is independent from and unconnected to Energizer and its Affiliated Undertakings² (this being assessed having regard to the situation following the divestiture);
 - b. The purchaser has the financial resources, proven expertise and incentives to maintain and develop the Divestment Business as a viable and active competitive force in competition with Energizer and other competitors; and
 - c. The acquisition of the Divestment Business by the purchaser must neither be likely to create, in 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. In particular, the purchaser must reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business.

2.1. Description of the Proposed purchaser

- (6) VAG, headquartered in Ellwangen, Germany, is a business currently active in the development, production, sale, research and development of microbatteries and energy storage solutions, for use within a variety of applications and end user

¹ Commitments, paras. 2 and 5.

² Affiliated Undertakings: undertakings controlled by Energizer and/or by its ultimate parent, whereby the notion of control shall be interpreted pursuant to Article 3 of the Merger Regulation and in light of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.

markets. VAG has been listed on the Frankfurt Stock Exchange since 19 October 2017 and has a market capitalisation of approximately EUR [...].

- (7) With [...], VAG is one of the leading battery manufacturers worldwide.

2.2. Independence from Energizer

- (8) Pursuant to paragraph 21 (a) of the Commitments, in order to be approved by the Commission, a suitable purchaser must be independent from and unconnected to Energizer and its affiliated undertakings.
- (9) According to the information provided by Energizer and the Trustee, there are no cross-shareholdings or material common shareholdings between VAG and Energizer, and VAG does not share any board directors with Energizer.³
- (10) Moreover, there are no joint-ventures in which VAG and Energizer both participate.⁴
- (11) VAG can therefore be considered to be independent from and unconnected to Energizer in terms of ownership and investments.
- (12) Moreover, the Trustee considers that pre-existing commercial relationships in place between VAG and Energizer should not impede VAG's independence from Energizer because they are not material [...]. Moreover, the Trustee considers that the post-closing links between VAG and Energizer are going to be transitional in nature and within the limits foreseen in the Commitments.⁵
- (13) On the basis of the information provided by Energizer and taking into account the Reasoned Opinion submitted by the Trustee, the Commission concludes that VAG is, and will continue to be post-transaction, independent and unconnected to Energizer and its Affiliated Undertakings.

2.3. Financial resources, proven expertise and incentive to maintain and develop the Divested Business as a viable and active competitor

- (14) Pursuant to paragraph 21 (b) of the Commitments, in order to be approved by the Commission, a suitable purchaser must have the financial resources, proven expertise and the incentives to maintain and develop the Divestment Business as a viable and active competitive force in competition with Energizer and other competitors.
- (15) According to the information provided by the Trustee, VAG has sufficient resources to maintain and develop the Divestment Business. As at March 2019, VAG had cash holdings of EUR [...] and has received commitments from a syndicate of banks for borrowings of EUR [...]. This compares to an upfront purchase price for the Divestment Business of approximately EUR [...]. Moreover, VAG may be able to raise additional financing through share issuances, should the need arise.⁶

³ Reasoned Opinion, Section 5.

⁴ Reasoned Proposal, Section 2.1.

⁵ Reasoned Opinion, Section 5.

⁶ Reasoned Opinion, Section 2.

- (16) In terms of proven expertise, VAG has a proven track record in the battery industry in which it operated for over 130 years. Moreover, VAG has been able to grow its core business organically by increasing its sales as well as its margins.⁷
- (17) In terms of incentives, the Trustee considers that VAG through the acquisition of the Divestment Business will have an opportunity to diversify its current product offering in the battery sector and will provide it with direct access to the mass retail market in Europe.⁸ Moreover, the Trustee notes that VAG intends to invest in maintenance capital expenditure for the Divestment Business at a higher level than forecast by management. Finally, the Trustee indicates that through the acquisition of the Divestment Business, VAG would create synergies between the Divestment Business and its existing businesses.⁹
- (18) On the basis of the information provided by Energizer and taking into account the Reasoned Opinion submitted by the Trustee, the Commission considers that VAG has sufficient financial resources, proven expertise and the incentives to maintain and develop the Divestment Business as a viable and active competitive force in competition with Energizer and other competitors.

2.4. Absence of *prima facie* competition concerns

- (19) Pursuant to paragraph 21 (c) of the Commitments, the acquisition of the Divestment Business by a suitable purchaser must neither be likely to create *prima facie* competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed. In particular, the purchaser must reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business.
- (20) The Commission assessed the acquisition by VAG of the Divestment Business in Case M.9449 and reached the conclusion that the transaction raised serious doubts as to its compatibility with the internal market with respect to the supply of HAB to other battery manufacturers.¹⁰ VAG offered commitments to address in full the serious doubts raised by the Commission by committing, among other things, to supply HAB to its actual and potential customers. On this basis, the Commission approved the acquisition of the Divestment Business by VAG as it considered that it no longer raised competition concerns in the EEA.
- (21) The Trustee indicated that the acquisition of the Divestment Business by VAG is not subject to review by any other competition authority.¹¹
- (22) On the basis of the above and taking into account the Reasoned Opinion submitted by the Trustee, the Commission concludes that the acquisition of the Divestment Business by VAG is neither likely to create *prima facie* competition concerns, nor give rise to a risk that the implementation of the Commitments will be delayed.

⁷ Reasoned Opinion, Section 2.13.

⁸ Reasoned Opinion, Section 3.4.

⁹ Reasoned Opinion, Section 3.4.

¹⁰ Commission Decision in Case M.9494 – VAG / Varta (consumer battery, chargers and portable power and lighting business) (2019).

¹¹ Reasoned Opinion, Section 6.4.

2.5. Conclusion on the purchaser criteria

- (23) In light of the above considerations, taking into account the Reasoned Opinion submitted by the Trustee, and taking into account the information available to it, the Commission concludes that VAG meets the purchaser criteria set out in paragraph 21 of the Commitments.

3. ASSESSMENT OF THE TRANSACTION AGREEMENTS

- (24) The Trustee reviewed the Proposed Agreements and confirmed that they fulfilled the condition of the Commitments to transfer the Divestment Business to a suitable purchaser.¹² The Trustee also pointed out that while the terms of the Proposed Agreements generally reflected Energizer's obligations set out in the Commitments, they deviated in three areas which are discussed below.

3.1. Pricing of the HAB supplies

- (25) The Commitments require Energizer to supply the Divestment Business with Rayovac-branded HAB [...], for sale in the non-audiologist retail channel only. Energizer is required to supply up to [...] % of the prior year net sales of HAB, on a rolling annual basis, for a period of [...] years from closing.
- (26) Should the Divestment Business request supply of HAB above [...] % of the net sales of the previous year, and should the fulfilment of such request impose unreasonable costs of Energizer, Energizer is to discuss in good faith, in consultation with the Trustee, a means of resolving such a supply request with the Divestment Business
- (27) The Proposed Agreements provide that any supplies in excess of [...] % prior year net sales of HAB would be set by Energizer based on [...].¹³ However, such provision appears to be contrary to the Commitments which foresee that the supply of HAB by Energizer to the Divestment Business should be [...] irrespective of the quantities supplied.

3.2. Duration of the HAB

- (28) Under the Commitments, Energizer cannot use the Rayovac brand for sales of HAB in the non-audiologist retail channel in the EMEA for a period of up to [...] years after the expiration of the supply agreement to be entered into with the Divestment Business pursuant to the Commitments (the black-out period).¹⁴
- (29) The Proposed Agreements provided that in the event that, during the period of the HAB supply agreement or of the black-out period, VAG commences selling HAB in the non-audiologist retail channel in EMEA under an established or new trademark, the parties would meet to discuss in good faith Energizer's use of the Rayovac brand.¹⁵ Such provision appears to be contrary to the Commitments which foresee that any modification of the Commitments should be approved by the Commission.¹⁶

¹² Reasoned Opinion, Section 4.10.

¹³ Proposed Agreements, 1.d(iii) and Annex A.

¹⁴ Commitments, para. 18.

¹⁵ Proposed Agreements, Annex C.

¹⁶ Commitments, para. 72.

3.3. Sale of Rayovac branded batteries to Amazon

- (30) Currently, the Divestment Business does have sales of “Rayovac Extra Advanced” branded HAB online to consumers, through the Amazon sales platform.
- (31) The Proposed Agreements provide that the Divestment Business going forward would no longer sell “Rayovac Extra Advanced” branded batteries but would sell instead batteries branded “Rayovac Acoustic” through the Amazon sales platform.¹⁷
- (32) In relation to such brand transition, the Commission raised concerns that (i) customers could receive batteries of inferior quality and (ii) it could adversely affect the Divestment Business’ position on the Amazon sales platform.

3.4. Energizer’s position

- (33) To address the concerns raised by the provisions of the Proposed Agreements relating to the duration and pricing of the HAB supply, Energizer and Varta offered to amend the Proposed Agreements so that (i) the pricing of the HAB supplies would be [...] irrespective of the quantities ordered by the Divestment Business and (ii) any modification of Energizer’s obligations relating to the duration of the black-out period would have to be approved by the Commission.
- (34) As regards the supply of “Rayovac Acoustic” branded batteries to the Divestment Business, Energizer confirmed that the change of brand would not imply also a change of the quality of the batteries. Moreover, Energizer indicated that the transition of Amazon customers to the “Rayovac Acoustic” brand should be relatively easy and that, in any event, the Divestment Business has strong e-marketing capabilities. Finally, Energizer indicated that a licence for the “Rayovac Extra Advanced” brand would not be required to implement the brand transition and that, in any event, it would be ready to offer such a licence to VAG should it be needed.

3.5. The Trustee’s Opinion

- (35) On 29 November 2019, the Trustee submitted an addendum to its Reasoned Opinion in which it expressed the view that the Amended Proposed Agreements are in line with the Commitments as relates to the duration and pricing of the HAB supply.
- (36) As to the sale of “Rayovac Acoustic” branded batteries on the Amazon sales platform, the Trustee considers that that a brand transition as described above is not uncommon on the Amazon platform and that a motivated and experienced marketing team with adequate time and resources would be expected to be able to complete such transition as needed.¹⁸

3.6. The Commission’s conclusions

- (37) On the basis of the above and taking into account the Energizer’s submissions as well as the Reasoned Opinion submitted by the Trustee, including its addendum, the Commission concludes that the Divestment Business is being sold in a manner consistent with the Commitments.

¹⁷ Proposed Agreements, Clause 9.

¹⁸ Addendum to the Reasoned Opinion, Section 5.4.

4. CONCLUSION

- (38) On the basis of the above assessment, the Commission approves VAG as a suitable purchaser for the above-mentioned reasons.
- (39) On the basis of the Amended Proposed Agreements, the Commission further concludes that the Divestment Business is being sold in a manner consistent with the Commitments.
- (40) This decision only constitutes approval of the proposed purchaser identified herein and of the Proposed Agreement. This decision does not constitute a confirmation that Energizer has complied with its Commitments.
- (41) This decision is based on paragraph 21 of the Commitments attached to the Decision.

For the Commission

(Signed)
Cecilio MADERO VILLAREJO
Acting Director-General