



EUROPEAN COMMISSION

DG Competition

*Case M.9019 – Mars / AniCura*

Only the English text is available and authentic.

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

**MERGER PROCEDURE**

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Decision on the implementation of the commitments

Purchaser approval

Date: 06/02/2019





## EUROPEAN COMMISSION

Brussels, 6.2.2019  
C(2019) 1009 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 Where possible the information omitted has been replaced by ranges of figures or a general description.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.9019 – Mars/AniCura**  
**Approval of Fidelio as purchaser of VetFamily following your letter of 16 December 2018 and the Trustee’s opinion of 15 January 2019**

### **I. FACTS AND PROCEDURE**

1. By decision of 29 October 2018 (“the Decision”) adopted in application of Article 6(2) of Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings,<sup>1</sup> the Commission declared the operation by which Mars, Inc. (“Mars”) acquired sole control over AniCura TC AB (“AniCura”, together with Mars, the “Parties”) compatible with the internal market, subject to conditions and obligations (the “Commitments”).
2. In particular, the Commitments provide that the Parties shall divest or procure the divestiture of VetFamily, a joint purchasing group wholly-owned by AniCura, which enables its members to procure veterinary supplies (such as pharmaceutical products, pet food, laboratory supplies etc.) under the framework agreements with selected suppliers (the “Divestment Business”).

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<sup>1</sup> 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.

3. The Divestment Business consists of the entire VetFamily business as at closing of the acquisition of AniCura by Mars ("Closing") and includes all staff employed by the Divestment Business, all tangible and intangible assets, including the intellectual property rights, contracts and licences required to conduct the business of the Divestment Business. The Divestment Business also includes the benefit, for a transitional period of up to [...] after Closing (and at the request of the purchaser, with a possible extension for a further period of [...]), subject to the opinion of the Monitoring Trustee) and on terms and conditions equivalent to those at present afforded to the Divestment Business, of all current arrangements under which AniCura or its affiliated undertakings supply services to the Divestments Business.
4. Furthermore, the Commitments include:
  - a. the commitment that AniCura will withdraw from joint purchasing activities with the Divestment Business for a period of ten years after Closing (with the exception of AniCura-owned veterinary practices which are currently VetFamily members in Denmark, unless their ceasing to be VetFamily Members is requested by the Commission);
  - b. the commitment that neither Mars, AniCura nor their affiliated undertakings will establish, operate, or enter into a joint procurement or purchasing group for or with any independent veterinary practices in Sweden, Denmark or Norway, or solicit any such independent veterinary practice to do so;
  - c. the commitment that neither Mars, AniCura nor their affiliated undertakings acquire an ownership interest in any veterinary practices in Sweden, Denmark or Norway which are VetFamily Members as at the date of the adoption of the Decision, or solicit any such VetFamily Member to be acquired;
  - d. the commitment by Mars, for a period of ten years after Closing, not to acquire, whether directly or indirectly, the possibility of exercising influence<sup>2</sup> over the whole or part of the Divestment Business, unless, following the submission of a reasoned request from Mars showing good cause and accompanied by a report from the Monitoring Trustee, the Commission finds that the structure of the market has changed to such an extent that the absence of influence over the Divestment Businesses is no longer necessary to render the proposed concentration compatible with the internal market.
5. The Commitments also provide for a Monitoring Trustee to monitor the implementation of the Commitments. On 30 October 2018, Mars proposed Monitoring Trustee Partners (the "Trustee"), which was approved by the Commission as a suitable monitoring trustee on 12 November 2018.
6. By letter of 16 December 2018, the Parties proposed Fidelio Capital AB, acting through a wholly-owned investment vehicle named Goldcup 17743 AB uct Akial AB ("Fidelio") for approval by the Commission as purchaser of the Divestment Business and submitted the proposed Share Purchase Agreement and related agreements, notably the Asset Transfer Agreement, the License Agreement, the

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<sup>2</sup> As defined in paragraph 43 of the Remedies Notice, footnote 3.

Transitional Services Agreement and the Reverse Transitional Services Agreement (the "Proposed Agreements"). The proposed acquisition of the Divestment Business by Fidelio is referred to as "the Proposed Transaction".

7. On 15 January 2019, the Trustee submitted to the Commission an assessment of Fidelio's suitability as a purchaser and, in particular, stated that it fulfils the criteria of the purchaser requirements in section D of the Commitments attached to the Decision. In its assessment, the Trustee also stated that, on the basis of the Proposed Agreements, the Divestment Business would be sold in a manner consistent with the Commitments, subject to the inclusion of certain amendments suggested by the Trustee in order to bring the License Agreement in line with the Commitments.
8. On 24 January 2019, Mars submitted a revised final version of the License Agreement, incorporating the amendments proposed by the Trustee.

## **II. ASSESSMENT OF THE PROPOSAL**

### **(a) Legal framework**

9. Pursuant to paragraph 17 of the Commitments, the Commission has to verify that the purchaser fulfils the purchaser criteria and that the Divestment Business is being sold in a manner consistent with the Commitments.
10. According to paragraph 16 of the Commitments, in its assessment of the purchaser, the Commission should ensure in particular that:
  - a. the purchaser is independent of and unconnected to Mars and its affiliated undertakings;
  - b. the purchaser has the financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors; and
  - c. the acquisition of the Divestment Business by the purchaser is neither 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.

### **(b) Description of the proposed purchaser**

11. Fidelio is a Swedish investment company founded in 2010, owned solely by its employees and a limited group of external investors. Fidelio is a long-term investment company that primarily invests in non-public small and medium-sized companies in Northern Europe. Fidelio's objective is to create value for its shareholders and investors by operating with a long-term and responsible approach to its investments. To this end, Fidelio's investment mandates stipulate that it is allowed to hold investments for a period of up to [...].
12. Fidelio is a previous founder and shareholder of AniCura and is therefore familiar with VetFamily's business (including through its acquisition by former portfolio

company AniCura in 2014 where Fidelio was active in the acquisition process of VetFamily on behalf of AniCura).

13. Fidelio's portfolio companies employ more than 1 000 employees, and have enjoyed an average of [...] % yearly sales growth.

**(c) Independence from the Parties**

14. According to the information provided by the Trustee, there are no material shareholder or investor links between Fidelio (including its investment funds and portfolio companies) on the one hand and Mars and its affiliated undertakings on the other hand. A high-ranking executive of AniCura has an equity stake in both the Fidelio II fund (amounting to [...] and [...]). However, based on the percentages of the committed capital and the voting rights, said executive has no possibility to influence in any way Fidelio's or [Fidelio portfolio company] decisions, his involvement as a consequence of his investments is very limited and he is precluded from having any insight into the decision-making or day-to-day activities of both Fidelio II or [Fidelio portfolio company]. For these reasons, the Trustee concludes that Fidelio is independent from Mars and its affiliated undertakings from an ownership (investor) perspective.
15. According to the Trustee, Fidelio has not engaged in any joint ventures, alliances or associations with Mars or any of its affiliated undertakings, nor have Fidelio on the one hand and Mars and its affiliated undertakings on the other hand been parties to any transaction (other than the transaction subject of the Decision) in the last three years. Fidelio is therefore independent from Mars and its affiliated undertakings from a collaboration (by means of joint ventures, alliances and associations) and merger and acquisition perspective.
16. According to the Trustee, the only commercial relations between Fidelio and Mars (and its affiliated undertakings) comprise the sale of [...] to individual AniCura-owned veterinary practices. These sales were made on an *ad hoc* basis and resulted in revenues to [Fidelio portfolio company] of an amount representing a small percentage of [Fidelio's portfolio company's] total revenues in 2018. The Trustee concludes that these business agreements are not material in any way to either [Fidelio portfolio company] or AniCura.
17. None of the management and supervisory board members of Mars or AniCura are active as a director or member of the management and supervisory board of Fidelio, its investment funds or portfolio companies, nor are any of the management and supervisory board members of Fidelio, its investment funds or portfolio companies active as a director or member of the management and supervisory board of Mars or AniCura. The Trustee notes that two of the individuals that have significant stakes in Fidelio's funds have been non-executive board members of AniCura until resigning just prior to Closing. In light of the fact that neither of these individuals continues to be involved in AniCura in any management or other capacity capable to influence commercial decisions of AniCura, the Commission considers that their previous involvement as non-executive board members of AniCura is not liable to affect Fidelio's independence from the Parties.

18. Therefore, based on the information provided by the Parties, and in line with the Trustee's opinion, the Commission concludes that the proposed purchaser, Fidelio, fulfils the criterion of independence from the Parties.

**(d) Financial resources, proven expertise and incentive to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors**

19. The Trustee submits that Fidelio has sufficient financial resources, proven expertise and incentives to maintain and develop the Divestment Business as a viable and active competitive business.

20. Fidelio's investors have committed a significant amount to the investment fund "Fidelio II", which Fidelio will use to acquire the Divestment Business. [...]. Fidelio has confirmed to the Trustee that it is committed and able to inject further capital into the Divestment Business in case the required capital expenditures turn out to be larger than anticipated or the Divestment Business' annual operating cash flows turn out to be lower than budgeted.

22. According to the Trustee, Fidelio has the proven expertise to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors in the EEA, in particular through its investments in AniCura and Nextmune and with access to a broad network of industry experts that can assist VetFamily, if required to do so.

23. According to the Trustee, Fidelio has the incentive to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors in the EEA. The fact that Fidelio can make investments for up to [...] with its Fidelio II fund would allow Fidelio to be committed to the development of the Divestment Business in the long term. The Trustee furthermore considers that Fidelio has financial responsibilities to its investors and, as a management company, also has its own incentives to create value.

24. Therefore, based on the information provided by the Parties, and in line with the Trustee's opinion, the Commission concludes that the proposed purchaser, Fidelio, fulfils the criterion that it has sufficient financial resources, proven expertise and incentives to maintain and develop the Divestment Business as a viable and active competitive force in competition with the Parties and other competitors.

**(e) Absence of *prima facie* competition concerns and of a risk that the implementation of the Commitments will be delayed**

25. The Trustee considers that the approval of Fidelio as the purchaser of the Divestment Business would not create any *prima facie* competition concerns nor give rise to a risk that the implementation of the Commitments would be delayed.

26. First, given that Fidelio does not have any investments in any companies which compete with VetFamily, the Proposed Transaction does not give rise to any horizontal overlaps.

27. Second, although Fidelio's portfolio company Nextmune is a supplier of specialty veterinary medicine and diagnostics, the Proposed Transaction would not give rise

to any problematic vertical overlaps given the limited size of both the Divestment Business and Nextmune in their respective markets. Nextmune's 2017 revenues in national markets in which the Divestment Business operated in 2017 (Denmark, Norway and Sweden), [...].

28. Third, the Share Purchase Agreement [...].
29. On this basis, the Commission concludes that Fidelio's acquisition of the Divestment Business would not raise *prima facie* competition concerns nor give rise to a risk that the implementation of the Commitments will be delayed.
30. This *prima facie* assessment is based on the information available for the purpose of this purchaser approval and does not prejudge the competition assessment of the acquisition of the Divestment Business by Fidelio by a competent competition authority under any applicable merger control rules.

**(f) Conclusion on the purchaser criteria**

31. In light of the above considerations and taking into account the Trustee's opinion, the Commission concludes that Fidelio meets the purchaser criteria set out in paragraph 16 of the Commitments.

### **III. ASSESSMENT OF THE PROPOSED AGREEMENTS**

32. The Proposed Agreements comprise: (i) the Share Purchase Agreement; (ii) the Asset Transfer Agreement, (iii) the License Agreement, (iv) the Transitional Services Agreement and (iv) the Reverse Transitional Services Agreement.
33. The Trustee reviewed the Proposed Agreements and, after having consulted, in agreement with the Commission, made a number of observations concerning the compliance of the Proposed Agreements with the Commitments, which led to several amendments by the Parties.
34. In particular, the initial version of the License Agreement concerning the grant of a licence to use the IT system through which VetPlan is administered, which according to paragraph 8 of the Schedule to the Commitments is to be granted on a perpetual, fully paid-up basis, envisioned the separation of data by users' access rights, meaning that the data in the IT system would be ringfenced, with AniCura only being able to access data relating to AniCura and the Divestment Business only being able to access data relating to the Divestment Business. A limited number of persons would be able to access all of the data held on the IT system, in order to support clinics or maintain and host the system. Such persons would sign non-disclosure and privacy agreements. [...].
35. Following initial feedback from the Trustee and the Commission, Mars proposed an alternative version of the Licence Agreement, which foresaw a complete separation of the IT system. Under such a scenario, [...].
36. The Trustee and the Commission provided feedback on the two options presented by Mars for the licensing of the IT system. In particular, the Commission was concerned that the first option would maintain structural links between AniCura and the Divestment Business and could thereby potentially undermine the



independence of the Divestment Business. The first option could also undermine the competitive differentiation between AniCura's and the Divestment Business' IT systems following the divestment. Furthermore, data ringfencing envisaged in the initial version of the License Agreement may not be sufficient to prevent inadvertent disclosure or sharing of information between AniCura and the Divestment Business.

37. On 24 January 2019, Mars submitted a revised version of the License Agreement, which provides for a complete separation of the IT system and incorporates other amendments reflecting the feedback received from the Trustee and the Commission.
38. Following these amendments, the Trustee confirmed to the Commission that it deems the Proposed Agreements to be fully in line with the Commitments.
39. In light of the above considerations, taking into account the information provided by the Parties and the assessment submitted by the Trustee, the Commission concludes that the Proposed Agreements are consistent with the Commitments and that, accordingly, the Divestment Business is being sold in a manner consistent with the Commitments.

#### **IV. CONCLUSION**

40. On the basis of the above assessment, the Commission approves Fidelio as a suitable purchaser of the Divestment Business.
41. Moreover, on the basis of the Proposed Agreements, the Commission also concludes that the Divestment Business is being sold in a manner consistent with the Commitments.
42. This Decision only constitutes approval of the proposed purchaser identified herein and of the Proposed Agreements. This Decision does not constitute a confirmation that Mars has complied with its Commitments.
43. This Decision is based on section D of the Commitments attached to the Commission Decision of 29.10.2018.

*For the Commission*

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