



EUROPEAN COMMISSION  
DG Competition

***Case M.9094 - AMCOR / BEMIS***

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: 7.8.2019



EUROPEAN COMMISSION

Brussels, 7.8.2019  
C(2019) 6031 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 Where possible the information omitted has been replaced by ranges of figures or a general description.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 parties

Dear Sir/Madam,

**Subject: Case M.9094 – Amcor/Bemis  
Approval of Kohlberg & Company L.L.C as purchaser of the  
Divestment Business: Bemis Healthcare Packaging Limited, Bemis  
Healthcare Packaging Ireland Limited and Bemis Elsham Limited  
following your letter of 01.07.2019 and the Trustee's opinion  
of 09.07.2019**

### 1. FACTS AND PROCEDURE

- (1) By decision of 11.02.2019 (“the Decision”) adopted in application of Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation (EC) No 139/2004 (the “Merger Regulation”),<sup>1</sup> and Article 57 of the EEA Agreement, the Commission declared compatible with the internal market the operation by which the undertaking Amcor Limited (“Amcor”) acquired control within the meaning of Article 3(1)(b) of the Merger Regulation over Bemis Company Inc. (“Bemis”), as modified and subject to conditions and obligations (the “Commitments”). Amcor and Bemis are referred to hereinafter as the “Parties”.

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<sup>1</sup> OJ L 24, 29.1.2004, p. 1 (the “Merger Regulation”).

- (2) The Commitments provide for the divestment of Bemis Healthcare Packaging Limited, Bemis Healthcare Packaging Ireland Limited and Bemis Elsham Limited (the “Divestment Business” or “Bemis Europe”), consisting of:
- (a) The divestment of the Bemis plants located in Derry, Clara and Elsham as a going concern, including all tangible and intangible assets, license permits and authorisations, contracts leases and agreements and key personnel necessary for their operations;
  - (b) The provision of transitional supply agreements by Bemis for a period of [1-2 years] for Bemis central services and for specific raw materials and inputs supplied to the Divestment Business by retained Bemis plants, under unchanged terms and conditions and with an extensible term of [1-2] additional [years].
- (3) By letter of 1 July 2019, the Parties proposed Kohlberg and Company L.L.C., with its acquisition vehicle KNPAK Acquisition Limited (“Kohlberg” or the “Proposed Purchaser”) as purchaser of the Divestment Business for approval by the Commission, and submitted the proposed Sale and Purchase Agreement, with its Annexes [list of ancillary agreements] (the “Proposed Agreement”). On 9 July 2019, the monitoring trustee (Grant Thornton UK LLP or the “Trustee”) has submitted an assessment of Kohlberg’s suitability as a purchaser and, in particular, has indicated that it fulfils the criteria of the purchaser requirements set forth in paragraph 13 of the Commitments. In this assessment, the Trustee also indicated that, based on the Proposed Agreement, and subject to a number of conditions and addenda, the Divestment Business would be sold in a manner consistent with the Commitments. The addenda recommended by the Trustee have been included into the corresponding Annexes of the Sale and Purchase Agreement submitted by the Parties, which have been finalised to date.

## **2. ASSESSMENT OF THE PROPOSAL**

### **2.1. Legal Framework**

- (4) According to paragraphs 14 of the Commitments, in its assessment of the Proposed Purchaser and the Proposed Agreement, the Commission has to ensure that (i) the Proposed Purchaser fulfils the purchaser criteria, and (ii) the Divestment Business is being sold in a manner consistent with the Commitments including their objective to bring about a lasting structural change in the market.
- (5) According to paragraph 13 of the Commitments, in its assessment of the proposed purchaser, the Commission should thus verify that the Purchaser:
- (a) is independent of and unconnected to the Parties;
  - (b) has the financial capabilities, 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 in particular has proven expertise in the supply of flexible packaging products for healthcare applications or other relevant related expertise; and

- (c) is neither 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, and must, in particular, reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Business.

## **2.2. Description of the Proposed Purchaser**

- (6) Kohlberg is a US private equity firm established in 1987. It has USD 15 billion worth of assets under its management. It is organised into eight funds for which it has raised a total of USD 7.5 billion of committed equity capital.
- (7) The purchaser is Kohlberg's fund Kohlberg VIII, under which an acquisition vehicle, KNPAK Acquisition Limited will be established in order to acquire the Divestment Business.
- (8) KNPAK has recently acquired Nelipak Corporation ("Nelipak"), the transaction was closed on 2 July 2019. Nelipak is active in healthcare packaging and Kohlberg's strategic intention is to merge the Divestment Business with Nelipak in order to develop the combined entity as platform for further acquisitions.
- (9) Nelipak is a global provider and one of the leading suppliers of rigid and semi-rigid plastic medical device and pharmaceutical packaging.

## **2.3. Independence from the Parties**

- (10) The Trustee's review has shown that Kohlberg and its portfolio companies have no structural connections with Amcor or Bemis and Kohlberg and Amcor do not have executive or non-executive directors in common.
- (11) Kohlberg, and Kohlberg VIII do not have controlling shareholders or group of shareholders acting in concert. Kohlberg VIII has [...] investors, the largest one holding [...]%. The only overlapping investor between Kohlberg VIII and Amcor is [name of investor], which has a minority shareholding in both ([...] % in Kohlberg and ca. [...] % in Amcor). However, the Trustee notes that Kohlberg's investors [...] over the investments.
- (12) Nelipak has some commercial relationship with [identities of specific customers]; sales made to [identity of specific customer] total ca. [>USD 300 000] and purchases from [identity of specific customer] amount to ca. [>USD 350 000] per annum. The Trustee remarks that all the products concerned have alternative suppliers.
- (13) The Commission considers that the Proposed Purchaser is independent and unconnected to the Parties. Although the Proposed Purchaser and Amcor have a minority shareholder in common this does not, in this case, cast doubt on the Proposed Purchaser's independence, given the shareholder's very small share in the Proposed Purchaser and the passive nature of that investment. Likewise, the existing commercial relationships between Nelipak and Amcor and Bemis only represent a very small fraction of Nelipak's turnover and, hence, do not cast doubt over the Proposed Purchaser's independence. Therefore, based on the information provided by the Trustee and in view of the above, the Commission considers that the Proposed Purchaser is independent of and unconnected to the Parties.

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

- (14) Kohlberg has been operating for over 30 years and has successfully mounted eight funds with a total of USD [...] billion equity capital, from which Kohlberg VIII, the acquiring fund, makes up USD [...] billion. Kohlberg holds ca. 10-20% cash reserves for development opportunities or other financing needs.
- (15) Kohlberg has made a number of investments in the packaging and healthcare sectors, making up ca. one third of its portfolio. It recently acquired Nelipak, a global leader in thermoformed medical packaging,
- (16) Kohlberg also has holdings in the broader medical sector; in device manufacturers such as Philips-Medisize and Cadence and in companies active in healthcare. Kohlberg has a number of senior operating executives with extensive knowledge of the flexible packaging industry who will be deployed to the benefit of developing the Divestment Business. These include the former chairman of Spectrum Plastics Group, a company active in films and bags in the medical and food segments, and the former CEO of Packaging Dynamics Corp, a supplier of flexible packaging made from paper, film and foil.
- (17) The Trustee describes that Kohlberg has been successful in growing and further developing its past acquisitions in the packaging - including medical - and healthcare sectors, including the above mentioned Spectrum Plastics Group and Packaging Dynamics Corp. In terms of strategy, Kohlberg intends to merge the Divestment Business with Nelipak, a medical and pharmaceutical packaging company with over 60 years of experience that Kohlberg recently acquired (2 July 2019), in order to exploit synergies from the complementary product offerings, enlarged geographic footprint and increased customer base. Nelipak is operating from seven production facilities across the globe, including in the Netherlands (Venray) and Ireland (Galway) and has been profitable and growing organically in the past three years.
- (18) In future, Kohlberg intends to further expand the combined Divestment Business – Nelipak business through using it as a ‘platform’ for further add on acquisitions in the medical packaging segment for which potential targets are already identified.
- (19) The acquisition of both the Divestment Business and Nelipak will be financed through significant amounts of debt, resulting in an over [...] % leverage on the Divestment Business, which in general is considered to be on the high side by the Trustee. However, upon confirmation with Kohlberg that this gearing is common for such transactions, the Trustee considers that it would not risk the viability and competitiveness of the Divestment Business given the seemingly sufficient and improving interest coverage and the gearing to be decreased over the years to below [...] % by [date].
- (20) The Commission agrees with the Trustee’s assessment. It considers that, with its significant funds and cash reserves, Kohlberg has the required financial capabilities. In addition, Kohlberg owns Nelipak, which is a global and experienced manufacturer of packaging for healthcare applications. Although Nelipak’s focus is on a different types of packaging, thermoformed semi-rigid or rigid packaging and not flexible packaging, this expertise constitutes relevant related expertise, as Nelipak’s packaging business and operations share many common features with flexible packaging for medical use such as specific regulations, and production processes

including one clean room requirement. . Nelipak's focus on medical and healthcare packaging ensures the Purchaser is familiar with the specific conditions and customer requirements that characterise this segment. Nelipak's proven expertise will therefore contribute to the Divestment Business being competitive.

- (21) Given Kohlberg's long-standing focus on packaging and healthcare and the rationale for the acquisition, the Commission also considers that it will have the incentive to develop the Divestment Business as a viable and active competitive force.
- (22) The Commission therefore concludes that the Proposed Purchaser has the financial capabilities, 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 in particular has proven expertise in the supply of flexible packaging products for healthcare applications or other relevant related expertise.

## **2.5. Absence of *prima facie* competition problems**

- (23) Previous Commission decisions<sup>2</sup> identified flexible packaging as a distinct product market, describing the production of flexible packaging as the manufacture, supply and conversion of plastic and cellulose films, aluminium foils and papers into reels of packaging to be used for primary retail food packaging and labelling and certain other non-food sectors.<sup>3</sup>
- (24) Commission precedents also found that the flexible packaging market could be further segmented into flexible packaging for different end use applications, namely (i) food, (ii) medical supplies, (iii) pharmaceuticals, (iv) household products, and (v) other non-food. No Commission precedents have assessed flexible packaging for medical use specifically.<sup>4</sup>
- (25) The recent decision in case M.9094 Amcor/Bemis<sup>5</sup> found that the flexible packaging market for medical use was a highly differentiated product market, which could potentially be further sub-segmented according to
  - (a) the end-use (such as Catheters, Drapes, Electro-mechanical devices, Gloves, Injection Systems, Minimally Invasive Devices, Orthopaedic Devices, Sutures, Tubing, Wound-care, In-hospital use, Kits, other ) and potential narrower end-use segments within these,
  - (b) material (e.g. film, foil, paper, non-wovens, various coatings, laminates of these or coextrusions) and the
  - (c) format (such as pre-made products, such as pouches and bags, lids, trays, or rollstock).
- (26) Evidence at hand did not allow concluding whether these segments could constitute relevant product markets and the ultimate market definition was left open. However,

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<sup>2</sup> See e.g. case COMP/M.2441 - Amcor/Danisco/Ahlstrom, decision of 16 June 2001, paragraph 8.

<sup>3</sup> Case COMP/M.2441 - Amcor/Danisco/Ahlstrom, paragraph 12; Case COMP/M.2840 - Danapak/Teich/JV, paragraphs 13; Case COMP/M.3049 - Alcan/FlexPack, paragraph 11-12; Case COMP/M.3225 - Alcan/Pechiney, paragraphs 128 and 131; Case COMP/M.5599 - Amcor/Alcan, paragraph 15.

<sup>4</sup> See case M.9094 Amcor/Bemis, paragraph 31.

<sup>5</sup> See case M.9094 Amcor/Bemis, paragraphs 38-62.

such alternative sub-segmentations have guided the Commission in its assessment of the competitive dynamics between the suppliers and determining their closeness.

- (27) Nelipak is one of the main suppliers of packaging solutions for medical and pharmaceutical use with a turnover of ca. EUR [...] million and extensive experience of over 60 years in the sector, as also indicated in paragraph (9). With a turnover of ca. EUR [...] million for the Divestment Business, the businesses of Nelipak and Bemis Europe are complementary: Nelipak achieves ca. [...] % of its turnover with rigid packaging<sup>6</sup> and does not see itself as a competitor in flexible packaging.<sup>7</sup> Bemis Europe on the other hand is mainly a flexible packaging solutions provider, with a minimal turnover (EUR [...] million) in rigid packaging.<sup>8</sup>
- (28) Therefore, in principle, Nelipak does not compete on the same product market (see paragraphs (23) and (24)) i.e. flexible packaging for medical use, as the Divestment Business. This is supported by evidence obtained through the Commission's investigation in case M.9094 Amcor / Bemis: respondents the market investigation have not identified Nelipak among the closest competitors of Bemis,<sup>9</sup> confirming the Parties' argument that the portfolios Bemis Europe and Nelipak are complementary.
- (29) In addition, the Commission notes that the win/loss bidding data submitted over the course of the Commission investigation shows that for a diverse range of products, Bemis and Nelipak [details of competitive interaction between Bemis and Nelipak]<sup>10</sup>.
- (30) Although Nelipak focuses on rigid packaging, as asserted by Nelipak and as also submitted by the Parties, Nelipak nonetheless figures among the top 25 medical flexible packaging competitors of Amcor and Bemis in the EEA in the Parties' submissions.<sup>11</sup> In addition, the products Nelipak manufactures seem to be classified also as semi-rigid (e.g. trays with lids) in view of the Parties.<sup>12</sup>
- (31) Although included among the competitors, the Parties still do not view Nelipak as one of the top 10 suppliers in flexible packaging for medical use.<sup>13</sup>
- (32) In any event, under the assumption that Nelipak's and Bemis Europe's businesses may compete, with a combined turnover of EUR [...] million, they would have a combined market share on an overall market for flexible packaging for medical use of [10-20] to [20-30] %<sup>14</sup> ([5-10] % to [10-20] % for Nelipak and [5-10] % to [10-20] % for Bemis Europe) depending on the market size estimate.
- (33) In particular, as regards the potential sub-segments of flexible packaging for medical use, horizontal overlaps between the activities of Bemis Europe and Nelipak are

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<sup>6</sup> See Nelipak's reply to question 2 of Q2 – Questionnaire to competitors of flexible packaging.

<sup>7</sup> See Nelipak's reply to question 7 of Q2 – Questionnaire to competitors of flexible packaging.

<sup>8</sup> See the Parties' Reasoned Proposal of 1 July, 2019, paragraph 4.3.1.

<sup>9</sup> See replies to question 48.2 of Q1B\_ Questionnaire to medical customers.

<sup>10</sup> See Parties' reply to RFI No. 7, question 4, 7 January 21019.

<sup>11</sup> See Form CO, Table 7.3. Overview of medical flexible packaging suppliers in the EEA.

<sup>12</sup> See the Parties' Reasoned Proposal of 1 July, 2019, paragraph 7.2.

<sup>13</sup> See Form CO, Table 6.1. Overview of medical flexible packaging suppliers in the EEA.

<sup>14</sup> [10-20] % based on the market size estimate of Amcor and Bemis (EUR 1 billion) and [20-30] % according to the lowest estimate in internal documents of the Parties as revealed by the investigation. See Commission decision in case M.9094 Amcor/Bemis, paragraphs 106-109.

minimal and the combined market shares are generally low, with only a small number of potential overlaps resulting in a share in excess of 20%.

- (34) As concerns the type of packaging, Nelipak manufactures thermoformed trays and achieves ca. [...] % of its turnover with these while Bemis Europe has hardly any activity in trays and achieves most of its turnover with bags and pouches, where Nelipak only has a marginal turnover with.
- (35) Between Bemis Europe and Nelipak, there is a horizontal overlap in lidding, with a combined share over 20%.<sup>15</sup> However, the Parties clarify that Nelipak does not produce any lidding itself and only resells the lidding purchased from third parties. Moreover, the Parties submit that there is also a large number of other competitors active in the supply of lidding such as Oliver Tolas, Coveris, Wipak, VP, Encaplast, Südpack, Medipack, TEQ, Inpak, Top Clean Packaging, Technoflex and LabelArt. The market investigation in case M.9094 Amcor/Bemis confirmed that many of these are credible competitors, active in lidding.<sup>16</sup>
- (36) In terms of end-use applications, combined shares, as submitted in the Form CO<sup>17</sup>, could exceed 20% in diagnostics/minimally invasive devices, orthopaedics and injection systems. However, the Parties emphasise that their respective products are largely complementary and they are not close competitors in these end-use applications given the different focus of the packaging formats, which they supply to the market – i.e. whereas the Divestment Business produces large amounts of bags, pouches and lidding, Nelipak focuses on trays. In addition, there is a significant number of competitors in the end-use applications in which the Divestment Business and Nelipak overlap:
- (a) Diagnostics/minimally invasive devices: Oliver, Wipak, Coveris, and others.
  - (b) Orthopaedics: Oliver, Amcor, Wipak, Coveris Prent, Autobag, Medipack, UFP Technologies, Vitalo, Technoflex, Südpack, VP, Encaplast, Riverside Packaging and Placon. Moreover, various packaging types are used in this segment, including pouches, die-cut lids and trays, and customers can and do choose between different packaging options both in terms of formats and materials.
  - (c) Injection systems: Wipak, Oliver, Coveris, Sterimed, LabelArt, Amcor, Riverside Medical, Billerud, Encaplast, Südpack, VP, Bischof & Klein, Constantia and Flextrus.
- (37) Amcor's internal documents [description of documents submitted by the Parties].<sup>18</sup> In addition, respondents to the market investigation also recognised many of the listed competitors as credible.<sup>19</sup>

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<sup>15</sup> See Commission decision in case M.9094 Amcor/Bemis, paragraphs 106-109, although combined shares have been revised downwards based on the actual figures of Nelipak, as opposed to estimates submitted by the Parties during the notification.

<sup>16</sup> See replies to question 46.2 of Q1B\_ Questionnaire to medical customers.

<sup>17</sup> See case M.9094 Amcor/Bemis, Table 1.

<sup>18</sup> See Amcor's internal strategic document entitled [...].

<sup>19</sup> See replies to question 46.2 of Q1B\_ Questionnaire to medical customers.



- (38) The acquisition of the Divestment Business by Kohlberg was notifiable under the merger control rules of Germany and Austria, both of which have cleared the transaction prior to this purchaser approval (on 12 July and 29 July respectively).
- (39) In view of the above, in view of the information available to the Commission and in view of the opinion of the Trustee, the Proposed Purchaser is neither likely to create *prima facie* competition concerns nor to give rise to a risk that the implementation of the Commitments will be delayed.
- (40) This *prima facie* assessment is based on information made available for the purpose of this buyer approval.

## **2.6. Assessment of the proposed agreement**

- (41) As concerns the draft Sale and Purchase Agreement between Bemis and the Proposed Purchaser, the Trustee identified a number of issues where it may be inconsistent with the Commitments. These are the following:

### Transaction document

- (42) The Trustee emphasizes the need for the agreed Sale and Purchase Agreement and Annexes to be finalised, either signed or agreed in a binding manner, as required by point 3.1 of the Commitments.
- (43) The Parties have confirmed to the Commission on 5 August, 2019 that all the transaction documents have been signed.

### Hold Separate Manager

- (44) The Trustee points out that the Proposed Purchaser does not require the services of the Hold Separate Manager, which represents a change in Key Personnel.
- (45) In this respect, the Parties confirmed on 5 August 2019 that the Hold Separate Manager will stay in place only until Closing and will not be employed by the Proposed Purchaser afterwards. In addition, as reported by the Trustee, this happens on request of the Proposed Purchaser and in mutual agreement with the Hold Separate Manager. In the Commission's view the Hold Separate Manager, [previous job title], does not possess a unique or irreplaceable expertise with relation to the plants to be divested. In addition, a large number of Key Personnel has been defined for each plant that have been effectively involved into the operational management of the plants already beforehand and also the Proposed Purchaser has the necessary capacity and expertise to manage the Divestment Business. [Details of Hold Separate Manager's future employment].
- (46) Therefore, considering the above information, the Commission agrees with this change in Key Personnel consisting of the Hold Separate Manager not transferring to the Divestment Business after Closing, since it will not affect the viability and competitiveness of the Divestment Business after the sale.

### Other personnel

- (47) Point 6.2 of the Schedule to the Commitments call for the transfer of [details of personnel], from Bemis to the Elsham plant, [reason for transfer]. The Trustee remarks that while the customer support staff has been transferred through the

separation plan, the Parties have been unable to fulfil the commitment to transfer the [details of personnel and reason why they did not transfer].

- (48) The Trustee reports that while the Parties have confirmed their best efforts to identify and transfer the personnel, there is a risk that no one would be found. It adds however, that a Transitional Supply Agreement from Bemis has been put in place in this respect until a solution is found. The Commission considers that this deviation from the Commitments does not undermine the viability and competitiveness of the Divestment Business, as the Transitional Agreement is in place to ensure continuity and the Proposed Purchaser is likely to be able to set up the corresponding expertise during the transitional period. Moreover, the Proposed Purchaser did not express any concerns in this regard. Therefore, the Commission agrees to the above-mentioned changes in terms of Personnel.

#### Transitional Supply Agreements

- (49) Point 6 of the Commitments require the transitional supply agreements to be provided at conditions equivalent to those at present afforded to the Divestment Business. The Trustee informs the Commission that the Parties claimed [details of calculation of terms and conditions of transitional supply]. In the Trustee's view the prices seem reasonable.
- (50) On the basis of the Parties' confirmation, the view of the Trustee and in light of the fact that an agreement with the Proposed Purchaser could be reached on the prices and indexation formulae, the Commission considers that the Proposed Agreement is in line with the Commitments.
- (51) As concerns the transitional supply of films from Bemis [plant] to Bemis [plant] and film supply for Bemis Europe's [name of product], the Trustee points out that these were missing from the Transitional Supply Agreements. The Parties have confirmed to include these supplies into the final Transitional Supply Agreement.
- (52) The Commission received confirmation from the Parties on 5 August 2019 that these particular supply agreements have also been signed. Therefore, the Commission considers that the Proposed Agreement in terms of its supply agreements is in line with the Commitments.

#### Non-solicitation of Key Personnel

- (53) The Trustee points out that point 9 of the Commitments require the Parties not to solicit Key Personnel transferred with the Divestment Business for a period of 2 years after Closing. The Proposed Agreement on the other hand contains a non-solicitation clause covering employees with a salary of over GBP [...]. The Trustee reports that this has been a requirement of the Proposed Purchaser. However, the non-solicitation clause does not currently cover all the Key Personnel listed in the Commitments.
- (54) In order to be fully in line with the Commitments, the Parties have signed a commitment letter to the Proposed Purchaser confirming their obligation in point 9 of the Commitments, not to solicit any of the Key Personnel defined in point 6.1 of the Schedule of the Commitments.

**3. CONCLUSION**

- (55) On the basis of the above assessment, the Commission approves the Proposed Purchaser, Kohlberg, as a suitable purchaser for the above-mentioned reasons.
- (56) On the basis of the Proposed Agreement, the Commission further concludes that the Divestment Business is being sold in a manner consistent with the Commitments.
- (57) This decision only constitutes approval of the Proposed Purchaser identified herein and of the Proposed Agreement. This decision does not constitute a confirmation that Amcor has complied with its Commitments.
- (58) This decision is based on paragraphs 13 and 14 of the Commitments attached to the Commission Decision of 11.02.2019.

*For the Commission*

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