



EUROPEAN COMMISSION

DG Competition

***Case M.9554 - ELANCO ANIMAL HEALTH /
BAYER ANIMAL HEALTH DIVISION***

Only the English text is available and authentic.

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

Decision on the implementation of the commitments -
Purchaser approval

Date: 09/07/2020



EUROPEAN COMMISSION

Brussels, 09.07.2020
C(2020) 4814 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 Where possible the information omitted has been replaced by ranges of figures or a general description.

Elanco Animal Health Inc.
2500 Innovation Way
46140 Greenfield, Indiana
United States of America

Dear Sir/Madam,

**Subject: Case M.9554 – Elanco Animal Health/Bayer Animal Health Division
Approval of MSD as purchaser of the Anticoccidials Divestment Business
following your letter of 10.06.2020 and the Trustee’s opinion of 25.06.2020**

1. FACTS AND PROCEDURE

- (1) By decision of 8 June 2020 (the “Decision”) based on Article 6(1)(b) in conjunction with Article 6(2) of Council Regulation (EC) No 139/2004¹ and Article 57 of the EEA Agreement, the Commission declared the operation by which Elanco Animal Health Inc. (“Elanco”, USA) acquires sole control of Bayer AG’s (“Bayer”, Germany) animal health business (“BAH”) (the “Transaction”) compatible with the internal market and the EEA Agreement. The Decision is subject to the conditions and obligations laid down in the commitments annexed to the Decision. The commitments consist of two components, i.e. the “Main Commitments” and the “Additional Commitments”, all together referred as “the Commitments”. Elanco and BAH are hereinafter collectively referred to as the “Parties”.

¹ OJ L 24, 29.1.2004, p. 1 (the “Merger Regulation”).

- (2) In particular, under the Main Commitments, the Parties undertook to divest to suitable buyers the following products:
- a. Elanco’s VECOXAN (anticoxidals for ruminants) at global level (the “Anticoxidals Divestment Business”);
 - b. Elanco’s OSURNIA (long lasting otitis treatment) at global level[...]² (the “Otitis Divestment Business”); and
 - c. BAH’s Drontal and Profender family of products (CA endoparasiticides) at EEA level and the pipeline product based on the [...] compound (the “[...] Pipeline”) (the “Parasiticides Divestment Business”).
- (3) Under the Additional Commitments, the Parties undertook to divest either (i) BAH’s pipeline products based on the [...] compound at global level (the “[...] Pipelines”) or, alternatively, (ii) Elanco’s marketed and pipeline isox products based on the [...] compounds at EEA level (the “Alternative Divestment Business”).
- (4) This decision only concerns the approval of the proposed purchaser of the Anticoxidals Divestment Business.
- (5) By reasoned submission dated 10 June 2020, Elanco proposed Merck & Co, Inc. [...] (* (“MSD” or the “Proposed Purchaser”) for approval by the Commission as purchaser of the Anticoxidals Divestment Business. MSD is a US-based publicly listed company headquartered in Kenilworth, New Jersey. MSD provides healthcare solutions worldwide. MSD serves drug wholesalers and retailers, hospitals, and government agencies, as well as managed health care providers, such as health maintenance organizations, pharmacy benefit managers and other institutions; as well as physicians and physician distributors, veterinarians, and animal producers. It operates through four operating segments: Pharmaceutical, Animal Health, Healthcare Services and Alliances. MSD’s Animal Health segment division develops, manufactures and markets a wide range of veterinary pharmaceutical and vaccine products, as well as health management solutions and services worldwide. The focus of MSD Animal Health is to prevent, treat and control diseases across all major livestock and companion animal species. The company sells its products to veterinarians, distributors and animal producers. It currently employs over 9,000 employees worldwide. MSD’s worldwide revenues in FY 2019 amounted to EUR 42,357.0 million, EUR 3,972.6 million of which were generated in animal health.
- (6) Elanco submitted to the Commission the agreements to be entered into between Elanco and MSD, consisting of the binding asset purchase agreement and its ancillary documents (the “Transaction Agreements”).
- (7) In its opinion of 25 June 2020 (the “Reasoned Opinion”) pursuant to paragraph 32 (viii) of the Main Commitments, Monitoring Trustee Partners, acting as monitoring trustee (“the Trustee”), concludes that:
- a. MSD fulfils the Purchaser Criteria as set out in paragraph 21 of the Main Commitments and there are no indications that the Anticoxidals Divestment Business would not be viable after the sale; and

² [...].

* Should read “(Kenilworth, New Jersey, USA)”.

- b. the Anticoccidials Divestment Business would be sold in a manner consistent with the Main Commitments under the Transaction Agreements.

2. ASSESSMENT OF THE PROPOSED PURCHASER

- (8) According to paragraph 22 of the Main Commitments, in its assessment of the Transaction Agreements, 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 including their objective to bring about a lasting structural change in the market.

2.1. Assessment of the Purchaser criteria

- (9) As set out in paragraph 21 of the Main Commitments, the purchaser of the Divestment Business³ must fulfil the following criteria:
 - (a) The Purchaser(s) shall be independent of and unconnected to Elanco and BAH and their Affiliated Undertakings (this being assessed having regard to the situation following the divestiture);
 - (b) The Purchaser(s) shall have the financial resources, proven expertise and incentive to maintain and develop the Divestment Businesses as a viable and active competitive force in competition with the Parties and other competitors;
 - (c) The acquisition of the Divestment Businesses by the Purchaser(s) 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(s) must reasonably be expected to obtain all necessary approvals from the relevant regulatory authorities for the acquisition of the Divestment Businesses; and
 - (d) The Purchaser(s) shall have:
 - i. Established capabilities or a track record in the manufacture, marketing and distribution of animal health products in the EEA/UK;
 - ii. Adequate manufacturing and regulatory capabilities to successfully implement a production transfer in relation to the Divestment Businesses (where relevant);
 - iii. Sufficient R&D resources and experience to develop the relevant pipeline products included in the scope of the Divestment Business(es); and
 - iv. Complementary products and expertise relevant to the Divestment Businesses.

³ Capitalised terms in this decision will have the meaning as set out in the Commitments, unless indicated otherwise.

2.1.1. *Independence from the Parties*

- (10) First, MSD, Elanco and BAH are publicly traded. Both MSD and Elanco are listed on the New York Stock Exchange. Bayer is listed on a number of stock exchanges in Germany (Berlin, Düsseldorf, Frankfurt, Hamburg, Hannover, Munich and Stuttgart). Elanco or BAH do not hold directly any controlling shareholding in MSD. Therefore, MSD is neither owned nor controlled by Elanco, BAH or any of their affiliates.
- (11) Ten of the larger investors in Elanco also hold interests in MSD (e.g. The Vanguard Group, Inc.; Black Rock, Inc.; State Street Global Advisors, Inc.; Wellington Management Group LLP), and seven of the larger investors in Bayer also hold interests in MSD (e.g. The Vanguard Group, Inc.; State Street Global Advisors, Inc.; BNY Mellon Asset Management). The Trustee considers, however, that these shareholdings are relatively small (the largest ones, from an MSD perspective, being The Vanguard Group, Inc., and Black Rock, Inc., with an 8.6% stake and 7.8% stake respectively) and, therefore, do not lead to a control situation by any of the shareholders.⁴
- (12) Second, none of the members of the Elanco's or Bayer's board of directors are at the same time members of the board of directors of MSD.⁵
- (13) The Trustee also reviewed the existing business relations and contractual relations between MSD and the Parties and concluded that they do not appear to be material to any party. Commercial relationships are limited and represent less than [...] of MSD's annual revenues in 2019.⁶
- (14) In light of the above, the Commission considers that MSD is independent of and unconnected to Elanco and BAH and their Affiliated Undertakings.

2.1.2. *Financial resources, proven expertise and incentive to maintain and develop the Anticoccidials Divestment Business as a viable and active competitor*

2.1.2.1. Financial resources

- (15) As regards MSD's financial resources, the Commission notes that it is a global healthcare solutions company, which generated total revenues of USD 42.4 billion in 2019. Furthermore, MSD's credit rating is investment grade.⁷ The Trustee reviewed the financial results of MSD and concluded that MSD is a healthy and profitable business that has achieved steady growth while maintaining a sound solvency position.
- (16) MSD will pay Elanco USD 55 million for the Anticoccidials Divestment Business, being approximately EUR 49.5 million. MSD is planning to fund the acquisition through existing cash resources and therefore the company does not need to obtain any additional external financing. In any event, MSD has additional loan capacity

⁴ Monitoring Trustee Reasoned Opinion on the acquisition of the Anticoccidials Divestment Business by MSD of 25 June 2020 ("Reasoned Opinion"), Section 4.

⁵ Reasoned Opinion, Section 4.

⁶ Reasoned Opinion, Section 4.

⁷ Credit rating AA- by Standard and Poor's.

thanks to its favourable credit rating. In its Reasoned Opinion, the Trustee concludes that MSD has ample sources to fund the acquisition and subsequent development of the Anticoccidials Divestment Business.⁸

- (17) Based on the information above and the Trustee's Reasoned Opinion⁹ on the financial situation of MSD and the business plan for the acquisition of the Anticoccidials Divestment Business, the Commission concludes that MSD fulfils the criterion of having the financial resources to maintain and develop the Anticoccidials Divestment Business as a viable and active competitive force in competition with Elanco and other competitors.

2.1.2.2. Proven Expertise

- (18) According to paragraph 21 of the Main Commitments, the Proposed Purchaser must have 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. Furthermore, the Proposed Purchaser shall have established capabilities or a track record in the manufacture, marketing and distribution of animal health products in the EEA/UK as well as adequate manufacturing and regulatory capabilities to successfully implement a production transfer in relation to the Divestment Business. Moreover, the Proposed Purchaser shall have sufficient R&D resources and experience to develop the relevant pipeline products. Finally, the Proposed Purchaser shall have complementary products and expertise relevant to the Divestment Business.

(a) *Manufacture, Marketing and Distribution of Animal Health Products in the EEA/UK*

- (19) First, MSD has several manufacturing sites in the EEA/UK. The Anticoccidials Divestment Business product, i.e. Vexocan and its private label version Coccidrench, [...]. Based on its manufacturing capabilities, in combination with its supply chain expertise, the Trustee considers that MSD is well positioned to oversee the various elements of the manufacture and supply chain of the Anticoccidials Divestment Business in an adequate manner.¹⁰
- (20) Second, MSD has a well-established distribution and marketing organization throughout the EEA/UK. This organization manages the sale of a large number of pharmaceuticals and biologics for production animals. MSD's commercial operations cover all EEA/UK countries in which the Anticoccidials Divestment Business is currently marketed. In particular, MSD employs personnel with the relevant expertise and experience in ruminants anticoccidials.
- (21) Based on the information above and the Trustee's Reasoned Opinion¹¹, the Commission considers that MSD has the proven experience, manufacturing, marketing and distribution capabilities to maintain and develop the Anticoccidials Divestment Business.

⁸ Reasoned Opinion, Section 5.

⁹ Reasoned Opinion, Section 5.

¹⁰ Reasoned Opinion, Section 5.

¹¹ Reasoned Opinion, Section 5.

(b) *Manufacturing and Regulatory Capabilities for Implementation of Production Transfer*

- (22) In the context of the acquisition of the Anticoccidials Divestment Business, there will be no transfer of production assets. [...].¹²
- (23) Further, Elanco, in cooperation with MSD, will apply to the relevant national regulatory bodies in the EEA/UK and globally where applicable to effect a transfer of national marketing authorisations to MSD. According the Parties, this is a straightforward process, and typically takes [...] days or less (although this can vary from country to country).¹³
- (24) Based on the aforementioned considerations, the Trustee concludes that this criterion is not relevant in this particular situation. In view of this, the Commission also concludes that the criterion of having manufacturing capabilities for the implementation of a production transfer is not relevant and that MSD has the necessary regulatory capabilities to implement the transfer of the relevant marketing authorisations.

(c) *Sufficient R&D Resources and Experience to Develop the Relevant Pipeline Products*

- (25) MSD invested [...] in R&D in 2019. [...].¹⁴
- (26) Having said this, the Anticoccidials Divestment Business does not contain any R&D products.
- (27) Based on the aforementioned considerations, the Trustee concludes that this criterion is not relevant in this particular situation. In view of this, the Commission also concludes that this criterion is not relevant.

(d) *Complementary Products and Expertise Relevant to the Divestment Business*

- (28) MSD Animal Health has a wide production animal portfolio in Europe, including its brands Porcilis (vaccine line for infectious diseases in swine) and Rotavec Corona (active immunisation of pregnant cows).¹⁵ For ruminants in particular, MSD has a number of products in its current product portfolio and considers that an anticoccidial product, like Vecoxan, is a good addition to its product range enabling the company to offer a more complete range of products to its customers in the EEA/UK.¹⁶ As mentioned in paragraph (20), MSD has key personnel with the requisite expertise and experience to integrate Vecoxan into the MSD portfolio.¹⁷

¹² Reasoned Opinion, Section 5.

¹³ Reasoned Proposal in respect of an acquisition of the Anticoccidials Divestment Business by MSD (“Reasoned Proposal”) of 10 June 2020, footnote 9.

¹⁴ Reasoned Opinion, section 5.

¹⁵ Reasoned Opinion, Section 3.

¹⁶ Reasoned Opinion, Section 5.

¹⁷ Reasoned Opinion, Section 5.

- (29) Based on the information above and the Trustee's Reasoned Opinion¹⁸, the Commission considers that MSD has sufficient complementary products and expertise relevant to the Anticoccidials Divestment Business.

2.1.2.3. Incentives to maintain and develop the Divestment Business

- (30) The acquisition of the Anticoccidials Divestment Business will broaden MSD's product portfolio for ruminants. More in particular, MSD currently has no products against coccidiosis for ruminants in its product offering and therefore considers Vecoxan a welcome addition to its range of portfolios.¹⁹
- (31) Based on the information above and the Trustee's Reasoned Opinion, the Commission considers that MSD has the incentives to maintain and develop the Anticoccidials Divestment Business.²⁰

2.1.3. *Absence of prima facie competition concerns and implementation risks*

- (32) MSD does not have any products ([...]) against coccidiosis for ruminants. In addition, the acquisition of the Anticoccidials Divestment Business by MSD will not trigger merger control filings in the EEA or in other jurisdictions²¹.
- (33) In light of the above, the Commission considers that the acquisition of the Anticoccidials Divestment Business by MSD 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.

2.1.4. *Conclusion*

- (34) In view of the above, the Commission considers that MSD meets the Purchaser Criteria.

2.2. The Divestment business is being sold in a manner consistent with the Commitments

- (35) The Commission has reviewed the Transaction Agreements and considers that the Transaction Agreements reflect the Parties' obligations set out in the Commitments. The Trustee observed no deviations between the Commitments and the Transaction Agreements. Moreover, MSD confirmed that it is satisfied with the manner in which the Commitments are reflected in the Transaction Agreements. [...].²²
- (36) Therefore, the Commission concludes that the Anticoccidials 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.

¹⁸ Reasoned Opinion, Section 5.

¹⁹ Reasoned Opinion, Section 5.

²⁰ Reasoned Opinion, Section 5.

²¹ Reasoned Opinion, Section 5. Although the Proposed Transaction did not meet the thresholds for mandatory notification in South Africa, Elanco was requested to notify it in South Africa as a condition of clearance of the Elanco / BAH transaction as a matter of policy. The parties notified the Proposed Transaction to the South African Competition Commission on May 6, 2020, and it was unconditionally cleared on June 2, 2020.

²² Reasoned Opinion, Section 6.

3. CONCLUSION

- (37) On the basis of the above assessment, the Commission approves MSD as a suitable purchaser of the Anticoccidials Divestment Business.
- (38) On the basis of the Transaction Agreements, the Commission further concludes that the Anticoccidials Divestment Business is being sold in a manner consistent with the Commitments.
- (39) This decision only constitutes approval of the Proposed Purchaser identified herein and of the Transaction Agreements. This decision does not constitute a confirmation that the Parties have complied with the Commitments.
- (40) This decision is based on paragraph 22 of the Main Commitments attached to the Commission Decision of 8 June 2020.

For the Commission

(Signed)
Olivier GUERSENT
Director-General