II

(Acts adopted under the EC Treaty/Euratom Treaty whose publication is not obligatory)

DECISIONS

COMMISSION

COMMISSION DECISION

of 29 March 2006

declaring a concentration compatible with the common market and the functioning of the EEA Agreement

(Case COMP/M.3975 — Cargill/Degussa)

(notified under document number C(2006) 1034)

(Only the English version is authentic)

(Text with EEA relevance)

(2007/783/EC)

On 29 March 2006 the Commission adopted a Decision in a merger case under Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [1], and in particular Article 8(1) of that Regulation. A non-confidential version of the full decision can be found in the authentic language of the case and in the working languages of the Commission on the website of the Directorate-General for Competition, at the following address: http://ec.europa.eu/comm/competition/index_en.html

I. SUMMARY

(1) On 21 October 2005, the Commission received a notification of a proposed concentration within the meaning of Article 3(1)(b) of Council Regulation (EC) No 139/2004 on control of concentrations between undertakings (the Merger Regulation).

(2) After examination of the notification, the Commission has concluded that the notified operation falls within the scope of the Merger Regulation.

(3) On 23 November 2005, the parties submitted undertakings to the Commission. On 14 December 2005, the Commission concluded that the concentration, even in taking into account the undertakings submitted, raised serious doubts as to its compatibility with the common market, and decided therefore to initiate proceedings in accordance with Article 6(1)(c) of the Merger Regulation.

(4) Following an in-depth investigation, the Commission, however, concluded that the notified operation does not raise concerns as to its compatibility with the common market. Therefore, it was proposed to clear the notified transaction pursuant to Article 8(1) of the Merger Regulation.

II. THE PARTIES AND THE OPERATION

(5) Cargill is a US-based privately owned company worldwide active as a producer and trader of agricultural commodities, animal feed and food and of financial services related hereto. DFI is a German food ingredients company, currently owned by Degussa AG, whose main shareholders are RAG and E.ON. DFI's two main business branches are 'DFI Texturant Systems' and 'DFI Flavours'. The operation consists in the acquisition of 100 % shares in DFI currently held by Degussa AG.

III. CONCENTRATION WITH COMMUNITY DIMENSION

(6) The proposed transaction consists in the acquisition of control by Cargill of the whole of DFI within the meaning of Article 3(1)(b) and Article 1(3) of the the Merger Regulation.

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

IV. THE RELEVANT PRODUCT MARKETS

(7) The Commission's market investigation in the present case was particularly focussing on the markets for *not genetically modified (non-GM) fluid lecithin* and *non-GM deoiled lecithin* (1). Other affected markets were *genetically modified (GM) lecithin, pectin* and crude seed oil (2).

1. The different lecithin markets

(8) Lecithin is a food ingredient which, as a 'emulsifier' is used to stabilise emulsions, that is a mix of hydrophilic (e.g. water) and hydrophobic (e.g. oil) substances. Lecithin is used mainly in food and feed applications, but also in cosmetics, pharmaceuticals and industrial products (such as herbicide and leather). Although it generally represents less than 1 % of total production costs, it is usually essential to the industrial process of end-users and can change radically the quality of final products.

(9) Lecithin is a by-product generated in the process of crushing oilseeds, generally soybeans: the vast majority of lecithin sold on the market is extracted from soy oil (95 %) while other sources like rapeseed and sunflower remain marginal. Lecithin represents less than 1 % of the soybean content in volume and well below 5 % in value.

(a) *Lecithin and synthetic emulsifiers are not on the same product market*

(10) Emulsifiers can be divided into *natural emulsifiers* (i.e. lecithin) and *synthetic emulsifiers* (such as mono- or diglycerides). While the former are extracted from oilseeds, the latter are artificially produced through chemical reactions. The Commission's market investigation has established that both types of emulsifiers do not belong to the same product market, mainly for the following reasons:

(11) From a demand-side perspective, the market test has shown that lecithin and synthetic emulsifiers are not substitutable for both technological and quality reasons. This applies to feed and food manufacturers. Virtually no customer of non-GM lecithin has switched to synthetic emulsifiers in the past even though prices of the non-GM lecithin have doubled over the last two years, and the vast majority would not switch to synthetic emulsifiers should the price for lecithin increase by 10 % in the future.

(b) *GM and non-GM lecithin have to be assessed separately*

(12) The market investigation has also shown that separate markets for GM and non-GM lecithins have to be distinguished in Europe. Indeed, European customers (unlike customers in other parts of the world) have a strong opposition to genetically modified products. This has led the European Union to adopt several regulations that require labelling and traceability for genetically modified food, feed and their ingredients as of 2004 [1]. Accordingly, lecithin can only be exempted from the labelling obligation, if there is an established certification process (audit trail) that covers the entire production and supply chain, proving that the relevant soy crop is non-GM, and that the inputs for the intermediate and finished products have been kept separate from GM material during planting, harvesting, storage, processing and distribution.

(13) From a supply-side perspective, the production costs of non-GM lecithin are significantly higher than those of GM lecithin. In fact, the supply chain of non-GM lecithin is different from that of GM lecithin. As a result, prices of GM and non-GM lecithin differ significantly.

(c) *Fluid, deoiled and fractionated lecithin have to be assessed separately*

(14) The Commission in addition found that different types or grades of lecithin can be distinguished, since fluid lecithin (as the basic product) can be further refined by a deoiling process into 'deoiled' lecithin or by fractionation into 'fractionated' lecithin [2]. Cargill is not active in the manufacture of fractionated lecithin. The market investigation has identified several elements that militate for a distinction between fluid, deoiled, and fractionated lecithin.

(15) Nearly all customers indicated that they cannot switch between fluid and deoiled lecithin, since the respective lecithin type meets very specific needs of customers (e.g. taste, processing etc.) and involves a different production process. From a supply-side perspective, the production of deoiled and fractionated lecithin requires additional production facilities and a significant investment and involves different production know-how.

2. Pectin

(16) The parties' activities overlap also in the field of Pectin. Pectin is used to gelatinize, stabilise and jellify products. The Commission has considered a further distinction beteen different Pectin types (e.g. apple and citrius pectin and according to the methoxyl content), but could ultimately leave the market definition open since the transaction would not impede competition under either market definition.

(1) Regulation (EC) No 1829/2003 of the European Parliament and the Council on 22 September 2003 on genetically modified food and feed (OJ L 268, 18.10.2003, p. 1) and Regulation (EC) No 1830/2003 of the European Parliament and of the Council of 22 September 2003 concerning the traceability and labelling of genetically modified organisms and the traceability of food and feed products produced from genetically modified organisms and amended by Directive 2001/18/EC (OJ L 268, 18.10.2003, p. 24).

(2) There are also some forms of modified/customised 'special lecithins', which, however, account only for a negligible part of the market.

V. THE RELEVANT GEOGRAPHIC MARKETS

1. Lecithin

(17) The Commission came to the conclusion that at least the markets for *non-GM lecithin* are EEA-wide in scope.

(18) Indeed, the strong preference of European customers for non-GM products, which is clearly limited to Europe, leads to different market conditions in Europe. Eighty per cent of all non-GM lecithin sales are within in the EEA, although only 45 % of the worldwide lecithin sales are within the EEA. What is more, customers only rarely buy directly from suppliers outside Europe, not only because transport costs are a relevant factor, but also since on-time delivery and support in terms of product and production know-how are crucial for many customers. The structure of demand for lecithin in the EEA differs therefore significantly from the rest of the world.

(19) As regards the markets for *GM lecithin* (fluid and deoiled), although some factors seem to militate for a worldwide market (e.g. regulation requirements do not differ significantly across the world), the Commission could, for the purpose of this decision, leave the exact geographic market definition open.

2. Pectin

(20) Even if the market investigation provided indications that the geographical scope of the markets may be limited to the EEA, the exact geographic market definition could be left open, because no competition concerns occur under either delineation.

VI. ASSESSMENT

1. Non-GM fluid lecithin

(21) As regards the EEA market for non-GM fluid lecithin, the results of the in-depth market investigation effectively removed the serious doubts as to the proposed transaction's compatibility with the common market.

(22) The investigation showed that the parties' actual market share (30-40 %) is smaller than estimated by the parties (40-50 %) and confirmed that the competitive constraint stemming from other competitors is strong enough to effectively constrain the parties' position on this market. Indeed, the share of competitors to Cargill, DFI and Solae is steadily and significantly increasing. Not only established food ingredients distributors such as Nore Ingredients (5-15 % market share) or Helm AG (0-10 % market share) were able to increase their share. Also Brazilian and Indian competitors have recently become a more credible alternative for European customers, since many of them have (unlike Cargill and Degussa) direct access to the raw material for non-GM fluid lecithin. Some bigger food/chocolate customers are today already buying directly from Brazilian sources. The leading Brazilian manufacturers have shown that they are able to establish their own distribution and logistics network in Europe and to compete directly with well established players like the merged entity and Solae.

(23) The significant price increase and the attractive margins for non-GM fluid lecithin are a further incentive for Brazilian and Indian manufacturers to compete more aggressively with the parties on the European market. Since the leading players in the EEA (Cargill, DFI, Solae) currently source almost all their non-GM raw material from actual or at least potential Brazilian competitors, the current competitive environment in the market for non-GM fluid lecithin is not likely to change so as to create a substantive impediment of competition.

(24) The Commission's market investigation showed also that the merger will not lead to anti-competitive effects through *coordinated effects*. This is not only due to the asymmetry of the two major players' market shares after the merger. Also, the results of the market investigation strongly indicate that the market for non-GM fluid cannot be considered as transparent: the price for non-GM lecithin is negotiated between the supplier and its customers on an individual basis with no price lists being available. As a result, prices for fluid lecithin vary significantly between individual customers, even those of a comparable size.

2. Non-GM deoiled lecithin

(25) The Commission's investigation was particularly focussed on the market for non-GM deoiled lecithin, since the parties hold a particularly high combined market share in this market. However, while according to the notification only three players were active on this market, the in-depth investigation revealed that a number of new suppliers have already entered or are about to enter the non-GM deoiled market, thereby effectively constraining the parties' ability to behave independently form their competitors.

(26) The market investigation has confirmed that in 2005 DFI was still the biggest supplier of non-GM deoiled lecithin, with a market share of [50-60] %. Together with Cargill's market share of [0-10] % in 2005, the merged entity would hold [60-70] % of the non-GM lecithin market in the EEA.

(27) In addition, the investigation showed that Cargill's position on the deoiled market is relatively weak, and that its disappearance as a competitor would not significantly change the current competitive structure of the market. Indeed, unlike its main competitors, Cargill has no own production facilities for deoiled lecithin, but has its deoiled lecithin produced in a factory in Arkansas, USA. This factory has a relatively limited capacity, which could not be utilised due to serious technical problems. Furthermore, the market investigation revealed that the 'low price' strategy that Cargill chose for the entry into the non-GM deoiled lecithin market proved not to be sustainable, given the dramatic increase of the costs for the raw material (non-GM fluid lecithin).

(28) Furthermore, the investigation showed that new suppliers of non-GM deoiled lecithin have already entered the market or are likely to enter in a timely manner and with a sufficient scope of activity. Most of these suppliers (e.g. Berg & Schmidt/Sternchemie, Ruchi and Matlani) have already built up their own deoiling lines or will have them operational next year (e.g. SG Lecitinas). The fact that the newly installed deoiling capacities are significant shows that Indian and South American suppliers are highly committed to enter the European market. The newly available production capacity for non-GM deoiled lecithin in India and Brazil will exceed the volume of the entire EEA market.

(29) The entry of a relatively large number of companies shows that the entry barriers to the deoiled lecithin market may be significant but are not insurmountable: while it is true that deoiled lecithin is no 'commodity' and its production involves technology and know-how, competitors have confirmed that this technology was available on the market (e.g. through engineering firms) and that they were able to produce non-GM deoiled lecithin of a comparable quality level to the market leaders. Also the fact that many food customers require a European presence of their supplier is not a significant obstacle for these competitors, since most of them cooperate with established European distributors who can provide the necessary know-how on customers and their individual need. Many customers have, indeed, confirmed that they are interested in alternative sources of deoiled non-GM lecithin.

3. **GM lecithin markets**

(30) The market investigation has not confirmed the existence of competition problems in the markets for GM lecithin. As concerns *fluid lecithin*, ADM will, even under the assumption of European markets, still be the clear market leader with a share of [40-50] %, followed by the parties, Solae, and a number of smaller competitors. This suggests that the new entity would have little leeway to increase prices unilaterally or otherwise impede competition. Furthermore Cargill does not focus its lecithin marketing strategy on GM markets. As for the risk that the merger will elicit coordinated behaviour, the Commission considers that such a risk is negligible, mainly for the same reasons as for non-GM fluid lecithin (no price transparency, asymmetry of market shares etc.). As concerns GM *deoiled* lecithin, Solae would hold [50-60] % of a European market, followed by DFI, but with a limited increment through the addition of Cargill. There are a number of other competitors on the market (e.g. ADM). Consequently, the overlap in the markets for GM deoiled lecithin is very limited.

4. **Pectin**

(31) The parties' combined market share for pectin does not exceed 25 %, neither on a worldwide nor on an EEA-wide basis, with only a very limited increment. The position of the market leader, CP Kelco and the current number 2 (Danisco) will not be affected by the merger. This assessment would not change when alternative markets (e.g. worldwide markets, markets for apple/citrus or markets according to the methoxyl content) were to be distinguished, because Cargill's position on these markets would be even weaker.

5. **Vertical effects (crude seed oil)**

(32) Although, on the basis of a hypothetical definition of an upstream market for crude soy oil in the EEA, the proposed transaction technically gives rise to a vertically affected market, it does not raise any vertical concerns, mainly because DFI and Cargill buy ready-made fluid non-GM lecithin from third parties and do not use non-GM raw material from their own production to produce non-GM lecithin.

VII. **CONCLUSION**

(33) The decision, therefore, concludes that, the proposed concentration will not significantly impede effective competition in the Common Market or in a substantial part of it.

(34) Consequently, the decision declares the concentration compatible with the Common Market and the EEA Agreement, in accordance with Articles 2(2) and Article 8(1) of the Merger Regulation and Article 57 of the EEA Agreement.