Summary of Commission Decision

of 17 July 2015

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

(Case M.7408 — Cargill/ADM Chocolate Business)

(notified under document C(2015) 4840)

(Only the English version is authentic)

(2017/C 232/13)

On 17 July 2015 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(2) of that Regulation. A non-confidential version of the full Decision can be found in the authentic language of the case on the website of the Directorate-General for Competition, at the following address: http://ec.europa.eu/comm/competition/index_en.html*

(1) On 19 January 2015, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EC) No 139/2004 ('Regulation (EC) No 139/2004') by which the undertaking Cargill, Incorporated ('Cargill', the United States) intends to acquire control of the industrial chocolate business of the undertaking Archer Daniels Midland Company ('the ADM Chocolate Business', the United States) by way of purchase of shares and assets ('the Transaction'). Cargill and the ADM Chocolate Business together will be referred to as 'the Parties'.

I. THE PARTIES

(2) Cargill is a US-based company active in the international production and sale of food, agricultural and risk management products and services. Cargill's businesses include the production and sale of industrial chocolate and fat-based coatings and fillings (including chocolate compound) as well as the production and sale of semi-finished cocoa products which are used in the production of industrial chocolate.

(3) The ADM Chocolate Business produces and sells industrial chocolate and fat-based coatings and fillings, including chocolate compound. The mother company Archer Daniels Midland Company also produces and sells semi-finished cocoa products ('the ADM's Cocoa Business'). Archer Daniels Midland Company has entered into a contract with Olam International Limited ('Olam') for the sale of its ADM Cocoa Business [2]. The upstream ADM Cocoa Business would thus be acquired by Olam while the downstream ADM Chocolate Business would be acquired by Cargill.

II. THE OPERATION

(4) On 28 August 2014, the Parties signed a Master Purchase Agreement pursuant to which Cargill will acquire the assets and equity interests constituting the ADM Chocolate Business. Cargill will thus acquire sole control of ADM's industrial chocolate business through the Transaction.

III. EXPLANATORY MEMORANDUM

(5) The Transaction leads to:

(a) horizontal overlaps in the production and sale of industrial chocolate;

(b) vertical links between the production and sale of semi-finished coca products (upstream) and the production and sale of industrial chocolate (downstream); and

(c) horizontal overlaps in the production and sale of chocolate compound.

A. THE RELEVANT PRODUCT MARKETS

Introduction to the chocolate/cocoa value chain

(6) Harvested cocoa beans are first dried and fermented. They are then processed and ground to produce cocoa liquor. Cocoa liquor may be further pressed to separate cocoa butter (~45 %) and cocoa cake (~55 %), which is pulverized to produce cocoa powder. Cocoa liquor and cocoa butter together with sugar and milk powder are the raw materials for the production of industrial chocolate used in the production of end-consumer chocolate products such as chocolate confectionery, biscuits, bakery goods, ice cream and cereals. Industrial chocolate is delivered to the customer either in liquid form (through the use of heated delivery trucks) or in solid form.

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

[2] Olam International Limited's acquisition of the ADM Cocoa Business was cleared unconditionally by the European Commission on 10 June 2015 — see case M.7510 – Olam/ADM Cocoa Business.

(7) Fat-based coatings and fillings are a mix of vegetable fats, sugar and a flavour ingredient. Chocolate compound is a cocoa-flavoured fat-based coating and filling which is sometimes used instead of chocolate in the production of end-consumer products because of its specific product properties or its lower price.

Industrial chocolate

(8) The Commission has found evidence to consider that liquid and solid industrial chocolate might fall into separate product markets. Industrial chocolate customers, in particular those purchasing more than a couple of hundred tons per year, can generally not switch between purchasing liquid and solid industrial chocolate. Liquid industrial chocolate is cheaper and its handling at the processing plant is easier and less time-consuming. Furthermore, switching between the production of liquid and solid industrial chocolate requires investment in additional equipment and not all suppliers are able to supply both solid and liquid industrial chocolate. Nevertheless the product market definition can be left open in this respect as the competitive assessment would not change regardless of the precise product market definition.

(9) The Commission also considered a potential distinction between dark, white and milk chocolate, and between standard and non-standard industrial chocolate (which includes certified, organic and/or traceable chocolate). The product market definition can also be left open in this respect as it has not effect on the outcome of the competitive assessment.

Semi-finished cocoa products

(10) Taking into account its previous case practice, the Commission considers that semi-finished cocoa products should be segmented into the separate product markets for cocoa liquor, cocoa butter and cocoa cake/powder. In addition, it can be left open whether standard and non-standard semi-finished cocoa products constitute separate product markets as the competitive assessment would not change regardless of the precise product market definition.

Fat-based coatings and fillings/chocolate compound

(11) The Commission considers that chocolate compound falls into a separate product market from industrial chocolate because of differences in price, taste and consistency and product regulations. The additional question whether chocolate compound constitutes a separate market from other fat-based fillings can be left open as the competitive assessment would not change regardless of the precise product market definition.

B. **THE RELEVANT GEOGRAPHIC MARKETS**

Industrial chocolate

(12) The Commission considers that the relevant geographic market for industrial chocolate is not EEA-wide but corresponds to circular-shaped catchment areas of 500 km distance drawn around the Parties' plants or around the Parties' customers. The Commission has also found evidence in this case in favour of national markets.

(13) Contrary to the Parties' submissions, the market investigation revealed several elements indicating that physical and demand characteristics of industrial chocolate limit the distance over which the product is shipped in practice. The Commission collected transaction level data for the years 2013 and 2014 from the Parties and their main industrial chocolate competitors. The delivery patterns apparent from this data show that 80 % of all industrial chocolate is sold within a distance of about 500 km. In addition, liquid chocolate is transported over relatively shorter distances compared to solid chocolate. A majority of customers explained that they rely on just-in-time deliveries, particularly because of limited storage capacities, and that therefore they source liquid chocolate over relatively short distances.

(14) The Commission's investigation showed further that national borders also play a role in the sourcing patterns and deliveries of industrial chocolate. For example, the Commission's reconstruction has shown that 70 % of the liquid chocolate used in Germany is produced in Germany. These figures are even higher for France (76 %), the UK (90 %), the Netherlands (86 %) and Belgium (98 %) and show that cross-border purchases by customers are overall limited.

(15) The geographic market definition can be left open, however, as the competitive assessment would not change regardless of the precise geographic market definition.

Semi-finished cocoa products

(16) There are elements to consider that the geographic market for semi-finished cocoa products could be either EEA-wide or global in scope. However, the geographic market definition can be left open as the competitive assessment would not change regardless of the precise geographic market definition.

Fat-based coatings and fillings/chocolate compound

(17) The geographic market for fat-based coatings and fillings, including chocolate compound, can be left open as the competitive assessment would not change regardless of whether it is defined as national or catchment areas around Parties' plants.

C. **COMPETITIVE ASSESSMENT**

Horizontal overlaps in industrial chocolate concerning Germany

(18) The merged entity would have market shares above [50-60] % at the national German level and at least above [50-60] % (and even above [50-60] % or [60-70] % in many cases) for the different plant-centred or customer-centred catchment areas that could be considered in the sales regions around the Parties' German plants. Furthermore, the markets for industrial chocolate around the Parties' German plants are concentrated and the Transaction would lead to a sizeable increase in concentration levels as measured by the HHI index.

(19) The clear majority of customers with production facilities in Germany who replied to the Commission's market investigation raised concerns about the impact of the Transaction, regarding price increases in particular. Some of the competitors confirmed that the Transaction would lead to increases in prices and margins due to the expected reduction in competition.

(20) As regards the closeness of competition between the Parties, the geographic proximity of the Parties' plants in Germany, their upstream integration in the sourcing of cocoa beans, their activities in the processing of semi-finished cocoa ingredients, their ability to serve the volume-driven market segment as well as their size and global scale lead to a similar positioning of Cargill and ADM in the marketing of industrial chocolate.

(21) The customers of the Parties in the sales regions around the Parties' German plants may have difficulties switching to other suppliers and may thus be vulnerable to price increase because (i) the customers rely on multi-sourcing to obtain security of supply and competitive prices, (ii) there are few alternative suppliers available, and (iii) many of those alternative suppliers have relevant shortcomings compared to the three large suppliers Barry Callebaut and the Parties because of the small size of their production plants, their limited product portfolio, their competitive relationship with potential customers in downstream markets, the location of their production plants and/or the quality of their industrial chocolate products.

(22) In addition, the Parties' competitors in the sales regions around the Parties' German plants face capacity constraints and thus currently do not have the ability to increase supply to a sufficiently large extent to defeat a potential price increase by the Parties after the Transaction. While the Parties' main competitor Barry Callebaut currently has plans of expanding its capacity in Western Europe, the Commission considers that this capacity increase will not provide it with additional incentives to defeat a price increase of liquid chocolate after the Transaction since Barry Callebaut's main strategic objectives are to develop business in emerging markets, in outsourcing deals with very large customers such as Unilever or Mondelez and in gourmet/specialty products.

(23) Due to barriers to entry and based on the Commission's contacts with potential market entrants as named by the Parties (including vertically integrated chocolate producers such as Mondelez and Nestlé), the Commission considers that is unlikely that there would be future market entry in industrial chocolate in the sales regions around the Parties' German plants. In addition, there is no conclusive evidence of sufficient countervailing buyer power, in particular not from small and mid-size customers of industrial chocolate so as to impose a significant competitive constraint on the Parties.

Horizontal overlaps in industrial chocolate concerning other countries

(24) The market structure in Belgium, France, the Netherlands and the United Kingdom differs considerably from the market structure in Germany and in the relevant overlap areas between the Parties' German plants.

(25) In the UK, the Parties' combined market share (around 25 %) is lower and Barry Callebaut is the market leader with 66 %. Overall UK respondents to the market investigation did not identify any competitive impact stemming from the Transaction, because of the moderate combined shares and the presence of a strong competitor. The same goes for Belgium and the Netherlands where a similar market structure applies. In France, the Transaction does not raise any competition concern in the light of the small presence of ADM and the strong position of alternative supplier Cémoi.

Vertical links between semi-finished cocoa products and industrial chocolate

(26) The transaction leads to vertical links between Cargill's activities in the production and supply of semi-finished cocoa products and the Parties' downstream activities in industrial chocolate. Since Cargill holds a moderate position in the upstream cocoa markets and there are a number of alternative suppliers, the Commission considers that the Transaction does not give rise to input foreclosure concerns as regards semi-finished cocoa products.

(27) Furthermore, as part of the Transaction, Cargill and the ADM Cocoa Business entered into a transitional supply arrangement pursuant to which Cargill will purchase cocoa products from the ADM Cocoa Business to supply the industrial chocolate plants acquired in this Transaction. However, there will be no change in the capacity available in the merchant market. Moreover, Cargill has spare capacity in cocoa products. The Commission therefore considers that the transitional supply agreement does not create incentives for the merging parties to reduce competition in the upstream cocoa markets and that the incentives for Cargill to renew the agreement are too low to raise any competition concerns.

Horizontal overlaps in fat-based coatings and fillings/chocolate compound

(28) The Parties' combined market shares in fat-based coatings and fillings and in chocolate compound remain modest and lead to only two affected markets with market shares of around 30 % (with limited increments in market shares at below 5 % and below 10 % respectively). The results of the market investigation did not provide evidence that there were any competition concerns related to fat-based coatings and filling or to chocolate compound specifically.

Conclusion

(29) The Commission considers that the Transaction leads to a significant impediment to effective competition in the market for industrial chocolate sold to customers in Germany or to customers located in the overlap areas of the catchment areas of ADM's plant in Mannheim/Germany and Cargill's plants in Germany.

(30) The Transaction does not lead to a significant impediment to effective competition in the markets for (i) industrial chocolate sold to customers located in the overlap areas of the catchment areas of ADM's and Cargill's plants in Belgium, France and the United Kingdom, (ii) semi-finished cocoa products and (iii) chocolate compound.

D. **COMMITMENTS**

Description of the commitments

(31) The Parties submitted modifications to the Transaction on 4 May 2015 ('the Commitments of 4 May 2015') to address the competition concerns identified by the Commission. Under the Commitments of 4 May 2015, Cargill proposes to divest ADM's industrial chocolate plant in Mannheim/Germany to a suitable purchaser. The Mannheim plant is the largest of ADM's European industrial chocolate plants. It is ADM's only industrial chocolate plant in Germany.

(32) The Commitments of 4 May 2015 include a supply agreement to be concluded at the option of the purchaser with Olam or ADM, whichever is then owner of the ADM Cocoa Business, or with Cargill. The Commitments of 4 May 2015 do not include any IP rights, the contracts related to the production of specialty chocolate or the contracts with customers to the extent that the volumes are not fully produced in the Mannheim plant. Furthermore, the Commitments of 4 May 2015 do not include any specific purchaser criteria requiring the purchaser to have specific knowledge of the cocoa and chocolate value chain.

Assessment of the commitments

(33) The Commitments of 4 May 2015 would eliminate very close to the entire sales overlap in Germany and the area where competition concerns were identified and would thus address the concerns stemming from the horizontal overlaps between the Parties' activities in those areas. Accordingly, the majority of respondents to the market tests considered that the Commitments of 4 May 2015 would remove any competition concerns raised by the Transaction.

(34) However, based on the results of the market test and its assessment, the Commission considered that the Commitments of 4 May 2015 raised concerns in the following main respects:

(a) the specialty chocolate business was excluded from the divestment;

(b) the purchaser criteria did not require the purchaser to have specific knowledge of the cocoa and chocolate value chain;

(c) the supply agreement did not allow for sufficient flexibility for the purchaser in terms of volumes purchased and changes of the volumes year on year.

(35) The Parties submitted modified commitments on 22 May 2015 which adequately address these issues.

(36) In its decision, the Commission therefore reaches the conclusion that, on the basis of the Commitments of 22 May 2015, the notified concentration will not lead to a significant impediment to effective competition in the market for industrial chocolate sold to customers in Germany or to customers located in the overlap areas of the catchment areas of ADM's plant in Mannheim/Germany and Cargill's plants in Germany.

IV. **CONCLUSION**

(37) For the reasons mentioned above, the decision concludes that the proposed concentration will not significantly impede effective competition in the Internal Market or in a substantial part of it subject to Cargill's compliance with the Commitments of 22 May 2015.

(38) Consequently the concentration should be declared compatible with the Internal Market and the functioning of the EEA Agreement, in accordance with Article 2(2) and Article 8(2) of the Merger Regulation and Article 57 of the EEA Agreement.