

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: 89/LM/Oct06

In the matter between:

Siemens Aktiengesellschaft

Primary Acquiring Firm

and

Bayer Diagnostics

Primary Target Firm

Panel : N Manoim (Presiding Member), Y Carrim (Tribunal Member), and M Mokuena (Tribunal Member)

Heard on : 13 December 2006

Decided on : 13 December 2006

Reasons Issued: 18 December 2006

Reasons for Decision

Approval

[1] On 13 December 2006 the Competition Tribunal issued a merger clearance certificate unconditionally approving the merger between Siemens Aktiengesellschaft and Bayer Diagnostics. The reasons follow.

The parties

[2] The primary acquiring firm is Siemens Aktiengesellschaft ('Siemens'), a company incorporated under the laws of Munich, Germany.¹ Siemens is listed on the New York and Frankfurt Stock Exchanges. No single shareholder controls Siemens but it controls a significant number of subsidiaries worldwide, as well as in South Africa. Siemens' participating subsidiary in this transaction is Siemens Limited ('Siemens SA') and Diagnostics Products Corporation ('DPC').²

¹ Siemens' principal place of business is Wittesbacherplatz 2, D – 80333 Munich, Germany.

² See Annexure B to the form CC4 (2) for a complete list of the subsidiaries controlled by Siemens.

[3] The Primary target firm is Bayer Diagnostics Division ('Bayer Diagnostics'), a business division of Bayer Healthcare LLC ('Bayer Healthcare'). Bayer Healthcare is a subsidiary of Bayer Aktiengesellschaft ('Bayer'). Bayer is a company incorporated in Germany and is listed on the London Stock Exchange and New York Stock Exchange. No single shareholder controls Bayer. Bayer's participating subsidiary in this transaction is Bayer (Pty) Ltd ('Bayer SA').³

The transaction

[4] This transaction forms part of an international merger which was notified in several jurisdictions and has been approved in the European Commission and the United States.⁴

[5] On 2 July 2006, Siemens and Bayer concluded a Share and Asset Purchase Agreement in terms of which Siemens intends to acquire sole control over the Bayer Diagnostics business from Bayer. The transaction is structured as a combined share and asset purchase. The Business of Bayer Diagnostics is carried out by various direct or indirect subsidiaries of Bayer. Siemens will acquire those subsidiaries which are exclusively active in the in-vitro diagnostics ('IVD') area by way of an acquisition of shares. In relation to the Bayer subsidiaries that are not exclusively active in the IVD area, Siemens will either acquire their IVD assets by way of an asset purchase or acquire their shares. In the latter instance, the entities being acquired will first transfer to other Bayer entities those activities which do not belong to the IVD business by way of a split-off or asset deal or otherwise.

[6] In South Africa, the transaction is structured as an acquisition of assets. Newco South Africa ('Newco'), a wholly owned subsidiary of Siemens International BV, Netherlands, which in turn is a wholly owned subsidiary of Siemens AG, will acquire from Bayer SA, a wholly owned subsidiary of Bayer, those assets which relate to the business of Bayer Diagnostics. Following completion of the proposed transaction, Siemens will directly or indirectly control the business activities of Bayer Diagnostics.

Rationale for the transaction

³ Bayer holds 24.4% direct interest in Bayer SA, with the remaining 76% being held by Bayer's wholly owned subsidiary, Bayer Gasellschaft fur Beteiligungen mbH.

⁴ Record p2.

- [7] Siemens has identified medical technology as one of its main focuses in the future, since global demographic trends will support growth in this industry. The parties submitted that Siemens is already active in other areas of the medical sector, but has identified IVD as an investment opportunity enabling it to extend its pre-existing activities.
- [8] Bayer's sale of Bayer Diagnostics is part of its strategy for systematically aligning its health care business to concentrate on pharmaceuticals for both humans and animals, and other products that can be directly promoted to patients.⁵

The parties' activities

Siemens

- [9] Siemens' business portfolio comprises information and communication, automation and control, power, transportation, medical, lighting and financing and real estate.
- [10] Siemens has recently become active in IVD, but its activities are limited to immunochemistry systems, as one of the subcategories of the IVD business.⁶ Siemens is offering the IVD products through DPC.

Bayer SA

- [11] Bayer is structured into three distinct businesses, being CropScience, MaterialScience and HealthCare. However, in South Africa these sub-groups are contained in separate divisions within Bayer SA, instead of being contained in separate companies.

⁵ The systems business of Bayer Diagnostics, with its emphasis on hardware, IT, networking and comprehensive equipment service, is subject to different success factors than the other Bayer Healthcare divisions. Bayer is therefore divesting these activities as part of the consolidation phase in the diagnostics market.

⁶ Siemens develops, manufactures and sells immunochemistry systems throughout the world to hospitals, reference and physicians' offices, laboratories as well as to veterinary, forensic and research facilities. Siemens offers medical imaging systems, including x-ray, computer tomography, magnetic resonance, molecular imaging and ultra-sound. These diagnostics products are not substitutable with the IVD products which Siemens now offers through DPC.

[12] The relevant division for purposes of this transaction is the healthcare division of Bayer, and consequently in Bayer SA. Bayer SA's HealthCare Division is further split into different business units of which diagnostics is one of them. Bayer Diagnostics and Bayer SA offer a broad portfolio of IVD testing for clinical chemistry (including blood gas, urinalysis and diabetes), immunochemistry, haematology and molecular testing to assess and manage health in a myriad of disease, including cardiovascular, kidney and infectious diseases, oncology and virology.

RELEVANT MARKETS

Relevant product market

[13] IVD, or to give it its full name in-vitro diagnostics is a term in medical parlance used to describe a range of laboratory tests conducted to measure substances in patients body fluid and tissue samples ⁷.

[14] Although IVD is the broad rubric under which these services are considered, the common denominator being that they are conducted outside of the patient's body, the merging parties contend that it entails the provision of five different and unrelated services. These services are clinical chemistry (including urinalysis and near-patient testing); immunochemistry; haematology; microbiology and genetic testing. Since each service entails the use of different equipment and chemicals they are not considered substitutes for one another. If this segmentation is correct then Bayer and Siemens only compete in one of the five sub-markets of IVD, namely, immunochemistry. Immunochemistry testing involves the use of targeted anti-bodies to identify and test enzymes, drugs, hormones and other substances found in relatively small concentrations in the body. Immunochemistry testing enables physicians to diagnose, treat and monitor infectious diseases as well as other diseases such as cancer or heart diseases in patients.

Relevant geographic markets

[15] The merging parties submitted that the market is at least national since both parties distribute their immunochemistry systems throughout South Africa. In

⁷ 'In-vitro' translated from Latin means 'in glass'.

addition, the parties stated that there is a growing trend towards internationalisation of the market. This is because most major providers of immunochemistry systems, including the merging parties, are active worldwide but manufacture their instruments and reagents centrally at one or two international locations.

[16] For the purposes of this transaction, the Tribunal accepts the Commission and the parties' definition of the product and geographic markets.

Market shares and competition analysis

[17] As we noted earlier this is an international merger of two firms which only distribute the relevant products in South Africa. They have no manufacturing capacity in South Africa and the merger's consequences are thus confined to evaluating the effects of the removal of one international supplier on local customers.

[18] The Commission relied on the approximate market share figures provided by the merging parties. The parties submitted that no market studies have been conducted in relation to the immunochemistry services market. Thus the information provided on the market shares is based on the parties' own estimates. However, various competitors and customers contacted by the Commission confirmed that the major market participants are the ones mentioned by the merging parties.⁸

Table 1

Name of the players	Estimated market share (%)
Abbot	39
Roche	26
Beckman Coulter	9
Bayer Diagnostics	9
Siemens/DPC	7
Dade Behring	2

⁸ Record pp8, 789, 792-794, and p810.

OCD	2
Others	6
Total	100

[19] The merging parties will have a combined post-merger market share of approximately 16%. This market share does not raise competition concerns because there are two larger players in the market who will continue to compete with the merged entity. These are Abbot with a market share of 39%, and Roche with a market share of 26%. Moreover, the merged entity will face competition from other players such as Beckam Coulter, Dade Behring, and OCD, among others.

Public Interest

[20] There are no public interest issues.

Conclusion

[21] This transaction does not lead to a substantial prevention or lessening of competition and there are no public interest issues. Accordingly, this transaction is approved without any conditions.

N Manoim
Presiding Member

18 December 2006
Date

Concurring: Y Carrim and M Mokuena

Tribunal Researcher : R Kariga

For the merging parties : V. Koovejee, Deneys Reitz Attorneys

For the Competition
Commission : TG Mudzanani and M Van Hoven
(Mergers and Acquisitions)