



DETERMINATION OF MERGER NOTIFICATION M/12/023 -

DSM/Fortitech

Section 21 of the Competition Act 2002

Proposed acquisition by Royal DSM N.V. of sole control of Fortitech, Inc

Dated 14 December 2012

Introduction

1. On 15 November 2012, in accordance with section 18 of the Competition Act 2002 ("the Act"), the Competition Authority (the "Authority") received a notification of a proposed acquisition whereby Royal DSM N.V. ("DSM") would acquire sole control of Fortitech, Inc ("Fortitech").

The Undertakings Involved

DSM

2. DSM, headquartered in the Netherlands and listed on the NYSE Euronext, is a chemical company specialising in life sciences and material sciences. DSM's business activities can be grouped into five areas: nutrition, pharmaceuticals, performance materials, polymer intermediates, and emerging business areas. DSM's nutrition business, of which Fortitech will become a part post-transaction, supplies a range of nutritional ingredients to the food, beverage, animal feed, cosmetic, and pharmaceutical industries.
3. DSM's nutrition business manufactures nutritional ingredients (e.g., carotenoids, fat soluble vitamins, water soluble vitamins, nutritional lipids, etc) which it sells to customers. In addition, DSM sells premixed nutritional ingredients to customers as an alternative to its own individual ingredients. Premixing is the blending of two or more nutritional ingredients for convenience and easier application in the food production process. DSM's premix service, Quali®-Blends, allows customers to identify, assemble, and incorporate DSM's individual ingredients into premixes to use for food, beverages, dietary supplements, and infant formula. According to its website, DSM's premixes "are either standard blends or tailor made and manufactured according to your specifications."¹
4. DSM supplies the following products in the State: pharmaceutical ingredients, anti-infectives, animal feed products, personal care ingredients, human nutrition and health products, and infant nutrition. DSM sells in the State from its sales offices in the United Kingdom, from direct contact with larger customers, and via a distributor for

¹ See <http://www.dsm.com/nl_NL/html/dnpsa/vitaminpremixes.htm>.

smaller customers. DSM has no production or distribution facilities in the State and it does not employ any staff in the State.

5. For the year ending 31 December 2011, DSM's worldwide turnover was €9.19 billion. DSM's turnover in the State for the same period was €[...].

Fortitech

6. Fortitech provides customised premix services based on specifications provided by its customers. Fortitech purchases all input nutritional ingredients (e.g., flavours, caffeine, carbohydrates, enzymes, nucleotides, etc.) for its premix services from third party suppliers. Fortitech does not currently source any of its nutritional ingredients from DSM.
7. In the State, Fortitech sells premixed nutritional ingredients to manufacturers of infant nutrition, food, and beverages. Fortitech has no production or distribution facilities in the State and it does not employ any staff in the State. Fortitech supplies its products directly to customers in the State and does not use distributors.
8. For the year ending 31 December 2011, Fortitech's worldwide turnover was €153 million. Fortitech's turnover in the State for the same period was €[...].

Rationale for the Proposed Acquisition

9. The parties state in the notification:

"The proposed transaction will allow DSM to expand and complement its global nutrition cluster by combining DSM's ability to provide high quality raw materials with Fortitech's successful premix business model. This will enable DSM to expand its value chain presence. The combination will offer customers better value for their business and will create stronger relationships between the company and its customers."²

Third Party Submissions

10. No submission was received. However, in order to ascertain the views of food and beverage manufacturers who use premixed ingredients, the Authority designed a questionnaire to be answered by customers of DSM and Fortitech. The questionnaire consisted of questions about the respondent's experience with using companies that premix ingredients and its views about the proposed transaction.
11. DSM currently has [...] customers in the State who purchase premixed nutritional ingredients. Sales of premixed nutritional ingredients by DSM to these [...] customers amounted to €[...] in 2011.

² Notification Form Page 12.

12. Fortitech currently has [...] customers (of which [...] are also premix customers of DSM) in the State who purchase premixed nutritional ingredients. In 2011, Fortitech's sales of pre-mixed nutritional ingredients to these [...] customers amounted to €[...] ([...]).
13. All [...] customers were contacted by the Authority and all five customers either returned a completed questionnaire or answered the questions over the telephone. The Authority subsequently also contacted some of these [...] customers in order to discuss further and clarify their responses to the Authority's questionnaire.
14. The Authority also designed a questionnaire to be answered by competitors of DSM and Fortitech active in the sale of premixed nutritional ingredients. The Authority sent the questionnaire to five competitors. Two competitors returned a completed questionnaire to the Authority. One competitor provided a short view to the Authority in writing on the competitive impact of the proposed transaction but did not complete the Authority's questionnaire. The remaining two competitors did not respond to the Authority's questionnaire.
15. Finally, the Authority sent the questionnaire to a distributor of nutritional ingredients to customers including companies active in the premixing of ingredients. This company is not active in the premixing of ingredients and, thus, is not a competitor to DSM and Fortitech.

Industry Background – The Premixing of Nutritional Ingredients

16. Food and beverage manufacturers require nutritional ingredients such as vitamins, minerals, herbs, nutraceuticals, carotenoids, and enzymes as inputs into the production process. Manufacturers can purchase individual nutritional ingredients from suppliers and blend these ingredients in-house as part of the manufacturing process. Alternatively, manufacturers can purchase nutritional ingredients that have already been premixed according to the manufacturer's own specification. These premixed ingredients can then be used as inputs into the production process.
17. Market inquiries carried out by the Authority revealed that the main reasons why food and beverage manufacturers use premixed ingredients is because it reduces costs and some customers do not have the in-house capability to premix. When asked in the questionnaire why they purchase premixed ingredients, customers said the following (one comment per each of three customers):

"[...]"

"Ease of use – no blending or premix processing capability at our facility."

"[...]"

Relevant Product and Geographic Market

18. The parties state in the notification that "The food and beverage ingredients sector can be broken down into the market for the premixing or blending of nutritional ingredients for food and beverage applications. This industry includes such competitors as Glanbia, Lycored, Caravan, Stern Vitamins, and SL Wright. Within the industry are also a wide range of companies that perform considerable amounts of blending in-house, including Coca-Cola and Pepsi. The parties submit that the relevant product market is the mixing and blending of nutritional ingredients for use in food and beverage applications."³
19. For the purpose of its competitive assessment, the Authority will examine the competitive impact of the proposed transaction in the market for the supply of premixed nutritional ingredients. This is the narrowest possible product market affected by the proposed transaction. The Authority, however, does not need to come to a definitive view on the precise relevant product market because its conclusions concerning the competitive impact of the proposed transaction, outlined below, would be unaffected whether the relevant product market is the supply of premixed nutritional ingredients or includes some aspect of the supply of nutritional ingredients and their blending in-house by product manufacturers.
20. The parties state in the notification that "the relevant geographic market is at least EEA-wide, as the main food ingredient providers sell in various countries and transportation costs do not impede trade at EU level. Customers selling food products in the State purchase premixes and blends from a variety of companies throughout the world, both inside and outside the State."
21. The Authority considers that the relevant geographic market affected by the proposed transaction may be wider than the State. Neither DSM nor Fortitech have any production facilities for premixing in the State,⁴ so all of the merging parties' customers in the State purchase imported premixed nutritional products. Some competitors of the merging parties active in the State have production facilities located abroad. These include Glanbia Customised Solutions (United States, Germany, and China), Lycored (United Kingdom) and Vitablend (Holland). The Authority is aware, however, of one Irish premix manufacturer active in the State, namely, Nutrition Supplies which is located in Co. Cork.
22. The Authority does not need to come to a definitive view on the precise relevant geographic market because its conclusions concerning the competitive impact of the proposed transaction, outlined below, would be unaffected whether the relevant geographic market is narrow (i.e., the State) or broader to encompass, for example, all of the countries in the European Union.
23. In conclusion, for the purpose of its competitive assessment, the Authority will examine the competitive impact of the proposed transaction in the market for the supply of premixed nutritional ingredients in the State.

Competitive Analysis

³ *ibid.* Page 12.

⁴ DSM has premix facilities in the USA, France, Mexico, Colombia, Brazil, South Africa, Singapore, and China. Fortitech has production facilities in the USA, Brazil, Malaysia, Denmark, and Poland.

Horizontal Overlap

24. There is horizontal overlap between the parties as they both sell premixed nutritional ingredients to customers in the State.
25. The parties state in the notification that “data for shares of sales in mixing and blending of nutritional ingredients are not readily available. Many of the players in mixing and blending are privately owned, and no financial data are available for these companies. For those that do publish financial data, the mixing and blending business is part of a larger operation and no separate figures are publicly available. Moreover, because mixing and blending involves multiple different ingredients with different values, capacity is a much better indicator of market presence than turnover. DSM and Fortitech’s combined share in mixing and blending of nutritional ingredients is low (around [10-20]% based on worldwide capacity) and there are a number of other large competitors, including Stern Vitamins, Lycored, Glanbia and Evre.” The parties confirmed to the Authority that this estimate is limited to the supply of premixed nutritional ingredients; it excludes the premixing of ingredients in-house by customers. The Authority, however, has not been able independently to confirm the parties’ estimate.
26. On its website, DSM describes itself as “the world’s leading company in the manufacture and supply of micronutrient blends or premixes.”⁵ Fortitech describes itself on its website as “the world leader in the development of custom nutrient premixes for the food, beverage and pharmaceutical industries.”⁶
27. Notwithstanding that the parties are leading premixers of nutritional ingredients worldwide, the Authority considers that the proposed transaction will not substantially lessen competition in the market for the supply of premixed nutritional ingredients in the State for the following reasons.
28. As noted above, DSM currently sells premixed ingredients to [...] customers in the State, while Fortitech has [...] customers in the State ([...]). The Authority contacted all [...] customers.
29. One of the [...] customers expressed a concern about the proposed transaction stating that “[...]” This customer currently uses three suppliers of premixed ingredients: [...].
30. In a follow-up questionnaire, the Authority asked this customer to explain why it does not consider other suppliers of premixed nutritional ingredients (such as those listed in paragraph 31 below) to be credible alternatives to DSM and Fortitech. This customer responded as follows: “[...]”
31. In contrast, [...] out of the [...] customers contacted by the Authority did not object to the proposed transaction on competition grounds and indicated that there are a number of credible alternative suppliers of premixed nutritional ingredients active in the State. Names mentioned included Lycored, Vitablend, Glanbia Customised Solutions, SternVitamin, BASF, Unitech, and Nutrition Supplies.

⁵ See <http://www.dsm.com/nl_NL/html/dnpsa/vitaminpremixes.htm>.

⁶ See <<http://www.fortitech.com>>.

32. One of these customers explained its reasoning as follows:
- "[...]"
33. Another customer expressed the view to the Authority that the proposed transaction would not have a "significant impact...No concerns at the moment." This customer stated that it has identified a new supplier of premixed ingredients that it is "working to bring...into the supply mix."
34. After careful consideration, the Authority does not consider the first customer's concern (described in paragraphs 29 and 30 above) to be persuasive. It has not been shown that manufacturers of premixed nutritional ingredients need to be vertically integrated (i.e., both a manufacturer of nutritional ingredients and a manufacturer of premixes) in order to compete effectively in the market for the supply of premixed nutritional ingredients in the State. As will be described in detail below when the Authority examines the likelihood of vertical foreclosure post-transaction, there are numerous suppliers of individual nutritional ingredients located in Europe and Asia.
35. Furthermore, many of the competing suppliers of premixed nutritional ingredients listed in paragraph 31 above are active worldwide. One competitor of the parties informed the Authority that the "activity of mixing and blending nutritional ingredients is a well-developed activity worldwide with some global players, and various regional and local players". For example, Vitablend has production facilities in Holland and Singapore and it delivers premixed ingredients to customers worldwide since 2011.
36. Finally, [...] out of Fortitech's [...] premix customers in the State - including the customer whose concerns are reported in paragraphs 29 and 30 - are global food and beverage manufacturers which use multiple suppliers of premixed ingredients. As noted in paragraph 33 above, one customer informed the Authority that it is currently working to purchase supplies of premixed ingredients from a new supplier. The Authority considers that there are a number of credible alternative suppliers of premixed nutritional ingredients (such as those listed in paragraph 31 above) to whom customers can switch post-transaction and that the proposed transaction will not substantially harm competition.

Vertical Overlap

37. There is also a potential vertical relationship between the parties in the State. DSM manufactures and sells its own nutritional ingredients. [...]. In theory, pre-proposed transaction, DSM, by virtue of it's being both a manufacturer of nutritional ingredients and a manufacturer of premixed nutritional ingredients, could have the ability and incentive to foreclose its rival premix suppliers (by, for example, raising the price of its nutritional ingredients or limiting access to its ingredients). The question is whether the proposed transaction is likely to change the ability or incentive of DSM to foreclose its premix rivals such that input foreclosure may become more likely.
38. The Authority considers that the proposed transaction will not substantially lessen competition in the market for the supply of premixed nutritional ingredients in the State. The Authority considers

that DSM will not have the ability to foreclose its premix competitors post-transaction for the following reasons.

39. Post-transaction, manufacturers of premixed nutritional ingredients will be able to purchase individual nutritional ingredients from suppliers who compete with DSM. Some of these competing suppliers are located in Asia (in particular China) and they include Northeast General Pharmaceutical Factory, Qianjiang Yongan, JSPC, Zhejiang Tianxin Pharma, Zhejiang Shengda Pharma, and Shangdong Guangtong Chlorophyll Co. A distributor of nutritional ingredients to companies active in the premixing of ingredients informed the Authority that "for each vitamin there are from 2-7 different Chinese manufacturers, so it is no problem to find alternative suppliers within this area."
40. Some competing suppliers of individual nutritional ingredients to DSM are located in Germany and these include BASF, Beneo-Orafti S.A., Atlantic Chemicals Trading GmbH, TSI Health Sciences (Europe) Limited, Dr. Paul Lohmann GmbH, and Merck.
41. The Authority also sought the views of competitors of DSM and Fortitech active in the supply of premixed nutritional ingredients in the State. As noted above, the Authority sent a questionnaire to five competitors of which two returned a completed questionnaire. One competitor provided a short view to the Authority in writing on the competitive impact of the proposed transaction but did not complete the Authority's questionnaire. The remaining two competitors did not respond to the Authority's questionnaire.
42. One competitor active in the supply of premixed nutritional ingredients expressed a concern about the proposed transaction stating that "[...]."
43. In response to a follow-up questionnaire from the Authority, this competitor stated that "[...]."
44. Two out of the three competitors who responded to the Authority raised no competition concerns. One competitor stated that in addition to DSM there are many other suppliers of individual nutritional ingredients such as vitamins and minerals. This competitor listed BASF (Germany) and suppliers in Asia such as Zhejiang Tianxin Pharma as credible alternatives to DSM.
45. A second competitor expressed the view that the proposed transaction is "an opportunity for other players to show their capabilities to customers and challenge a leading position."
46. After careful consideration, the Authority does not consider the competitor's concerns (described in paragraphs 42 and 43 above) to be persuasive. Two customers of the parties active in the infant nutrition industry in the State informed the Authority that they would have no problem purchasing premixed ingredients from suppliers located in China or from premix suppliers who use individual ingredients sourced from Chinese suppliers. Both customers informed the Authority that they currently purchase individual nutritional ingredients from Chinese suppliers.
47. In light of the above, the Authority considers that the proposed acquisition will not raise any vertical foreclosure concern in the State.

Ancillary Restraints

48. The parties have entered into a Stock Purchase Agreement which sets out a number of restrictive obligations. These include a non-compete clause for a period of five years in relation to four individual sellers and a non-solicitation clause for a period of three years in relation to those four sellers in respect of officers and employees of Fortitech.
49. The Authority sought clarification from the parties as to why a five-year period is being sought in relation to a non-compete clause. The parties stated that "the non-compete clause set out in Section 7.2 of the Stock Purchase Agreement is directly related to, and necessary for, the implementation of the proposed acquisition. This transaction involves the transfer not only of physical assets but also of the goodwill and know-how of Fortitech. Furthermore, premixes and blends are not protected by intellectual property and the process of blending ingredients is based on straightforward methodology and equipment (barriers to entry are low). In these circumstances, a non-compete clause of five years is necessary and appropriate in order to protect DSM against competition from the vendor, thereby allowing the acquirer to obtain the full value of the assets transferred."
50. The Authority informed the parties that it does not consider the five year non-compete period to be an ancillary restraint necessary for the implementation of the proposed transaction. The parties agreed on 13 December to amend the non-compete obligation from five years to three years as follows:
- "The Parties agree to amend Section 7.2(a) of the Agreement by deleting such section and replacing it as follows: For a period of three (3) years commencing on the Closing Date,"⁷
51. With the inclusion of the amendment described in paragraph 50 above, the Authority now considers the restrictions to be directly related and necessary to the implementation of the proposed transaction.

⁷ Communicated by the parties to the Authority on 14 December 2012.

DETERMINATION

The Competition Authority, in accordance with section 21(2)(a) of the Competition Act, 2002, has determined that, in its opinion, the result of the proposed acquisition whereby Royal DSM N.V. would acquire sole control of Fortitech, Inc will not be to substantially lessen competition in markets for goods or services in the State, and accordingly, that the acquisition may be put into effect.

For the Competition Authority

Stephen Calkins

Member of the Competition Authority

Director, Mergers Division