

***Case No IV/M.1273 -  
CREDIT SUISSE /  
NIKKO / MSA***

Only the English text is available and authentic.

**REGULATION (EEC) No 4064/89  
MERGER PROCEDURE**

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Article 6(1)(b) NON-OPPOSITION

Date: 14/08/1998

*Also available in the CELEX database  
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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 14/08/1998

PUBLIC VERSION

MERGER PROCEDURE  
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sirs,

**Subject: Case No IV/M.1273: Credit Suisse/Nikko/MSA**

Notification of 15 July 1998 pursuant to Article 4 of Council Regulation (EEC) No 4064/89, as last amended by Council Regulation (EC) No 1310/97.

1. On 15 July 1998 CS Structured Credit Fund, Ltd ("CS"), and Nikko Europe plc ("Nikko Europe"), notified an operation involving the acquisition of joint control, within the meaning of Council Regulation (EEC) No 4064/89 ("the Regulation"), of MSA Acquisitions Co Ltd ("MSA Acquisitions"), a company currently under the sole control of Nikko Europe.

**I THE PARTIES**

2. CS is a closed-ended Cayman Island limited liability company incorporated for the purpose of investing in a broad range of securities, derivatives and other assets. It is a wholly owned subsidiary of Credit Suisse First Boston, which is part of the Credit Suisse Group ("the Credit Suisse group").
3. Nikko Europe is the European and Middle Eastern arm of The Nikko Securities Co., Ltd, a Japanese security house and investment bank. Nikko Europe provides brokerage and investment banking services in the equity, bond and derivative markets, together with economic and investment research and corporate finance advice.
4. MSA Acquisitions is the company which was originally used to acquire RoadChef (see below) and which is now its immediate corporate parent. The issued share

capital of MSA Acquisitions is divided into ‘A’ and ‘B’ shares. A total of [...] ‘A’ shares have been issued, representing just under one-quarter of the issued share capital of MSA Acquisitions, and are held by the management of RoadChef (“the Management”). A total of [...] ‘B’ shares have been issued, representing just over three-quarters of the entire issued share capital of MSA Acquisitions, and are held by MSA Holdings Limited (“MSA Holdings”).

5. RoadChef is a wholly owned subsidiary of MSA Acquisitions, and is the third largest operator of motorway service areas in the UK. Its core activities are the provision of fuel and forecourt services, catering, retail services and lodge accommodation. Nikko Europe played a key part in arranging and providing the finance for the acquisition of RoadChef by MSA Acquisitions.
6. The entire issued share capital of MSA Holdings, the corporate parent of MSA Acquisitions, is held on trust by SPV Management Limited (“SPV”), a private limited company incorporated in England & Wales. SPV is wholly owned by its management, which consists of two private individuals. SPV’s business is to provide directors and other management services to special purpose companies (in this case MSA Holdings Limited) and, as and when required, to hold the equity share capital of such companies on discretionary trust, the beneficiaries of which are a number of UK charities. [...] Neither SPV nor MSA Holdings play an active part in the day to day management of MSA Acquisitions.

## II THE OPERATION

7. The notified operation is a change in respect of MSA Acquisitions from sole control by Nikko Europe, to joint control by Nikko Europe and CS.
8. The table below summarises the shareholdings and share warrant holdings in MSA Acquisitions before and after the notified operation

*Table: Control of MSA Acquisitions before and after notified operation*

[ ... ]<sup>4</sup>

9. The Management’s holding of [...] ‘A’ shares gives them certain rights, but no rights which would give them the power to block actions which determine the strategic commercial behaviour of MSA Acquisitions. Neither MSA Holdings, which has [...] shares, nor its corporate parent SPV, play an active part in the day to day management of MSA Acquisitions.

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<sup>1</sup> Deleted business secret

<sup>2</sup> Deleted business secret

<sup>3</sup> Text considered as business secret has been replaced by square brackets

<sup>4</sup> Deleted business secret

<sup>5</sup> Deleted business secret

<sup>6</sup> Deleted business secret

10. Nikko Europe has no shareholdings in MSA Acquisitions as such, but protects its investment in the company by the possession of warrants entitling it to subscribe at any time for up to [ *a substantial majority of the* ]<sup>7</sup> shares in the company. The warrants therefore give Nikko the ability on very short notice to acquire over [ *a substantial majority of the* ]<sup>8</sup> issued share capital of the company.
11. Under the terms of the operation, [...] <sup>9</sup> ‘B’ shares currently held by MSA Holdings will be converted into ‘C’ shares and transferred to CS. The shareholding of MSA Holdings in MSA Acquisitions will therefore diminish to [*just over half the issued share capital*]<sup>10</sup> ‘B’ shares. However, a shareholders’ agreement (“the shareholders’ agreement”) to be entered into as part of the transaction will give the holders of both ‘B’ and ‘C’ shares, that is MSA Holdings and CS respectively, veto rights (“strategic veto rights”) over a number of matters relating to the strategic and commercial behaviour of MSA Acquisitions. [ ... ]<sup>11</sup> Even if either Nikko or CS exercised their respective warrants in order to acquire additional shares, this would not enable them to defeat the strategic veto rights of the other class of shareholders under the shareholders’ agreement.

### **III THE CONCENTRATION**

12. The operation represents a change from sole control of MSA Acquisitions by Nikko Europe, to joint control by Nikko Europe and CS.

### **IV COMMUNITY DIMENSION**

13. Because this is a transition from sole to joint control of a pre-existing company, the undertakings concerned are each of the jointly-controlling companies, including the initial shareholder, but not the target, MSA Acquisitions. Nikko Europe and CS are therefore the undertakings concerned.
14. Both Nikko Europe and CS are part of financial groups, Nikko Europe being part of the group headed by The Nikko Securities Co (“the Nikko group”) of Japan, and CS being a part of the Credit Suisse group. Their turnovers for the purposes of Article 1(2) of the Regulation have to be calculated in accordance with the provisions of Article 5(3)(a) of the same Regulation. On this basis the worldwide turnover of the Credit Suisse group in 1997 was in excess of ECU 25 000 million, and the turnover of the Nikko group was in excess of ECU 3 000 million. The Community wide turnover of the Credit Suisse group was in excess of ECU 9 000 million and the turnover of the Nikko group in excess of ECU 1 000 million.
15. The Nikko group achieves more than two-thirds of its Community-wide turnover in the UK, but the Credit Suisse group does not derive more than two-thirds of its Community-wide turnover within any one member state.

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<sup>7</sup> Text in square brackets replaces figure considered as business secret

<sup>8</sup> Text in square brackets replaces figure considered as business secret

<sup>9</sup> Deleted business secret

<sup>10</sup> Text in square brackets replaces figure considered as business secret

<sup>11</sup> Text considered as business secret has been replaced by square brackets

16. The notification does not fall to be treated as an EFTA co-operation case.

## **V JOINT VENTURE**

### *Sole control by Nikko prior to the notified operation*

17. The parties argue that, although Nikko Europe has no direct shareholding interest in MSA Acquisitions, it is nonetheless in sole control within the meaning of the regulation owing to a combination of the share warrants and other factors.

17.1. The role of the corporate parent, SPV [ .. ]<sup>12</sup> acting through MSA Holdings, is not to manage companies as such but to provide a [ .. ]<sup>13</sup> facility for the legal ownership of shares [ ....]<sup>14</sup>

17.2. MSA Acquisitions, has undertaken to Nikko Europe that it will not, without the consent of the majority of holders of 'B' shares (in this case MSA Holdings), undertake a wide range of acts relating to the strategic commercial behaviour of MSA Acquisitions[ .. ]<sup>15</sup>.

17.3. The 'A' shareholders of MSA Acquisitions, that is the Management, have a right to appoint a maximum of two directors, provided they have at least 10% of issued shares. The 'B' shareholders, that is MSA Holdings, have the right to appoint up to three directors. The Nikko employees currently on the board of MSA Acquisitions are currently able to outvote the Management director. But, even if both sides appointed the maximum number of directors permitted to them, Nikko, through its influence on MSA Holdings, could still retain control of the board.

18. The Commission Notice of 2.3.98 on the concept of concentration under the Regulation (98/C 66/02) states at paragraph 15 that an option to purchase or convert shares cannot in itself confer sole control unless the option will be exercised in the near future according to legally binding agreements. However, the likely exercise of such an option can be taken into account as an additional element which, together with other elements, may lead to the conclusion that there is sole control. The Commission considers that the combination of the share warrants with the factors outlined in paragraph 17 above is sufficient to confer sole control, within the meaning of the Regulation, on Nikko.

### *Joint control after the operation*

19. After the operation the Management will still be able to appoint two directors. However MSA Holdings will now be able to appoint a maximum of only two rather than three. CS will be able to appoint one director.

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20. The transition to joint control occurs because Nikko Europe procures the transfer of some of the 'B' class shareholdings of MSA Holdings to CS (and their conversion to 'C' class shares) as well as [...]<sup>16</sup> of Nikko Europe's share warrants. At the same time the terms of the shareholders' agreement will mean that both MSA Holdings and CS acquire strategic veto rights.
21. After the operation the Management are in essentially the same position in terms of their level of influence as they were prior to the operation. MSA Holdings still holds the majority of the shares, and its corporate structure and function would still cause it to defer to the wishes of Nikko Europe. But Nikko Europe is no longer the only entity able to exercise decisive influence, because of the strategic veto rights afforded to CS through the shareholders' agreement. Nor can CS be said to be the only entity with decisive influence, because of the veto rights accorded to MSA Holdings by the shareholders' agreement.
22. Joint control within the meaning of the Regulation arises from the fact that Nikko Europe and CS are both in a position to exercise decisive influence.

## **VI COMPATIBILITY WITH THE COMMON MARKET**

### *Relevant product and geographic markets*

23. According to the notifying parties, the business of the joint venture is the operation of motorway service stations in the UK (in which its market share is under 25%). However, as neither of the parents is otherwise involved in this business activity, the issue of horizontal overlap does not arise, and product and geographic market definitions do not need to be considered further.

## **VII CONGLOMERATE ASPECTS**

24. Neither CS nor Nikko nor any of their subsidiaries or undertakings in which they have an interest are active in the business of operating motorway service areas in the UK or in any other Member State, nor in any business which might be considered upstream or neighbouring to this market.

## **VIII CONCLUSION**

25. In view of the above the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the functioning of the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation No 4064/89 and Article 57 of the EEA Agreement.

For the Commission,

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<sup>16</sup> Text considered as business secret has been replaced by square brackets