

***Case No IV/M.1482 -
KINGFISHER /
GROSSLABOR***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION

Date: 12/04/1999

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 12.04.1999

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EEC) No 4064/89 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

To the notifying party

Subject: Case No IV/M.1482 – Kingfisher/Großlabor

Notification of 05.03.1999 pursuant to Article 4 of Council Regulation No 4064/89

1. On 05.03.1999, the Commission received a notification of a proposed concentration pursuant to Article 4 of a Council Regulation (EEC) No 4064/89 by which the UK retail group Kingfisher plc ("Kingfisher") acquires within the meaning of Article 3(1)(b) of the Council Regulation control of the whole of the German company Wegert-Großlabor GmbH ("Großlabor") by way of purchase of shares.
2. This operation follows a previous acquisition by which Kingfisher has acquired within the meaning of Article 3(1)(b) of the Council Regulation control of the undertakings Wegert Verwaltungs-GmbH & Co Beteiligungs-KG ("Wegert"), ProMarkt Holding GmbH ("ProMarkt"), WPM Gesellschaft für Werbung und Marketing mbH ("WPM"), Profinanz Warenkreditvermittlungs GmbH ("Profinanz") and TKE Electronic Service GmbH ("TKE") by way of purchase of partnership capital and shares through its subsidiary Eijsvogel Beteiligungs GmbH ("Eijsvogel"). This transaction was notified on 14.05.1998 and cleared by the Commission on 18.06.1998 (IV/M.1188 Kingfisher/Wegert/ProMarkt).

3. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation (EEC) No 4064/89 and does not raise serious doubts as to its compatibility with the common market and with the functioning of the EEA Agreement.

I. THE PARTIES' ACTIVITIES AND THE OPERATION

4. Kingfisher is a broadly based retail group operating mainly within the United Kingdom but with significant interests in Belgium, France, Germany and the Netherlands. It currently retails non-food/drink products through more than 2,300 stores and has more than 114,700 employees. Its subsidiary Eijsvogel has been created for the purpose of the transaction in 1998.
5. Wegert is active in the retailing of photographic, entertainment, electronic, computer electrical and office communications goods in the Berlin area and in East Germany. WPM and Profinanz were ultimately owned by the same owners as Wegert and are engaged in marketing and financing respectively exclusively for companies owned by these owners.
6. ProMarkt is active in the retailing of photographic, entertainment, electronic, computer electrical and office communications goods and household equipment and the provision of services relating thereto. ProMarkt operates retail stores in the south of Germany. TKE is the after sales service company for ProMarkt which was legally separated from ProMarkt recently [*the deleted text indicates the reason for the legal separation*]. TKE's majority was owned by the sons of the owner of ProMarkt, who according to the parties still controlled this company.
7. Großlabor provides photographic development services for retailers as well as wholesale of photographic accessories. It is active only in Germany.
8. Kingfisher has acquired a 60% controlling share of Wegert through its subsidiary Eijsvogel, under the condition that Wegert acquires 100% of ProMarkt. As part of the transaction Kingfisher has acquired 60% of the shares in WPM, 100% of the shares from Profinanz and through Wegert 100% of the shares in TKE. The signing of the relevant agreements and the completion of all transactions respectively have taken place at the same time. The majority of the ProMarkt purchasing price has been paid by Eijsvogel as part of its purchase price for Wegert. Kingfisher only intended to acquire Wegert if it could acquire WPM, Profinanz, ProMarkt and TKE together. Since Kingfisher did not have an interest in acquiring a purely regional electrical retailing business, it had entered into a deal that would have given it a broader geographic spread in the German market.
9. The UK retail group Kingfisher now intends to acquire through its subsidiary Kingfisher Beteiligungs GmbH the German company Wegert-Großlabor GmbH ("Großlabor") by accepting an irrevocable offer made by the sellers Michael and Matthias Wegert at the time of the earlier transaction, to acquire 100% of the shares of Großlabor.

II. CONCENTRATION

10. This operation includes several transactions which constitute one concentration within the meaning of Article 3(1)(b) of the Regulation.
11. Although the set of transactions in 1998 entailed more than one change of control, it must be regarded as a single operation since the different elements were mutually interdependent: both the acquisition of ProMarkt by Wegert and the acquisition of a controlling interest in the latter by Kingfisher were conditioned to each other so that one could not proceed without the other. Kingfisher has provided the capital for the entire operation and all transactions have been carried out simultaneously. Kingfisher was not interested in acquiring one of the main businesses without the other, since it would not have obtained a sufficient geographic spread which would have enabled it to enter the German market with a minimum impact. The acquisition of WPM and Profinanz, the service businesses for Wegert, have only taken place because the main companies were acquired and can thus be considered accessory.
12. The parties have submitted that the acquisition of TKE was also part of the operation. The notified agreements only contain an obligation for ProMarkt to ensure that, at completion, the company owning TKE enters into the TKE Sale and Purchase Agreement. However such an agreement had not been concluded at the time. Therefore there was not sufficient certainty at the time that the transaction would take place. The degree of economic interdependence between the acquisition of TKE and the main operation is considerably lower than that of the transactions referred to in the previous paragraph. Therefore the acquisition of TKE should be regarded as a distinct operation without a Community dimension.
13. The transaction notified on 05.03.1999 constitutes a concentration within the meaning of Article 3(1)(b) of the Regulation, since Kingfisher acquires control over Großlabor. This acquisition takes place within a period of two years of the acquisition by Kingfisher of the companies that have been covered by the Commission decision in case IV/M.1188 - Kingfisher/Wegert/ProMarkt. Both operations take place between the same persons and undertakings, i.e. Kingfisher being the acquirer and Michael and Matthias Wegert being the vendors. The two operations therefore have to be treated as one and the same transaction arising on the date of the last transaction according to Article 5(2) subpara. 2 of the Merger Regulation.

III. COMMUNITY DIMENSION

14. The undertakings have a combined aggregate world-wide turnover in excess of 5,000 million ECU¹. At least two of them have a Community-wide turnover in excess of 250 million ECU, but they do not achieve more than two-thirds of their aggregate Community-wide turnover

¹ Turnover calculated in accordance with Article 5(1) of the Merger Regulation and the Commission Notice on the calculation of turnover (OJ C66, 2.3.1998, p25). To the extent that figures include turnover for the period before 1.1.1999, they are calculated on the basis of average ECU exchange rates and translated into EUR on a one-for-one basis.

within one and the same Member State. The notified operation therefore has a Community dimension, but does not constitute a co-operation case under the EEA Agreement, pursuant to Article 57 of that Agreement.

IV. COMPATIBILITY WITH THE COMMON MARKET

A. Relevant product markets

15. The notifying party states that the only economic sector in which more than one party is active is electrical retailing. The party states that this market can be broadly divided into the following four segments: brown goods, i.e. audio and visual appliances, large domestic appliances, e.g. washing machines, freezers etc., small domestic appliances, e.g. toasters, irons etc., and computer and communication. Großlabor is active in the development of photographic pictures and the sale of photographic accessories at the wholesale level in Germany. Kingfisher operates at the retail level only. However it is not necessary to further delineate the relevant product markets because in all alternative market definitions considered, effective competition would not be significantly impeded in the EEA or any substantial part of that area.

B. Relevant geographic markets

16. The notifying party states that the relevant geographic market is either national, regional or local. According to the parties cross-border trading within Europe is minimal. Even though many of the suppliers are global players, they tend to have a national sales policy due to different consumer preferences. This assessment is in line with previous decisions concerning retail operations, where the Commission has defined the geographic market to be at least national, if not regional or local.² It is not necessary to delineate the relevant geographic markets because, in all alternative geographic market definitions considered effective competition would not be significantly impeded in the EEA area or any substantial part of that area.

C. Competitive assessment

17. Kingfisher is active in Germany through seven stores it has acquired on 31.12.1998 and which are active in the retail of entertainment electronics and electronic goods of all kinds in Germany and Austria. This operation was cleared by the German authorities in January 1999.
18. Wegert is active in a different part of Germany than ProMarkt. With the exception of ProMarkt's retail stores in Luxembourg, Wegert and ProMarkt are only active in Germany whilst Kingfisher is not active in Luxembourg or Germany. Within Germany Wegert and ProMarkt are active in different regions: Wegert in Berlin and East Germany, ProMarkt in the South.
19. On the basis of a local or regional market there would only be an overlap between the activities of the parties in the area of Leipzig regarding retailing of entertainment electronics. The combined market shares of the parties in Germany in this market segment and in this region are less than *[between 10% and 15%]*.

² Case IV/M.784 - Kesko/Tuko; case IV/M.890 Blokker/Toys "R" Us.

20. Should the relevant market be defined as Germany the combined market share of Wegert and ProMarkt in electrical retailing would be below [*the figure is less than 3%*]. Even if one were to break these figures down according to the various segments neither of these undertakings could command a market share exceeding [*the figure is less than 3%*]. On the German market there are at least three competitors in the electrical retail sector which have larger market shares than the combined entity. The largest company is Mediamarkt/Saturn which belongs to the Metro group and has an estimated size of up to [*the figure is between 5% and 10%*].
21. On a European level the increase of Kingfisher's market share due to the operation would be marginal due to the minor size of these businesses on such a large market. Any position which Kingfisher would hold vis-a-vis these suppliers, would [*describes the market position Kingfisher holds in this context*].
22. A vertical link exists in that Großlabor supplies its photographic development services to retailers such as Kingfisher. In fact 70%-80% of its business is with the Kingfisher stores that have been acquired through the transaction in 1998. Großlabor's market in photographic development is below [*the figure is less than 3%*]. Kingfisher's market share of the downstream retail film services sector in Germany is less than [*the figure is between 5% and 10%*]. The estimated share of Großlabor in the wholesale supply of accessories, which it does not sell to Kingfisher is below [*the figure is less than 3%*], whereas Kingfisher's share of the downstream accessories market is less than [*the figure is between 20% and 25%*].
23. In view of the market position of the parties to the concentration, it appears that the notified operation will have no impact on competition in the EEA. Consequently, the proposed concentration does not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the EEA or any substantial part of that area.

V. ANCILLARY RESTRAINTS

24. The parties have submitted a number of contractual obligations they wish to be cleared as ancillary restrictions. These contractual obligations include non-competition clauses in the sense of Chapter III.A. of the Commission Notice on restrictions ancillary to concentrations ("Notice")³, non-solicitations clauses with regard to senior employees and confidentiality clauses. These clauses are contained in the sale and purchase agreement for Wegert, in the sale and purchase agreement for ProMarkt, in the agreements relating to the employment of Michael and Matthias Wegert as managers in the acquired companies and in the options agreement relating to the option for the vendors of Wegert to sell and for Kingfisher to acquire the remaining 40% share in the acquired company.
25. The clauses that are contained in the options agreement between Kingfisher and the vendors of Wegert are not ancillary to the concentration and can therefore not be covered by the present decision. The notified transaction relates to the purchase of a 60% controlling share in Wegert and the acquisition of control in the other above-mentioned companies. The option [*the text describes the clauses in question in the options agreement*] concerns a different transaction that is not directly related and necessary to the implementation of the notified concentration.

³ OJ C 203, 14.8.1990, p.5.

26. The non-competition clauses contained in the sale and purchase agreement relating to the sale of Wegert and in the sale and purchase agreement relating to ProMarkt are covered by this decision only to the extent that their duration does not exceed two years in line with Chapter III.A.2. of the Notice. With the purchase of the undertakings which are the object of this notification Kingfisher acquires only goodwill. While the parties claim the acquisition of know-how with the purchase of the undertakings in question, they themselves point to the necessity of retaining the vendors of Wegert as the managers for the new entity in order to obtain this know-how. This know-how is acquired through the agreements relating to the employment of the vendors of Wegert. These agreements have separate non-competition clauses for a period of [*the figure is less than 5*] years after the termination of the agreement covering this know-how.
27. The application of this decision on the competition clauses in the above-mentioned sales and purchase agreements is furthermore limited to the respective geographic areas where the vendors had established the products and services before the transfer (Chapter III.A.3. of the Notice). In the same manner the application of this decision to the non-competition clauses is limited to the products and services which form the economic activity of the undertaking transferred (Chapter III.A.4. of the Notice). In so far as the non-competition clauses in question limit the vendors to own specified percentage interests in competing companies, this restriction should not be used to prevent the purchase of shares for investment purposes only, where the person concerned does not exercise, directly or indirectly, any management function in the company concerned or any material influence in that company.⁴
28. The obligations not to solicit employees from the transferred business and not to disclose confidential business information contained in the above-mentioned sales and purchase agreements have a similar purpose as the non-competition clauses and are covered by this decision within the same limits as laid down above for the non-competition clauses. These limits do not include the limitation of a period of [*the figure is less than 5*] years for the confidentiality clause.⁵
29. The non-competition and non-solicitation clauses contained in the agreements relating to the employment of Michael and Matthias Wegert are covered by this decisions within the limits established by the considerations made above with regard to the corresponding clauses in the sales and purchase agreements.
30. The sale and purchase agreement between Wegert and the vendors of ProMarkt imposes an obligation on the vendors not to carry on business in Europe under the ProMarkt name and/or trademarks. The Commission recognises the need for the purchaser to hinder the vendor from using the name and the trademarks of the acquired undertakings. However, intellectual property rights are protected by specific legislation under which undertakings are entitled to register names and trademarks. Consequently, this clause is not covered by the present decision
31. The shareholders agreement between Eijsvogel and the vendors of Wegert [*the deleted text describes the conditions for other activities of the Kingfisher group in domestic*

⁴ Case IV/M.301 - Tesco Ltd/Catteau SA

⁵ See case IV/M.597 - Swiss Bank Corporation/S.G. Wargurg; case IV/M.512 - UAP/Provincial.

electrical retailing in Germany as agreed between the parties]. This clause is covered by this decision because it is an integral part of the transaction.

VI. CONCLUSION

32. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EEC) No 4064/89.
33. The acquisition of TKE is not covered by the present decision, as it is a distinct operation without Community dimension.

For the Commission,