

***Case No COMP/M.2075 -
NEWHOUSE / JUPITER
/SCUDDER / M&G / JV***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 01/09/2000

*Also available in the CELEX database
Document No 300M2075*



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 01/09/2000
SG(2000)/D106464

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

PUBLIC VERSION

To the notifying parties

Dear Madam/Sir,

Subject: Case No COMP/M.- 2075 - Jupiter / M&G / Newhouse / Scudder / JV
Notification of 2.8.2000 pursuant to Article 4 of Council Regulation No 4064/89

1. On 2.8.2000, the Commission received a notification of a proposed concentration by which the UK-based company, Jupiter International Group Plc ("Jupiter"), controlled by the German bank, Commerzbank AG, the UK-based company M & G Limited ("M&G"), controlled by Prudential plc., the US company Newhouse Capital Partners LLC ("Newhouse"), controlled by the US Nationwide Mutual Insurance Company and the UK-based company Scudder Investments Holdings Limited ("Scudder"), controlled by the Swiss company, Zurich Financial Services, acquire joint control in a newly created company constituting a joint venture, Cofunds Limited ("CFL").
2. 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 EEA Agreement.

I. THE PARTIES' ACTIVITIES AND THE OPERATION

3. CFL is conceived as an independent on line supermarket for sale of Retail Mutual Funds via Independent Intermediaries.
4. The four parents of CFL, which belong to financial, insurance and banking groups above mentioned, provide investment management and fund management. CFL will be jointly owned by the four notifying parties, each with a 25% shareholding. The Joint Venture Agreement is signed also by the UK company, Gartmore Investment Management Plc, a

group active in investment management, which belongs also to the Nationwide Mutual Insurance Company. However, Gartmore will exert its control only through Newhouse, given that it will not itself have any influence on the decisions of CFL. The four parent companies and Gartmore are together denominated "the Founders"

Full function

5. CFL's activities will consist of the provision of an electronic supermarket for the sale of Retail Mutual Funds through Independent Intermediaries. It will have management for its day to day operations, staff, finance and assets to operate on a lasting basis as an autonomous economic entity. CFL will have its own proprietary software system. At the outset, the majority of funds sold through the on-line supermarket are likely to be those of the parents; however it is anticipated that a substantial number of third Fund Manager companies will list their funds with CFL in the next two years.

Joint control

6. CFL will be owned equally by the four parent companies Jupiter, M&G, Newhouse and Scudder. Each parent company will have equal voting rights, and a number of key corporate governance and commercial decisions, such as the adoption of the business plan, are subject to the veto rights of each parent. Thus, the four parent companies will have the possibility to exercise decisive influence over CFL.
7. The proposed Joint Venture constitutes, therefore, a concentration in accordance with the dispositions of Article 3 (2) and (3) of the Council Regulation.

II. COMMUNITY DIMENSION

8. Commerzbank AG, Prudential plc., Nationwide Mutual Insurance Company and Zurich Financial Services groups have a combined aggregate worldwide turnover in excess of EUR 5,000 million¹ (Commerzbank AG, EUR [...]; and Prudential plc., EUR 24,960 million; Nationwide Mutual Insurance Company, EUR 26,220 million; Zurich Financial Services, EUR 46,390 million).
9. Each of them has a Community-wide turnover in excess of EUR 250 million (Commerzbank AG, EUR [...]; Prudential plc., EUR [...]; Nationwide Mutual Insurance Company, EUR [...], Zurich Financial Services, [...]), but they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension according to Article 1(2) of the Council Regulation.

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.

III. COMPETITIVE ASSESSMENT

A. Relevant product market

10. CFL's activities will be the provision in the open market of an electronic on-line supermarket for the sale of Retail Mutual Funds through Independent Intermediaries in the UK, based on a complex and expensive software, offering a large number of services to facilitate and support the sales and the accounting operations.
11. The notifying parties have proposed that the relevant product market on which CFL is present is the market for the provision of an electronic supermarket or other on-line dealing system for the sale of Retail Mutual Funds. It is not necessary to consider whether or not this market is part of a larger relevant product market for the provision of electronic supermarkets for a wider range of investment products as even on the narrow definition the operation will not give rise to competition concerns.
12. The notifying parties are not active on the same market as CFL. However, as Managers of Retail Mutual Funds, they are active on the related market for the design, creation and management of Retail Mutual Funds. Again it is not necessary to consider whether the Retail Mutual Funds market is part of a wider relevant product market encompassing a wider range of investment products as even on the narrow definition the operation will not cause competition problems.

B. Relevant geographic market

13. The parties state that the relevant geographic market for such activities is national, due to legal, regulatory and fiscal reasons and customer preferences. The Fund Managers make separate arrangements for marketing Retail Mutual Funds in each Member State and must comply with local conduct of business rules in force in the Member States as they relate to the marketing and distribution. In this case it is not necessary to define the relevant geographic market as even on the basis of an UK market the operation will not give rise to competition concerns.

C. Assessment

14. According to the information provided by the parties, there are no horizontally or vertically affected markets.
15. On-line supermarkets are a recent development in the distribution of Retail Mutual Funds. The new company, CFL, will face competition from other platforms, some of which have already been launched or will be launched in the near future. These new platforms include Fidelity FundsNetwork, Skandia, Fundhub, Fedsure and The Exchange.
16. In addition CFL will be subject to the competitive pressures of the conventional means of distribution including, tied agents/sales forces, direct sales and sales to private clients through banks and stockbrokers.
17. On the other hand, on the upstream market for the design, creation and management of the Retail Mutual Funds, the parties had a combined market share of 14% in 1999. They face competition from over 140 other suppliers of Retail Mutual Funds including Fidelity and Schroder the largest and second largest companies in this field.

Possible Co-ordination

18. The parties are and will remain active in the market for the design, creation and management of the Retail Mutual Funds, which is a related market with regard to the relevant market. Therefore, it needs to be assessed whether the creation of CFL is likely to lead to an appreciable degree of co-ordination of the parties' competitive behaviour on the market for the design, creation and investment management of the Retail Mutual Funds.
19. The first assessment which needs to be carried out is whether the parties together or separately have sufficient market power to make co-ordination worthwhile. As already pointed out above, this does not appear to be the case as they together only held 14,31% of the related market in 1999. In addition, there are over 140 fund manager companies in the UK. None of these companies appears to have a market share exceeding 7%. Accordingly, it appears that it is not likely that the parties have the possibility to restrict competition.
20. In any event, even if the parties had the market power to make co-ordination worthwhile, it is necessary to examine whether the establishment of the joint venture would give them the means. For this purpose, the risk of exchanging commercial sensitive information between the parties and between the parties and CFL has been examined.
21. To prevent the disclosure or exchange of such commercial sensitive information the parties have agreed on a number of provisions in the Joint Venture Agreement. In combination with the apparent lack of market power these provisions seem sufficient for the time being to negate the possibility of anti-competitive effects. Therefore there is no reason to believe that the joint venture will have as its object or effect, the co-ordination of the competitive behaviour of undertakings that remain independent such as to restrict competition to an appreciable degree.

Conclusion

22. On the basis of the facts set out above no competition problem arises from the proposed concentration. Consequently, it 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 this area.

IV ANCILLARY RESTRICTIONS

23. The notifying parties have requested that the following provisions set out in the six points below be assessed in conjunction with the concentration and declared restrictions ancillary to it pursuant to the second paragraph of Article 6(1)(b), Council Regulation (EC) N° 4064/89:

1 [Restrictions during the start up period]

2 [Restrictions during the start up period]

24. The parties state that the Joint Venture needs sufficient time to establish itself on the market, and without these restrictions the concentration could only be implemented under more uncertain conditions and less probability of success. In particular, they state that the vital element required in establishing an on-line supermarket is the ability to offer a wide range of funds and that the portfolio of funds of the Founders will initially provide the

critical mass required. This will attract other Funds Managers to list their products and independent intermediaries to use the on-line supermarket.

25. These restrictions which [...] are necessary to ensure that during the start up the sales of the parents products through the supermarket are maximised. The restrictions are limited to [...]. As a result the restrictions may be as directly related and necessary to assure the implementation of the concentration and their respective duration proportionate to their end. They may therefore be considered as restrictions ancillary to the concentration.

3 [Obligation not to compete with the JV]

26. The obligation on the parties not to compete with the Joint Venture is covered by this decision as provided in the paragraph V, letter A of the Commission Notice regarding the treatment of restrictions ancillary to concentrations. It expresses the lasting withdrawal of the parents from the market assigned to the Joint Venture. In respect of the obligation for a parent not to compete with the Joint venture for a period of [...], is considered proportionate to protect the CFL' business. This restriction may therefore be considered ancillary to the concentration.

4 [Non-solicitation and confidentiality clauses]

5 [Non-solicitation and confidentiality clauses]

6 [Non-solicitation and confidentiality clauses]

27. The parties state that without these restrictions, mentioned in point 4,5 and 6, the Joint Venture would not be able to take place and so they do not consider that such clauses are restriction on competition within the mean of the Article 81. In any case the parties argue that without such restrictions the Joint Venture would not be able to demonstrate the necessary independence from their parents as a key objective in creating CFL is to establish its business independently of the parties. These restrictions aim to ensure that CFL is not used as a means of exchanging commercial sensitive information, an essential factor in the context of the CFL' operations. The parties state also that the [...] is also necessary to protect the business of the Joint Venture.

28. The non-solicitation and confidentiality clauses (points 4, 5 and 6) may be evaluated by analogy to the non-compete obligations. In this operation their restrictive effects are not separable from the concentration as they reinforce the reality of the lasting withdrawal of the parents from the market assigned to the Joint Venture and the independence of the Joint Venture. The period of [...] may be considered proportionate to its end.

In conclusion the mentioned restrictions (number 1 to 6) are considered directly related and necessary to the implementation of the concentration and therefore they are covered by the present decision pursuant to Article 6(1)(b), second paragraph, of Council Regulation.

V. CONCLUSION

29. 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 and Article 57 of the EEA Agreement.

For signed the Commission,
Günther by
Member of the **VERHEUGEN**
Commission