EUROPEAN COMMISSION

Brussels, 5.5.2017
C(2017) 2838 final

Subject: **State aid / Denmark**
SA.41400 (2015/FC) – Complaint concerning alleged unlawful State aid through the sale of the Lurpak trademarks

Sir,

The European Commission ("the Commission") wishes to inform Denmark that it has assessed the complaint regarding the sale of the Lurpak trademarks from the Danish Dairy Board to Arla Foods Amba and found that no State aid was involved in that transaction. As regards the initial transfer of the collective LUR-marks from the Danish State to the Danish Dairy Board in 1991 and 1997, the Commission has concluded that it involved State aid which is now deemed to be existing aid.

1. PROCEDURE

(1) On 27 March 2015, a complaint was submitted on behalf of the Association of Danish Margarine Manufacturers (MIFU) regarding alleged unlawful State aid in favour of the Danish Dairy Board (*Mejeriforeningen*; hereinafter "the DDB") and Arla Foods Amba (hereinafter "Arla"). The complaint was registered by the Commission on the same day.

(2) The complaint was forwarded to Denmark for comments on 8 May 2015. Denmark submitted comments and further information on 12 August 2015. By letter dated 17 November 2015, the Commission informed the complainant of its preliminary view that there were not sufficient grounds to pursue the matter further. The complainant reacted to that letter on 15 December 2015 and provided additional information. The complainant also requested that the Commission adopts a decision in accordance with Article 4(2) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union[1], should it

[1] OJ L 248, 24.9.2015, p. 9

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decide not to open the formal investigation procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU). Denmark provided further comments of the submission of the complainant by letter of 20 April 2016.

2. DESCRIPTION OF THE ALLEGED STATE AID MEASURE

(3) The complaint concerns the transfer, in 1991 and 1997, of IP-rights known as the LUR-marks from the Danish State to the DDB (a private law body) and the subsequent sale, in 2013, of the Lurpak trademarks from the DDB to the company Arla.

(4) The DDB is a Danish trade association of dairy undertakings. It has at present 32 members, there among Arla. The Arla group processes more than 90 % of the Danish and two thirds of the Swedish milk pool. It also runs dairy operations in a number of other countries, with Arla UK plc as its biggest business[2].

(5) The complainant, MIFU, is a Danish trade organisation of manufacturers and importers of margarine. Among MIFU's members is *Dragsbæk A/S*, which produces a blended spreadable called "*Bakkedal*" which competes directly in Denmark with the blended spreadable "*Lurpak Smørbar*" marketed by Arla. The spreadables manufactured by Arla and Dragsbæk combined represent more than 95 % of the Danish market.

The LUR-marks

(6) The LUR-mark was originally established as a private trademark with the objective to differentiate Danish butter from competing butter products. It was first registered in Denmark in 1901. In the same year, the Danish dairies established a specific trade association, the Danish Dairies' Buttermark Association, which aimed at having all Danish butter labelled with the LUR-mark. In 1903, almost all butter exporting dairies had become members of the association and almost all exported Danish butter was labelled with the LUR-mark.

(7) The LUR-mark was transferred to the Danish State free of charge in 1906 as part of the establishment of statutory quality control. In 1911, the LUR-mark became an official quality mark that could be used only by Danish dairies meeting official quality requirements.

(8) The LUR-marks include the Lurpak mark, which was launched in 1957 in connection with a sales promotion campaign.

(9) The Joint organisation of Danish Dairies (today the DDB) and its members bore their own costs for the quality control of the LUR-marks over the period 1906-1991, when the marks were State-owned, and met the State expenditure for quality control through a fee scheme. The Danish State bore certain costs for the actual administration of the LUR-marks during that period. The responsibility for the marketing of the LUR-marks stayed with the DDB.

[2] Source: Danish Agriculture and Food Council

The transfer of the LUR-marks to the DDB

(10) In March 1991, the Danish law on manufacturing and wholesaling of dairy products was amended in the light of the development of the EU rules on official quality marks, under which the LUR-marks could no longer be reserved for Danish dairies. Pursuant to those amendments[3], the Ministry of Agriculture (today the Ministry of Environment and Food; hereinafter "the Ministry") issued the Ministerial Order No 258 (*bekendtgørelse nr. 258 af 25. april 1991 om administration af lurmærket*), according to which the Joint Organisation of Danish dairies should take over the administration of the LUR-marks.

(11) On 18 April 1991, the Ministry concluded an agreement with the Joint Organisation of Danish Dairies on the transfer to that organisation of all rights and obligations in Denmark and abroad associated with the LUR-marks. The LUR-marks were at the time of the transfer registered as either collective marks or trademarks in 51 countries[4]. The transfer of the marks was made free of charge. The agreement sets out the following conditions for the transfer:

– Section 1: 'The transfer covers all rights and obligations in Denmark and abroad associated with the collective marks 'LURBRAND' (DANISH BUTTER), 'DANMARK 00', 'LUR', 'the stylised Lur brand', 'LURMARK', 'LURBRAND', 'LURPAK' and 'LURCASK'

– Section 2: 'Any undertaking located in Denmark and approved by the Danish authorities to process milk products shall, regardless of membership of the Joint Organisation of Danish Dairies, be allowed to use the marks, provided that it meets the conditions for the use of the marks laid down by the Joint Organisation of Danish Dairies.'

– Section 3: 'Until 1 January 1996, the Ministry of Agriculture can require the Joint Organisation of Danish Dairies to terminate the registrations of the LUR-marks, or the Ministry of Agriculture can take another decision regarding the administration of the marks in the event that a dispute arises between the Joint Organisation of Danish Dairies and the Ministry of Agriculture concerning the use of the LUR-marks, including the specification of the quality requirements and the control requirements which essentially must correspond to the requirements existing under the current regulation of dairy products, or concerning the delimitation of the products which can be LUR-branded.'

– Section 4: 'The LUR-marks may only be applied on milk products produced according to ministerial orders on milk products and where the content of fat solely consists of milk fat from Danish cows. […]'

Section 5: '(1) As part of the agreement, the Ministry of Agriculture is allowed, if agreed upon with the Joint Organisation of Danish Dairies, until 31 December 1991 to maintain the registration of the LUR-marks in individual countries and to establish a supervision regarding the marks in connection

[3] Act No 163 of 19 March 1991.

[4] According to the information submitted by Denmark, the marks transferred from the Ministry to the DDB in 1991 were mainly collective marks registered in Denmark and in the majority of the registers abroad. In addition, a few marks were registered as trademarks in registers abroad.

herewith. Regardless of this, the Joint Organisation of Danish Dairies will be responsible for the administration and the control duties in relation to the use of the marks from 15 April 1991. (2) Regardless of Sub-section (1), the Ministry of Agriculture can be registered as owner of the marks after 31 December 1991 in countries where the transfer has not been closed.'

- Section 6: 'If the Joint Organisation of Danish Dairies ceases to operate as a joint organisation for the Danish dairies, the Ministry of Agriculture shall decide, following negotiation with the Joint Organisation of Danish Dairies, on the future of the marks. The Joint Organisation of Danish Dairies cannot, without the consent of the Ministry of Agriculture, transfer rights under this agreement to others'.

- Section 7: 'This agreement can be renegotiated on request of both the Ministry of Agriculture and the Joint Organisation of Danish Dairies, should the structural, economic or market development for the dairy industry require it.'

- Section 8: 'All expenditure in relation to the implementation of this agreement and all future expenses in relation to the maintenance of the marks are defrayed by the Joint Organisation of Danish Dairies. The Ministry of Agriculture is not liable for any trademark, patent or other feature-related legal risks connected with the transfer of the LUR-marks, including the issue of whether the marks from the outset can be continued by the Joint Organisation of Danish Dairies.'

(12) The conditions set out in the 1991 agreement thus allowed the State to keep some degree of control over the administration of the LUR-marks.

(13) The consent requirement set out in Section 6 of the agreement reflects the Minister's response to a question on the possible onward sale of the LUR-marks, which was raised by the Danish Parliament prior to the adoption of the act amending the law on manufacturing and wholesaling of dairy products (cf. recital (10)). The Minister replied as follows:

'… the Joint Organisation cannot transfer the Lur-mark rights to others without the consent of the Ministry of Agriculture. This means that the Joint Organisation cannot, without the consent of the Ministry of Agriculture, sell on the rights concerning the marks. These are collective marks which the whole dairy industry has been entitled to use. The proposed scheme is not intended to have to lead to changes in this principle. I therefore do not believe there can be a question of capitalising the value of the marks, for example by transferring them to a single enterprise. Neither, therefore, will consent be given for the Joint Organisation of Danish Dairies to transfer rights concerning the marks.'

(14) A memorandum prepared by the Ministry for the purpose of consulting stakeholders further states:

'To summarise, the transfer agreement is formulated such that all Danish enterprises producing dairy products have equal entitlement to Lur-mark their products, and at the same time the Joint Organisation of Danish Dairies is prevented through the agreement from being able to sell the registration rights commercially.'

(15) In November 1995, the European Commission raised again the subject of the LUR-marks and found that they continued to be official quality marks, taking into account the Ministry's continued involvement in the control of those marks, with the effect that the marks had to be made available to all producers in the Community whose products fulfilled the requirements to apply the marks.

(16) As a consequence of the Commission's findings, the reference to the LUR-marks was removed from the legal act authorising the Ministry to lay down rules for quality marks[5], with the effect that the Ministry lost its statutory authority to stipulate conditions for the use of the LUR-marks, and the Ministerial Order on the administration of the LUR-marks was repealed[6].

(17) Moreover, the 1991 agreement on the transfer of the LUR-marks was amended by way of a supplementary agreement of 17 January 1997, so as to remove the power of the Ministry to exercise control over the LUR-marks and to establish the final transfer of those marks to the DDB.

(18) The conditions set out in Sections 3 to 8 of the 1991 agreement were thus repealed and replaced by the following:

- Section 3: 'In agreement with the DDB, the Ministry of Food, Agriculture and Fisheries is allowed to maintain the registration of the LUR-marks in countries where the legal conditions do not permit a transfer to the DDB without the protection of the marks becoming insufficient for a period of time.

  (2) The DDB is responsible for the administration and the control duties in relation to the use of the marks.

  (3) The DDB organises the completion and registration of the transfers as soon as possible.

  (4) Registrations in Member States of the European Union are supposed to be made in the Office of Harmonisation in accordance with the procedure in the Council Regulation (EC) No 40/94.'

- Section 4 reproduces the conditions set out in Section 6 of the 1991 agreement, in exactly the same wording.

- Section 5 reproduces the conditions set out in Section 8 of the 1991 agreement, in exactly the same wording.

- Section 6: 'In case of any dispute regarding access to the use of the mark, cf. Section 2 of the agreement of 18 April 1991, the decision of the DDB can be appealed to the Danish Agricultural Council[7]'.

(19) The 1997 agreement thus reproduced the exact same conditions as those set out in Sections 1, 2, 6 and 8 of the 1991 agreement, including the provision according to

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5 Act No 323 of 14 May 1997 amending the Dairy Products Act.

6 Order No 200 of 12 March 1997.

7 The Council is a private law body which represents the farming and food industry of Denmark including businesses, trade and farmers' associations.

which the DDB cannot, without the consent of the Ministry, transfer rights under the agreement to others.

(20) Further to the 1997 agreement, guidelines were drawn up by the DDB for the use of the LUR-marks, including the use of the Lurpak mark for composite (blended) products. In 2006, Arla launched a blended product under the name of *Lurpak Smørbar* ("Lurpak Spreadable"). There is among MIFU's members an undertaking, *Dragsbæk A/S*, which also produces blended products but which does not have access to the Lurpak marks, as it is not approved for the processing of milk products.

(21) Between 2007 and 2012, Arla had invested over DKK 7 billion in the promotion of the Lurpak trademarks.

(22) *The sale to Arla of the Lurpak trademarks registered by the DDB after 17 January 1997*In 2012, Arla and the DDB initiated negotiations on a sale of the LUR-marks to Arla. The main reason why Arla wished to obtain the legal ownership of these marks was to secure the substantial financial investments that the company was making in the Lurpak mark. The DDB represented the general interests of the dairy industry during the negotiations, in which the other users of Lurpak (*Thise Mejeri, Bornholms Andelsmejeri* and *Nørup Mejeri*) also took part. At an extraordinary general meeting of the DDB on 18 December 2012, it was decided that the DDB should transfer the LUR-marks to Arla for DKK 150 million (approximately EUR 20 million), as agreed in the negotiations.

(23) Following that decision, the DDB asked the Ministry, by way of a letter dated 9 January 2013, to sign an unconditional declaration of consent and waiver in relation to the rights of the Ministry under the agreements of 1991 and 1997 (hereinafter "the State agreements"). That request was submitted to the Legal Adviser to the Danish Government for an assessment of in particular the significance of the consent requirement reproduced in Section 4 of the 1997 agreement.

(24) The Legal Adviser to the Danish Government found that if the Ministry gave its unconditional consent, there was a non-insignificant risk of providing the DDB with an economic advantage, as it would enable the latter to sell all rights to the LUR-marks to Arla, including the collective marks and trademarks initially transferred to DDB under the State agreements.

(25) At a meeting on 22 August 2013, it was therefore settled with the DDB and Arla that the requirement for consent applied to the original collective mark and trademark rights explicitly covered by the State agreements (i.e. ‘the collective marks ‘LURBRAND (DANISH BUTTER)’, ‘DANMARK 00’, ‘LUR’, ‘the stylised Lur mark’, ‘LURMARK’, ‘LURBRAND’, ‘LURPAK’ and ‘LURCASK’), but that no consent was required for an onward sale of the trademarks registered by the DDB after 17 January 1997.

(26) The sales agreement between Arla and the DDB was consequently amended so that it no longer covered the collective marks and trademarks that had been transferred to the DDB by the State agreements, but solely the trademarks that the DDB had itself established after the transfer in 1997. The Ministry subsequently informed the DDB that, under this condition, the sale to Arla was not covered by the consent requirement set out in Section 4 of the 1997 agreement.

3. MAIN ARGUMENTS BROUGHT FORWARD BY THE COMPLAINANT

(27) The complainant alleges that the sale of the Lurpak trademarks to Arla in 2013 constitutes unlawful State aid awarded to both Arla and the DDB.

The transfer of the LUR-marks to the DDB

(28) As a starting point, the complainant considers that the free transfer of the LUR-marks from the Danish State to the DDB in 1991 and 1997 constitutes State aid as defined by Article 107(1) TFEU, in the sense that the LUR-marks were under the ownership of the State and therefore constituted State resources, that the free transfer created a selective advantage for the DDB and its members that they could not have obtained under normal market conditions and that the transfer had an impact on competition and trade due to Arla's use of the Lurpak brand at both EU and global level.

(29) The complainant also considers that the alleged unlawful aid granted to the DDB in 1997 has become existing aid as defined in Article 1(b), (iv) of Council Regulation (EU) 2015/1589.

(30) *The sale to Arla of the Lurpak trademarks registered by the DDB after 17 January 1997*The complainant alleges that the Ministry's abstention from taking a stand on the sale of IP-rights from the DDB to Arla was the same as a tacit consent to that transaction, from which it should be concluded that the sale was imputable to the state and meant that State aid was awarded to both DDB and Arla, either in itself or through an alteration to the existing aid dating from 1997. The complainant considers in that regard that the State agreements and the transfer to Arla should be seen as one single intervention, as defined by the European Court of Justice in Case C-399/10 P, "Bouygues"[8].

(31) The complainant further argues that, since the initial transfer of the LUR-marks to the DDB constitutes existing incompatible State aid, the Ministry could and should have acted as if it was still completely free to dispose of those marks when deciding on whether or not to consent to the DDB – Arla transaction and whether or not to make a consent subject to conditions. In that context, the complainant refers to the LUR-marks as public assets and to the Danish State as a "private vendor" and insists that the State should have acted in accordance with the "private vendor principle", as if it was still the owner of the marks.

(32) In addition, the complainant claims that Sections 4 and 5 of the 1997 State agreement would in any event have allowed the Danish State to maintain full control over the LUR-marks also after 1997. According to the complainant, the first sentence of Section 4 ('If the DDB ceases to operate as a joint organisation for the Danish dairies, the Ministry of Agriculture shall, following negotiation with the DDB, decide on the future of the marks') implies a potential reassignment of the marks to the Danish State. Section 5 ('all expenditure in relation to the implementation of this agreement and all future expenses in relation to the maintenance of the marks are defrayed by the DDB') should, according to the complainant, be construed as limiting the assignment to DDB to a pure maintenance of "existing trademarks", covering also new registrations. On

[8] Judgment of the Court of Justice of 19 March 2013, Bouygues and Bouygues Télécom v Commission and Others, Joined Cases C-399/10 P and C-401/10 P, ECLI:EU:C:2013:175.

that basis, the complainant concludes that the State should be considered to have retained full control over any IP-rights assigned to the DDB under the State agreements, including trademarks registered after 17 January 1997.

(33) The complainant further argues that the distinction made between IP-rights registered before and after 17 January 1997 was artificial and served only to circumvent the State agreements. If a sale of the IP-rights existing before 1997 required consent, this should also be the case of wordmarks and figure-marks registered after 1997 which are basically identical to the marks referred to in Section 1 of the State agreements. The complainant thus concludes that the Danish State should have taken steps to prevent the DDB – Arla transaction, independently of the date of registration of the trademarks concerned.

(34) The complainant adds that, notwithstanding the distinction between older and newer IP rights, the mere fact that the Ministry did not exercise its rights under the State agreements to prevent the sale to Arla provided both parties of that transaction with a selective advantage, originating from State resources, which was imputable to the Danish State. The advantage for Arla would consist of the difference between the sales price DKK 150 million and the value of the Lurpak brand, which would amount to DKK 1.8 billion according to an article published in the newspaper Børsen on 14 August 2013, which in its turn refers to a study carried out by the British analyst Brand Finance. The advantage for the DDB would consist of the DKK 150 million paid by Arla.

(35) In addition, the complainant argues that even if the sale of the Lurpak trademarks would have been made at market price, it would still constitute State aid in the sense that the State, by its tacit consent, has foregone its rights to remuneration for allowing that sale. According to the complainant, the Danish authorities could and should either have prevented the sale to Arla or requested a correction of the initial free transfer to the DDB, to the effect that the market price that should have been paid by Arla (i.e. not just DKK 150 million) was transferred in full to the Danish State. The complainant therefore concludes that the State in its capacity of "private vendor" has, by not asking for the reimbursement of the full market price, acted in breach of the private vendor principle and thereby granted new State aid to both the DDB and to Arla.

4. COMMENTS AND ADDITIONAL INFORMATION SUBMITTED BY DENMARK

The transfer of the LUR-marks to the DDB

(36) Denmark has explained that the transfer in 1991 and 1997 took place free of charge because the marks had originally been transferred from the dairies to the State and because the DDB took on the administration of the marks and the associated costs. It was presupposed at the time that any undertaking that met the conditions to use the marks would continue to have the right to do so and that the DDB could not capitalise the marks by transferring them to an individual company.

(37) Denmark further argues that the transfer did not constitute State aid, as the transaction did not bring about an economic advantage for the DDB, or the members of that association, that they did not already have prior to the transfer in form of the use of the marks.

(38) Neither could, according to Denmark, the DDB's possibility to register further IP-rights lead to the conclusion that the original transfer constituted an economic advantage for the DDB. Denmarkargues, in that regard, that the State ownership, administration and regulation of the marks from 1906 to 1991 should be referred to as general regulation and not as a State measure signifying an economic advantage for certain undertakings.

(39) Denmark also recalls that the transaction just meant that the State was relieved of administrative costs and burdens, whereas it had not attained any income from its ownership of the LUR-marks in the period 1906 to 1991.

(40) *The sale to Arla of the Lurpak trademarks registered by the DDB after 17 January 1997*Denmark emphasises that the transaction between the DDB and Arla is an agreement entered into between two private parties about a transfer of privately owned rights and obligations.

(41) Denmark further contests the complainant's allegation that the Danish State retained full control over the Lurpak marks and underlines, in that regard, the difference between collective marks and trademarks. A collective mark, in the form of a certification mark such as the LUR-marks, is defined as a special identifying mark which belongs to a legal entity setting the standards for specified goods or services for which the marks are used[9]. Collective marks are open to all members who meet the specified standards. Trademarks, on the other hand, are open only to their owner. According to Denmark, all the marks transferred to Arla were trademarks registered by DDB after 17 January 1997, which should as such be distinguished from the collective LUR-marks covered by the State agreements.

(42) Denmark further argues that the IP-rights transferred to Arla in 2013 were new trademarks registered after 1997, whereas the DDB remained the owner of the original collective marks and some trademarks registered before 1997. Only the latter were subject to the consent requirement set out in section 4 of the 1997 State agreement. Denmark contests, in that regard, the complainant's allegation that the Lurpak wordmarks and figure-marks registered after 17 January 1997 would be the same IP-rights as those registered before that date (cf. recital 33), on the following grounds: Trademarks, certification marks and collective marks are priority rights for which the date of establishment is decisive for their existence, use and enforcement and ultimately their value for their owner. A mark which is filed for registration at a certain date can be enforced against a third party only with regard to identical or similar marks registered after that date, as is also the case with the Lurpak wordmark which was registered by the DDB in 2012. Two marks filed on different dates are therefore by definition two individual, separate and non-identical assets.

(43) Denmark argues, on that basis, that the Danish State had no statutory authority, either in the State agreements or in legislation, to prevent or to set any kind of conditions for the transfer of the trademarks registered by the DDB after 1997. Therefore, the State could not have consented either directly or indirectly to the transfer of those trademarks to Arla.

[9] Section 1(3) of the Consolidation Act on Collective Marks no. 103 of 24 January 2012.

(44) Denmark also makes the more general remark that the Ministry's possibility of controlling the LUR-marks listed in Section 1 of the State agreements was abandoned by the 1997 agreement in order to enable a definitive transfer of the property rights to those marks. Hence, the DDB was free to exercise its full ownership of the transferred IP-rights without any caveats in contract or in law. According to Denmark, the DDB has legally exercised those rights following a particular strategy which includes both deregistering existing marks (without renewal) and registering new marks. The Danish authorities have not at any stage interfered in that strategy and deemed that they did not have the legal means to do so after the final transfer in 1997. Consequently, the Danish authorities had no legal basis for requiring that all or part of the payment from Arla to the DDB should be transferred to the Danish State.

(45) Denmark stresses in that regard that neither Sections 4 or 5, nor any other section of the 1997 State agreement, can be construed as conferring on the Ministry a right to influence the DDB's brand strategy. Denmark thus contests the complainant's allegation that the Ministry would have retained a legal right to control all of the LUR-marks, either in relation to the DDB's registration of trademarks or in relation to the transfer of such registrations to another private party.

(46) As regards the Ministry's alleged involvement in the transfer to Arla, Denmark contends that this was confined to clarifying, in general, the circumstances under which a ministerial consent would be required. The Ministry was at no point involved in, or had any knowledge of, the terms and conditions of the transfer or the pricing of the rights concluding the agreement. This was purely a matter negotiated between Arla on the one side and the DDB and the other producers using the Lurpak marks (*Thise Mejeri, Nørup Mejeri* and *Bornholms Andelsmejeri*) on the other.

(47) Denmark has submitted the following additional information regarding the terms and conditions of the transfer agreed between the DDB and Arla:

– The sales price of DKK 150 million was established following negotiations between the private parties referred to in recital (46). The parties subsequently submitted the sales price to the Danish tax authorities ("SKAT") for an assessment of the tax liability in consideration of the transfer pricing rules. The tax authorities confirmed that the sales price could be recognised for tax purposes as the transaction was deemed to have taken place on arms-length terms.

– The agreement obliges Arla to enter into licensing agreements with all other Danish dairies which were members of the DDB at the time of the transfer, by which those dairies are allowed to use the Lurpak trademarks for the manufacturing, packaging and sale of butter and blended products which were on the market prior to 18 December 2012. The licensee has to pay a marketing fee set at a level corresponding to the level of the fees paid to the DDB before the transfer. The licence agreements are valid for 50 years on unchanged terms, whereupon they shall be renegotiated with the view to extending them for another 50 years.

– Arla cannot sell the marks to a third party, but only make an intragroup transfer to a company owned and controlled by Arla.

(48) DDB has declared that the guarantee and collective LUR-marks and trademarks registered before 17 January 1997 which remain under its ownership will be deleted in the course of time.

5. STATE AID ASSESSMENT

5.1. Existence of aid - Application of Article 107(1) TFEU

(49) According to Article 107(1) of the Treaty, "[s]ave as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market".

(50) The qualification of a measure as aid within the meaning of this provision therefore requires the following cumulative conditions to be met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an economic advantage to an undertaking; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and affect trade between Member States.

The transfer of the LUR-marks to the DDB

(51) As a first step, it should be assessed whether the transfer of the collective LUR-marks from the Danish Ministry to the DDB in 1991 and 1997 met the conditions for constituting State aid.

(52) The LUR-marks were State owned during the period 1906 to 1991, prior to the transfer, and thus constituted State resources in the form of IP-rights. The transfer of those marks to the DDB was decided by the Ministry and conducted via agreements between the Ministry and the DDB. It can therefore be concluded that the measure was imputable to the State.

(53) The DDB (and its predecessors) is a private association of undertakings producing and marketing dairy products. The recipients of the IP-rights associated with the LUR-marks were thus engaged in an economic activity, consisting of offering goods on the market, and were as such undertakings as referred to in Article 107(1) TFEU.

(54) The transfer of the IP-rights associated with the LUR-marks had the effect of providing the DDB with an intangible asset, free of charge, that it could later sell and capitalise on, even if that was an unexpected outcome at the time when the State agreements were concluded. Moreover, the DDB could, through the acquisition of those marks, engage in a special brand strategy, including notably the development, registration and de-registration of trademarks as well as the conditions for using those trademarks[10], to the benefit of its members. The Commission therefore considers that the transfer of the LUR-marks conferred an economic advantage upon the DDB and its members that they could not have

[10] The DDB has for example allowed the use of the Lurpak brand on composite (blended) products for undertakings which fulfil the conditions laid down in Section 2 of the State agreement (which excludes MIFU's members as they are not approved by the Danish authorities to process milk products).

obtained under normal market conditions. The advantage was also selective, as the rights to the LUR-marks were given to one single association representing a certain group of undertakings in the dairy sector.

(55) According to the case law of the Court of Justice, the mere fact that the competitive position of an undertaking is strengthened compared to other competing undertakings, by giving it an economic benefit which it would not otherwise have received in the normal course of its business, points to a possible distortion of competition.[11] The rights associated with the LUR marks enabled the undertakings which are members of the DDB to strengthen their competitive position vis-à-vis other undertakings producing and marketing butter and similar products, such as the spreadable margarine products produced by MIFU's members. Pursuant to the case law of the Court of Justice, aid to an undertaking appears to affect trade between Member States where that undertaking operates in a market open to intra-EU trade.[12] The members of the DDB operate in the highly competitive dairy market.[13] The sector concerned is open to competition at EU level and therefore sensitive to any measure in favour of the production in one or more Member States. Therefore, the measure was liable to distort competition and to affect trade between Member States.

(56) In light of the above, the conditions of Article 107(1) TFEU are fulfilled. It can therefore be concluded that the transfer of the IP-rights associated with the LUR-marks to the DDB involved State aid within the meaning or that article. The aid was never notified to the Commission and was therefore unlawful.

(57) However, more than 18 years had elapsed between the final transfer of the LUR-marks under the State agreement of 17 January 1997 and the Commission's first request for information addressed to the Danish authorities on 8 May 2015. Hence, the 10 year limitation period referred to in Article 17 of Council Regulation (EU) 2015/1589 has expired and the aid in question shall therefore be deemed to be existing aid, pursuant to paragraph 3 of that article.

(58) *The sale to Arla of the Lurpak trademarks registered by the DDB after 17 January 1997*According to the complainant, the 2013 transaction between the DDB and Arla should qualify as a "new State aid", as defined in Article 1(c) of Regulation (EU) 2015/1589, either in itself or through an alteration to the existing aid dating from 1997, which was awarded to both parties in the transaction.

(59) As to the complainant's argument that the State agreements and the transfer to Arla should be regarded as one single intervention (cf. recital (30)), the Commission is of the opinion that these two transactions cannot be considered as inseparable from one another in the sense of the case-law established by the Court

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[11] Judgment of the Court of Justice of 17 September 1980 in Case 730/79 Philip Morris Holland BV v Commission of the European Communities, ECLI:EU:C:1980:209.

[12] See in particular the judgment of the Court of Justice of 13 July 1988 in Case 102/87 French Republic v Commission of the European Communities, ECLI:EU:C:1988:391

[13] As regards intra-EU trade in butter, Denmark is the 9th largest exporter in the EU. The volumes of butter imported to and exported from Denmark in January to May 2016 amounted to respectively 6 094 and 9 751 tonnes. (Source: Milk Market Observatory 10.8.2016, Eurostat: http://ec.europa.eu/agriculture/milk-market-observatory/pdf/eu-intra-trade_en.pdf).

judgement in the Case C-399/10 P, "Bouygues"[14]. The criteria to be applied according to point 104 of that ruling, namely the chronology, the purpose and the circumstances of the undertaking at the time, rather clearly speak against the presence of one single intervention in the case at hand. To start with, more than 16 years had elapsed between the final transfer of the LUR-marks from the Danish State to the DDB and the sale to Arla of the Lurpak trademarks registered after 17 January 1997. Furthermore, the purpose of the State agreement was to deregulate and privatise the administration of the LUR-marks, whereas the DDB's sale to Arla was a transaction between two private parties aiming at securing the investments made by Arla in the Lurpak trademarks. Finally, that sale was indisputably an unforeseen event when the State agreements were concluded in 1991 and 1997.

(60) The Commission therefore finds that the transfer of the LUR-marks from the Danish State to the DDB and the sale to Arla of the Lurpak trademarks registered after 17 January 1997 are two clearly separable events.

(61) The Commission's conclusion that the transfer of the LUR-marks from the Danish State to the DDB constitutes existing State aid is therefore relevant only for the assessment of whether the DDK 150 million paid by Arla for the acquisition of the marks constitutes new State aid for the DDB. The question of whether the sale meant that State aid was granted also to Arla has to be assessed on its own merits.

(62) As regards the alleged granting of new aid to the DDB, Denmark has submitted information showing that the sale to Arla covered only the trademarks registered by the DDB after the date of entry into force of the 1997 State agreement (cf. recitals (25) and (26)). Denmark has also submitted information showing why the marks registered after 17 January 1997 should not be deemed to be the same IP-rights as the marks registered before that date, in the sense that IP-rights are priority rights for which the date of establishment is decisive for their existence, use and enforcement (cf. recital 42). Denmark has also highlighted the fact that the IP-rights sold to Arla were trademarks, whereas the majority of the rights that remained with the DDB were collective marks (cf. recital (41)) and were therefore IP-rights of a different nature also in that regard.

(63) The Commission finds, in the light of the above, that the IP-rights covered by the State agreements and those sold to Arla were individual, separate and non-identical assets, wherefore the latter IP-rights cannot be considered to be State resources. The Commission thus concludes that the Ministry's decision not to pronounce itself on the sale of the Lurpak trademarks to Arla did not alter the existing aid previously granted to the DDB, nor did it in any other way involve new aid within the meaning of Article 1(c) of Regulation (EU) 2015/1589.

(64) The Commission further concludes, in the light of the same findings, that the sale of the Lurpak trademarks to Arla did not involve any granting of State aid to Arla, because those trademarks were not State resources.

(65) In any case, even in the event that the IP-rights transferred under the State agreements would have been the same IP-rights as those sold to Arla, the

[14] See full reference in footnote 8.

Commission would still not consider that State resources were involved in the latter transaction, for the following reasons.

(66) According to Denmark, the objective of the 1997 State agreement was to achieve a full privatisation of the LUR-marks by way of removing all conditions that could have allowed the Danish State to keep control over the IP-rights associated with those marks.

(67) The complainant contests those affirmations and invokes Section 4, first sentence, and Section 5 of the 1997 State agreement (cf. recitals 11 and 18) in support of its argument that the Danish State continued to keep full control over all the IP-rights associated with the LUR-marks also after the transfer in 1997.

(68) However, the Commission notes that the first sentence of Section 4 would have come into play only if the DDB had ceased to exist, which was never the case. The Commission thus finds that a condition which would have become applicable only in the case of the DDB's dissolution cannot be construed as conferring on the Danish State a right to reclaim the ownership of the IP-rights transferred to the DDB or to otherwise exercise any kind of direct or indirect control over those IP-rights.

(69) The Commission further notes that Section 5 of the 1997 State agreement merely states that the DDB shall bear the costs incurred in relation to the maintenance of the mark. The Commission finds that the use of the word "maintenance" in this context can in no way be understood as limiting the property rights transferred to the DDB to a mere maintenance of existing marks under the Ministry's continued control, not least since the very objective of the 1997 agreement was to remove the Ministry's power to exercise any kind of control over the LUR-marks (cf. recitals (16) and (17)).

(70) Finally, the Commission takes note of the fact that the second sentence of Section 4 of the 1997 State agreement indeed states that the DDB cannot transfer rights under the agreement to others without the Ministry's consent. The Commission however considers that not even a clause on consent in the event of a sale can be understood as conferring on the Ministry a right to keep constant control over the use of the transferred IP-rights or to reclaim the ownership of those rights, and even less so as concerns trademarks which were registered after the entry into force of the 1997 State agreement.

(71) The Commission thus concludes that, despite the clause on consent in the case of sale, there is nothing in the 1997 State agreement which could be construed as allowing the Danish State to retain the ownership of or control over the IP-rights associated with the LUR-marks.

(72) Moreover, it is clear from the information submitted by Denmark that the purpose of the actions taken by the State in 1997 was to fully privatise the LUR-marks and return them to the Danish dairy industry. It also appears from that information that the DDB was free to exercise its full ownership of the LUR-marks, without any caveats in contract or law. The DDB has over the years used its ownership to develop a brand strategy consisting of registering new trademarks and deregistering existing marks (without renewal). The DDB has also defined the conditions for the use of those marks. The Danish authorities have not at any

stage interfered in these activities and deemed that they did not have the legal means to do so.

(73) The Commission concludes, in the light of the above, that none of the IP-rights associated with the LUR-marks were under constant public control or in any way available to the Danish State before the DDB sold them to Arla[15]. Hence, they cannot be considered to be State resources, even if they would have been the same IP-rights as those initially transferred to the DDB. This also means that the Danish State had neither the right nor the obligation to require any kind of monetary compensation in return for the DDB's sale of those IP-rights to Arla. That transaction did not therefore entail either an additional expenditure or a reduced revenue for the Danish State.

(74) In view of the finding that State resources were not involved in the transaction between the DDB and Arla, as regards either the seller or the buyer, there is no need to examine whether the other criteria laid down in Article 107(1) TFEU are met.

6. CONCLUSION

On the basis of the above assessment, the Commission has come to the conclusion that:

- The initial transfer of the LUR-marks from the Danish State to the DDB in 1991 and 1997 involved State aid. However, pursuant to Article 17(1) of Council Regulation (EU) 2015/1589, the powers of the Commission to order recovery of aid shall be subject to a limitation period of 10 years. In the present case, the limitation period expired on 17 January 2007. As the Commission addressed its first request of information to the Danish authorities after 17 January 2007, the Commission does not have the powers to order the recovery of the aid.

- the sale of the Lurpak trademarks registered after 1997 from the DDB to Arla does not constitute State aid within the meaning of Article 107(1) TFEU.

If any parts of this letter are covered by the obligation of professional secrecy according to the Commission communication on professional secrecy in State aid decisions[16] and should not be published, please inform the Commission within fifteen working days of notification of this letter. If the Commission does not receive a reasoned request by that deadline Denmark will be deemed to agree to the publication of the full text of this letter. If Denmark wishes certain information to be covered by the obligation of professional secrecy please indicate the parts and provide a justification in respect of each part for which non-disclosure is requested.

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[15] Cf. Judgment of the Court of Justice of 16 May 2000, France v Ladbroke Racing Ltd and Commission, C-83/98 P, ECLI:EU:C:2000:248, paragraph 50.

[16] Commission Communication C(2003) 4582 of 1 December 2003 on professional secrecy in State aid decisions, OJ C 297, 9.12.2003, p. 6.

Your request should be sent electronically via the secured e-mail system Public Key Infrastructure (PKI) in accordance with Article 3(3) of Commission Regulation (EC) No 794/2004[17], to the following address: agri-state-aids-notifications@ec.europa.eu.

For the Commission

Phil HOGAN
Member of the Commission

[17] Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).