



EUROPEAN COMMISSION

Hearing Officer

Final Report¹ in the Friesland/Campina Case

COMP/M.5046

INTRODUCTION

On 12 June 2008, the Commission received a notification of a proposed concentration² whereby the cooperatives Zuivelcoöperatie Campina U.A. and Zuivelcoöperatie Friesland Foods U.A. (the "Parties") merge by way of full legal merger.

The Commission initiated proceedings on 17 July 2008 on the basis that the concentration raised serious doubts as to its compatibility with the common market and the functioning of the EEA Agreement³.

PROCEDURE

Extension of deadline

The Commission extended the procedure by five working days in Phase II, following agreement with the Parties⁴.

Statement of Objections and reply

The Commission issued a Statement of Objections ("SO") on 3 October 2008. In the SO it came to the preliminary conclusion that the transaction would raise serious competition concerns on the following 14 product markets: sales of fresh milk, fresh buttermilk and plain yoghurt; sales of branded non-health fresh dairy drinks separated according to distribution channel into retail and Out of Home ("OOH"); sales of value-added yoghurts and quark in the OOH segment; sales of fresh custard and porridge (together "fresh dairy"); sales of long-life dairy drinks; sales of Dutch-type cheese to specialized wholesalers and to modern types of retail; procurement of conventional raw milk (insofar

¹ Pursuant to Articles 15 and 16 of Commission Decision (2001/462/EC, ECSC) of 23 May 2001 on the terms of reference of Hearing Officers in certain competition proceedings – OJ L162, 19.06.2001, p.21.

² Pursuant to Article 4 of Council Regulation (EC) No 139/2004 ("EC Merger Regulation").

³ Cf. Article 6(1)(c) of Regulation (EC) No 139/2004.

⁴ In accordance with Article 10(3) second subparagraph of the EC Merger Regulation.

as this is linked to competition concerns on downstream markets); and sales of pharmaceutical and DPI lactose.

The Parties replied to the SO on 17 October 2008.

Access to file

Access to file was granted to the Parties on 6 October 2008.

Subsequently, they obtained on several occasions access to documents that had been added to the file after the notification of the SO.

Involvement of third parties

The following third parties were admitted to the procedure after having submitted reasoned requests to me: Superunie C.I.V. B.A., Albert Heijn B.V., Arla Foods AmbA and CBC Co., Ltd.

Oral Hearing

An Oral Hearing was held on 21 October 2008. It was attended by the Parties, two out of the four admitted third parties (Albert Heijn B.V. and Arla Foods AmbA) and 11 Member States. The comments of the Parties led the Commission to carry out further investigations.

Commitments

Already before the Hearing, the Parties submitted draft remedies covering fresh dairy products. In a state of play meeting with the Parties after the Hearing the Commission informed them that the draft remedies would not address all objections identified in the SO. In order to enable the Parties to submit a viable remedy proposal, the Commission extended the procedure by one working day, following agreement by the Parties⁵.

A first set of binding commitments was offered by the Parties thereafter which was later complemented. The remedy package mainly consists of the divestiture of fresh dairy, cheese, long-life dairy activities and access to raw milk. The ensuing market test showed that significant improvements were needed. As a consequence the Parties submitted a revised commitments package.

The second market test showed that improvements were still needed in regard of procurement of raw milk to ensure competition in the downstream markets for fresh dairy products and cheese.

On 27 November 2008 the parties submitted a final commitments package.

Regarding the commitments, the Parties informed me about their concern that the Commission had violated their rights of defence. Allegedly the Commission required them to offer a remedy on the market for the procurement of raw milk which in their view did not find a basis in the SO.

⁵ In accordance with Article 10(3) second subparagraph of the Merger Regulation.

In this regard I note that the Commission neither in the draft Decision nor previously in the SO concludes that the strong market position of the merged entity in the market for the procurement of raw milk would in itself result in a significant impediment of effective competition. Rather, competition concerns flow from the increased market power of the Parties on downstream markets. The commitments proposed by the Parties with respect to the procurement of raw milk serve to ensure, together with the commitments regarding fresh dairy products and cheese, that effective competition on these downstream markets is restored by allowing purchasers of the divestment business and competitors on downstream markets to secure adequate supplies of raw milk on a lasting basis. Accordingly, once the concerns on the downstream markets are remedied, the concern on the market for the procurement of raw milk is automatically also remedied.

I understand that, subsequently, during a state of play meeting the Commission services addressed potential misunderstandings of previous communications and confirmed to the Parties that the concern in the market for the procurement of raw milk relates to barriers of entry and/or expansion on the downstream markets and therefore the commitments concerning access to raw milk are needed in order to address competition concerns on the downstream markets.

The Parties did not further pursue this matter with me.

THE DRAFT DECISION

In the draft Decision, the Commission has come to the conclusion that the commitments as submitted on 27 November 2008 ensure that the proposed merger would not significantly impede effective competition in the markets for sales of fresh milk, fresh buttermilk and plain yoghurt; sales of branded non-health fresh dairy drinks separated according to distribution channel in retail and OOH; sales of value-added yoghurts and quark in the OOH segment; sales of fresh custard and porridge (together with all aforementioned markets "fresh dairy"); sales of long-life dairy drinks; sales of Dutch-type cheese to specialized wholesalers and to modern types of retail; and therefore also for procurement of raw milk.

Contrary to its preliminary assessment, the Commission has determined that the concentration will not lead to a significant impediment of effective competition as regards pharmaceutical lactose and DPI lactose. It has come to the overall conclusion that the proposed concentration is to be declared compatible with the common market and the functioning of the EEA Agreement conditional on full compliance with the commitments set out in the annex to the decision.

Apart from the above mentioned submission of the Parties no queries or submissions have been made to me by them or any third party. In view thereof and taking into account the observations mentioned above I consider that this case does not call for any particular comments with regard to the right to be heard.

Brussels, 12 December 2008

[signed]
Michael ALBERS