

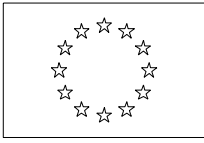
***Case No IV/M.1188 -
KINGFISHER /
WEGERT /
PROMARKT***

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 18/06/1998

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

Brussels, 18.06.98

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties

Dear Sirs,

Subject: Case No IV/M.1188 - Kingfisher/Wegert/ProMarkt

Notification of 14.05.1998 pursuant to Article 4 of Council Regulation N.° 4064/89.

1. On 14 May 1998, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89¹ of 21 December 1989 on the control of concentrations between undertakings, as last amended by Regulation 1310/97² by which the undertaking Kingfisher plc ("Kingfisher") will acquire 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 Warenkreditvermittlung GmbH ("Profinanz") and TKE Electronic Service GmbH ("TKE") by way of purchase of partnership capital and shares through its subsidiary Eijsvogel Beteiligungs GmbH ("Eijsvogel").
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 functioning of the EEA Agreement.

¹ OJ No L 395 of 30.12.1989; Corrigendum: OJ No L 257 of 21.09.1990, p. 13.

² OJ No L 189, 9.7.1997; corrigendum OJ L 40, 13.2.1998, p.17.

I. THE PARTIES' ACTIVITIES AND THE OPERATION

3. Kingfisher is a broadly based UK retail group (including electrical retailing) with significant interests also in Belgium, France and the Netherlands. It operates more than 2,200 stores and has more than 84,000 employees. Its subsidiary Eijsvogel has been created for the purpose of the present transaction.
4. Wegert is a family owned company 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 are ultimately owned by the same owners as Wegert and are engaged in marketing and financing respectively exclusively for companies owned by these owners.
5. ProMarkt is a privately owned company 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 [...]①. TKE's majority is owned by the sons of the owner of ProMarkt, who according to the parties still controls this company.
6. Kingfisher will acquire 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 will acquire 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 will take place at the same time. The majority of the ProMarkt purchasing price will be paid by Eijsvogel as part of its purchase price for Wegert. Kingfisher only intends to acquire Wegert if it can acquire WPM, Profinanz, ProMarkt and TKE together. Since Kingfisher does not have an interest in acquiring a purely regional electrical retailing business, it has entered into a deal that will give it a broader geographic spread in the German market.

II. CONCENTRATION

7. This operation includes several transactions which constitute one concentration within the meaning of Article 3(1)(b) of the Regulation. Although this set of transactions entails more than one change of control, it must be regarded as a single operation since the different elements are mutually interdependent: both the acquisition of ProMarkt by Wegert and the acquisition of a controlling interest in the latter by Kingfisher are conditioned to each other so that one cannot proceed without the other. Kingfisher provides the capital for the entire operation and all transactions will be carried out simultaneously. Kingfisher is not interested in acquiring one of the main businesses without the other, since it would not obtain a sufficient geographic spread which would enable it to enter the German market with a minimum impact. The acquisition of WPM and Profinanz, the service businesses for Wegert, only takes place because the main companies are acquired and can thus be considered accessory.

① Deleted for publication; the text indicates the reason for the legal separation.

8. The parties have submitted that the acquisition of TKE is 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 has not been concluded as yet. Therefore it cannot be assured with sufficient certainty that the transaction will take place. Furthermore 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.

III. COMMUNITY DIMENSION

9. The undertakings have a combined aggregate world-wide turnover in excess of 5,000 million ECU. 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 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

10. 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. 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

11. 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.³ 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.

³ Case IV/M.784 - Kesko/Tuko; case IV/M.890 Blokker/Toys "R" Us.

C. Competitive assessment

12. On the basis of a local or regional market there would be no overlap between the activities of the parties, since Kingfisher is not active in Germany and 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.
13. Should the relevant market be defined as Germany the combined market share of Wegert and ProMarkt in electrical retailing would be [...]® according to the figures supplied by the parties. Even if one were to break these figures down according to the various segments neither of these undertakings could command a market share exceeding [...]®. 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 [...]®.
14. 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-avis these suppliers, would [...]®.
15. 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

16. 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")⁴, 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 service agreement relating to the employment of the vendors of 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.

® Deleted for publication; the figure is less than 3%.

® Deleted for publication; the figure is less than 3%

® Deleted for publication; the figure is between 5% and 10%.

® Deleted for publication; describes the market position Kingfisher holds in this context.

⁴ OJ C 203, 14.8.1990, p.5.

17. 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 [...]®concerns a different transaction that is not directly related and necessary to the implementation of the notified concentration.
18. 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 [...]®years after the termination of the agreement covering this know-how.
19. 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.⁵
20. 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 [...]®years for the confidentiality clause.⁶
21. The non-competition and non-solicitation clauses contained in the agreements relating to the employment of the vendors of 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.

® Deleted for publication; the text describes the clauses in question in the options agreement.

® Deleted for publication; the figure is less than 5.

⁵ Case IV/M.301 - Tesco Ltd/Catteau SA

® Deleted for publication; the figure is less than 5.

⁶ See case IV/M.597 - Swiss Bank Corporation/S.G. Wargurg; case IV/M.512 - UAP/Provincial.

22. 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
23. The shareholders agreement between Eijsvogel and the vendors of Wegert [...]®. This clause is covered by this decision because it is an integral part of the transaction.

VI. CONCLUSION

24. 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.
25. The proposed acquisition of TKE is not covered by the present decision, as it is a distinct operation without Community dimension.

For the Commission,

® Deleted for publication; the text describes the conditions for other activities of the Kingfisher group in domestic electrical retailing in Germany as agreed between the parties.