

*Case No IV/M.1372 -
HUGH BAIRD /
SCOTTISH &
NEWCASTLE*

Only the English text is available and authentic.

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

Article 6(1)(b) NON-OPPOSITION
Date: 18/12/1998

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

Brussels, 18. 12. 1998

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 Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

to the notifying parties

Dear Sirs,

Subject: Case No IV/M. 1372 – HUGH BAIRD/SCOTTISH AND NEWCASTLE

Notification of 19.11.1998 pursuant to Article 4 of Council Regulation N/ 4064/89

1. On 19.11.1998, the Commission received a notification by which Hugh Baird & Sons Limited (HB), a subsidiary of Ulgrave Limited controlled by ConAgra Inc. and Tiger Oats, and Scottish & Newcastle plc acquire joint control of Bairds Malt Limited (BM), a newly incorporated company for the purpose of transferring to it the existing malting and grain merchanting business in the UK of Ulgrave and S&N.
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation (EEC) No 4064/89¹ and does not raise serious doubts as to its compatibility with the common market and with the functioning of the EEA Agreement.

¹ O.J.L 395, p.1; corrected version O.J. L 257 of 21.09.1990, p.13; as last amended by Regulation (EC) No. 1310/97, O.J. L 180 of 09.07.1997, p.1; corrigendum in O.J. L 40 of 13.02.1998, p.17

I. THE PARTIES' ACTIVITIES AND THE OPERATION

3. HB's principal activity is the manufacture of malt, mainly for the brewing and malting industries. ConAgra and Tiger Oats have a number of other malting joint ventures around the world (known generically as ConAgra Malt), of which the most important is located in North America. ConAgra Malt ranks second world-wide with a share of 7.2 % of the global malting capacity.
4. S&N comprise three business divisions: beer brewing, pub retailing and leisure. It is the first brewer in the UK with market shares around 28%, ties or manages around 2,600 pubs and carries on business of malting and grain merchandising under the name Moray Firth Malting and other trade names.
5. BM will be a full-function and autonomous undertaking. Ulgrave and S & N are transferring their existing malting and grain merchandising business. The existing malt business of Ulgrave and S & N are both well established trading business. HB and S & N will have joint control over the joint venture. The shareholding of BM will be split 60/40 between HB and S & N. The Board will consist of five directors, three appointed by HB and two appointed by S & N. However, strategic decisions will require unanimous consent of HB and S & N. Thus, the transaction constitutes a concentration within the meaning of Article 3 (1)(b) of the Regulation.

II. COMMUNITY DIMENSION

6. HB and S & N have a combined aggregate world-wide turnover in excess of ECU 5,000 million (HB, ECU 24,506.5 million; and S & N, ECU 4,929.9 million). Each of them has a Community-wide turnover in excess of ECU 250 million (HB, ECU 1,259.76 million; and S & N, ECU 4,946 million), 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, and it does not constitute a co-operation case under the EEA Agreement, pursuant to Article 57 of that Agreement.

III. COMPETITIVE ASSESSMENT

A. Relevant product market

7. The notifying parties state that the relevant product market is at least as broad as malt. Although the malt market may arguably be subdivided, e. g. into brewing malt and distilling malt, the parties do not believe that this is appropriate because of the high degree of supply-side substitutability. Even if such sub-division was made, their combined market share would not be significantly higher. 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 market

8. The notifying parties state that the relevant geographic market may be limited to the UK or may even be EU-wide or global. However, it is not necessary to further delineate the

relevant geographic markets because, in all alternative geographic market definitions considered, effective competition would not be significantly impeded in the EEA or any substantial part of that area.

C. Assessment

9. The UK Malt production can be separated into two categories: independent maltsters and in-house maltsters. HB is an independent maltster and S & N's malting business, Moray Firth Maltings plc (MFM) is normally taken in this category, although MFM supplies almost [...] of its production directly to S & N. Total production in UK amounts 1,556,550 tonnes of which 1,099,550 (70.6%) corresponds to independent maltsters and 457,000 tonnes (29,4%) corresponds to in-house maltsters.
10. The combined output of HB and MFM is [less than 300,000 tonnes] ([...] tonnes and [...] tonnes respectively). Currently MFM supplies around [...] tonnes to S & N. HB supplies [...] tonnes to S & N. After the joint venture (MB) is formed it will be contracted to supply around [...] tonnes to S & N. The parties' market shares on total production are [less than 10%] for HB and [less than 10%] for MFM.
11. Even including the [...] tonnes to be supplied to S & N, the market share of the new entity in the free market will be [between 20% and 25%] in the UK. The new entity will compete with a number of well established players with important market shares such as Pauls [between 30% and 35%], Muntons [between 12% and 17%], Anglia [between 12% and 17%] and Simpsons [between 12% and 17%]. Market shares of the joint venture together with those of ConAgra Malt are [less than 10%] in the EU and [less than 10%] world-wide.
12. S & N holds 26 % of the UK beer production, HB has no interest in the production and wholesaling of beer in the UK. There would also appear to be no reason why the proposed transaction would strengthen S & N position in this downstream market. Supplies of malt are readily available to UK brewers; not only is there over-capacity in the UK in malt production, but UK production exceeds demand. S & N owns or is allowed to tie or manage 2,739 on-licensed premises, this represents 1.8% of the total number of on-licensed premises in the UK and around 4.2% of total beer throughput in the UK. HB has no presence in this segment of activity.
13. 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.

IV. ANCILLARY RESTRICTIONS

14. The notifying parties have requested that certain non-compete restrictions and the entire "Tolling Agreement" be considered as ancillary to the notified transaction. The parties have agreed not to compete in relation to the activities of the joint venture for its duration and within its geographical scope. This clause reflects the permanent withdrawal of the parents from the malting market within the scope of the joint venture. The Shareholders Agreement also contains a non-solicit covenant prohibiting the parties from soliciting customers from the joint venture until 12 months after its termination. This period is considered necessary to protect the interests of the joint venture in the particular circumstances of the case (both parents are familiar with the malting business; one will even remain active outside the geographical scope of the joint venture; they

could, thus, set up their own malting business immediately after leaving the joint venture and free-ride on the joint venture's clients). Both restrictions are directly related and necessary to the implementation of the concentration.

15. BM will enter into a [it refers to the number of years in the Agreement] Tolling Agreement with Scottish Courage Brewing Limited (Scottish Courage), a subsidiary of S & N, under which BM is obliged to supply to Scottish Courage minimum tonnages of malt, which decrease over the term of the Agreement. [It refers to quantities provided each year.] The parties argue that the Agreement provides a degree of assured output for the joint venture, it also gives S & N a degree of security of supply over the medium term of good quality malt from manufacturing units in which S & N has confidence. However, the Commission considers that three years would be a reasonable period to assure the joint venture's output. Concerning supplies to the former parent, the Commission does not identify any supply problem in the UK, a market permeable to imports. Consequently, to the extent that this agreement constitutes a restriction of competition, the Commission considers it as ancillary to the concentration for a duration of three years.

V. CONCLUSION

16. 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 functioning of the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of Council Regulation (EEC) No 4064/89 and Art. 57 of the EEA agreement.

For the Commission,