

***Case No COMP/M.2078 -  
UBS CAPITAL /  
HEIPLOEG  
SHELLFISH  
INTERNATIONAL***

Only the English text is available and authentic.

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

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Article 6(1)(b) NON-OPPOSITION  
Date: 21/08/2000

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, **21/08/2000**  
SG(2000)D/106317

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 Where possible the information omitted has been replaced by ranges of figures or a general description.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

Dear Sirs,

**Subject: Case No COMP/M.2078 - UBS Capital/Heiploeg Shellfish International**  
Notification of 17 July 2000 pursuant to Article 4 of Council Regulation  
No 4064/89

1. On 17 July 2000 the Commission received a notification of a proposed concentration by which the undertaking UBS Capital B.V. ("UBS Capital") will acquire sole control over Heiploeg Shellfish International B.V. ("HSI") by purchase of the majority of the share capital in HSI.
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation No 4064/89<sup>1</sup> and does not raise serious doubts as to its compatibility with the common market and with the functioning of the EEA Agreement.

## **I. THE PARTIES**

3. UBS Capital is a Dutch subsidiary of the Swiss banking company UBS A.G. UBS Capital is mainly active in investment banking and asset management.
4. HSI is a holding company of several companies active in fishing, processing and wholesale of seafood products in the Benelux, France, Germany, Spain and the UK.

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<sup>1</sup> OJ L 395, 30.12.1989, as amended by Council Regulation (EC) No 1310/97, OJ L 180, 9.7.1997

## II. THE CONCENTRATION

5. The concentration will be effected by the acquisition by UBS Capital of [...]² of the issued and outstanding share capital of HSI. The remainder of [...]% will be held by senior and junior management. According to the Subscription and Shareholders Agreement signed between UBS Capital, HSI and the remaining shareholders on 30 June 2000, UBS Capital will nominate [...]³ members to the Supervisory Board and Management Board, which will adopt resolutions on strategic business decisions by majority vote. UBS Capital will thus exercise sole control over HSI. The operation therefore constitutes a concentration according to Article 3 (1) b of the Merger Regulation.

## III. COMMUNITY DIMENSION

6. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion⁴ (UBS A.G.: EUR 17,888 million; HSI: EUR [...] million). Each of UBS A.G. and HSI have a Community-wide turnover in excess of EUR 250 million (UBS A.G.: EUR [...] million; HSI: EUR [...] 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. It 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*

#### *Fishing and sale of shrimps and shellfish*

7. Some companies are active in the fishing and processing of shrimps and shellfish and in the sale of these products to wholesalers. Other companies are only active in the wholesale of these products to other wholesalers, food manufacturers or retailers. HSI is active in fishing *and* in the wholesale of shrimps and shellfish, representing 90% of its business. The question whether fishing and sale of shrimps and shellfish on the one hand and wholesale of these products on the other hand constitute one market or form part of separate product markets can be left open in the present case since with both market definitions the concentration will not produce any competition concerns.

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2 Deleted as business secret: the majority.

3 Deleted as business secret: the majority.

4 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.

### *Wholesale of shrimps*

8. Based on the specific characteristics of the individual shrimps products with regard to taste, price, processing methods and the different geographic areas where these products are mainly consumed, the overall shrimps market could further be subdivided into the wholesale of warm water shrimps (fished in tropical water areas, representing approximately 76% of the total shrimps market) and cold water shrimps. Within the latter segment a distinction could further be drawn between North Atlantic shrimps, fished in the northern part of the Atlantic ocean, representing approximately 19% of the total shrimps market and North Sea shrimps, caught in the North Sea, representing 5% of the total shrimps market. Warm and cold water shrimps differ from each other in size, colour, taste and price. More specifically, North Sea Shrimps differ from North Atlantic shrimps with regard to their main sales areas (North Atlantic shrimps are sold all over Europe whereas North Sea shrimps are predominantly sold in the Netherlands, Benelux and Northern France).
9. Furthermore, a distinction could be drawn between the wholesale of frozen and chilled seafood products. In the case *Comp/M. 1698-RWA/Nordsee/Cerny*, the Commission, while leaving open the exact market definition, has considered that the wholesale market for fish products could be segmented into the wholesale market for fresh fish and the wholesale market for frozen or smoked fish.
10. The parties argue that notwithstanding the differences between the product categories there would be a certain degree of supply-side substitutability between these products since shrimps processors in Europe in general tend to market two of the three distinctive types. Furthermore, according to the parties, a switch in the processing from a certain type to another would not involve very significant investments. The parties further maintain that it would not be necessary to make a distinction between fresh (chilled) shrimps and deep-frozen shrimps given that both products are in general of the same price, available in the same assortment range and purchased by the same customers.
11. However, for the purposes of the present decision the question whether cold and warm water shrimps and frozen and chilled shrimps are part of the same product market or form separate product markets can be left open since with any alternative market definition the concentration will not lead to the creation of a dominant position.

### *Wholesale of shellfish*

12. As regards the processing and wholesale of shellfish, the parties argue that a distinction can be made between cockles, which are caught in the southern part of the North Sea and mussels, caught in Zeeland (The Netherlands) or in the Wadden Sea. While the processing techniques applied to the two product categories would not differ substantially from each other, there would be differences in cooking equipment and packaging equipment. The parties conclude that cockles and mussels form separate product markets. On the other hand, the parties are of the opinion that a distinction between frozen and chilled products is not relevant to define product markets given that both products are

in general of the same price, available in the same assortment range and purchased by the same customers.

13. However, for the purposes of the present decision, the question whether cockles and mussels on the one hand and frozen and chilled cockles and/or mussels on the other hand form part of the same or of separate product markets can be left open since the concentration will not lead to the creation of a dominant position with any of the two alternative market definitions.

**B. *Relevant geographic markets***

14. The parties maintain that the relevant geographic markets for warm water and North Atlantic shrimps would be likely to cover Western Europe. HSI and its main competitors supply their customers in this area through a network of subsidiaries and third party agents. The parties argue that there would not be any major price differences throughout Western Europe and distribution methods would be very similar. For North Sea shrimps, on the other hand, the parties argue that the relevant geographic market would comprise The Netherlands, Belgium, Northern Germany and Northern France, because these would be the countries where this product was predominantly sold. As regards the wholesale of cockles, the parties argue that these products would be consumed throughout Western Europe, thereby using similar distribution networks.
15. However, for the purposes of the present decision the question whether the relevant markets for shrimps and cockles are regional, national or even European can be left open since with any alternative market definition the concentration will not lead to the creation of a dominant position.

**C. *Assessment***

*Horizontal relationship*

16. UBS Capital does not have any activities in the wholesale of seafood products. Its parent company, UBS A.G., has provided [...] % of the capital invested by the “Phildrew Venture Fund III” in the Seafood Company, an undertaking selling seafood products in the UK. The Phildrew Venture Fund III (including six limited partnerships) holds [...] <sup>5</sup> % of the issued and outstanding shares in the Seafood Company and has appointed “Canven Ltd.”, a wholly owned subsidiary of UBS A.G., to act as the Managing General Partner for the fund. The parties are of the opinion that UBS does not control the Seafood Company. In previous cases (see for example case Comp/M. 1437-CVC/WMO/Wavin) it has been established that an entity, which has been appointed general partner to investment funds and which controls the investments has control over the affairs of the partnerships as well as sole and discretionary authority to take investment decisions on behalf of the partners. Therefore, it can be concluded that UBS A.G. controls the Seafood Company.

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<sup>5</sup> Deleted as business secret: the majority.

17. The Seafood Company is only active in the UK where it has a market share on the wholesale level of below 5% in frozen and chilled<sup>6</sup> warm water shrimps. HSI has only a very minor presence ([...] <sup>7</sup> % market share) in the wholesale of these product category in the UK. Combined market shares would therefore not exceed [...] <sup>8</sup> %. The UK wholesale market for warm water shrimps is very fragmented with a large number of competitors, such as for example Lyons, Kenbell or Krustanor (approximately 5% each).<sup>9</sup>
18. In the wholesale of cockles (frozen and chilled)<sup>10</sup> HSI's UK market share is [5-15]%. Again, the Seafood Company, which is exclusively active in the UK, has only a minor presence in this market, with a market share below 5%. The wholesale market is rather fragmented and customers have a wide choice of suppliers, including for example Prins en Dingemanse (4% market share) or Roem van Yerseke (11% market share).<sup>11</sup> The parties will face countervailing power from large customers as they predominantly sell to large food manufacturers or chain retailers.

#### *Vertical relationship*

19. UBS Capital has provided [...] % of the capital invested by the Phildrew Venture Fund IV, which holds a controlling stake of [...] % in RVP Foods, a company established in the UK, which manufactures food products and is therefore active in a product market downstream of HSI's product market. RVP Foods is a company established in the UK which manufactures food products, in particular Chinese ready-made meals.
20. RVP Foods is purchasing shrimps and cockles from wholesalers and is therefore active on a market downstream of the wholesale of shrimps and cockles. However, RVP Foods does not have a market share exceeding 25% in any of the Member States where HSI is active. There are no reasons to conclude that the operation would lead to a dominant position of the new entity for the purchase of shrimps and cockles since there are a number of national and European wholesalers supplying these products, from which food manufacturers can source their products.

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<sup>6</sup> The market position of the companies concerned would not differ substantially if frozen and chilled products were treated as separate product markets.

<sup>7</sup> Below 5%.

<sup>8</sup> Below 10%.

<sup>9</sup> At a regional level (comprising The Netherlands, Belgium, Northern Germany and Northern France), HSI has a market share of approximately [1-10] % in warm water shrimps (frozen and chilled) and of below 1% in North Atlantic shrimps. The market shares of the Seafood Company in warm water shrimps and North Atlantic shrimps in these countries are insignificant.

<sup>10</sup> See footnote 3.

<sup>11</sup> Based on a regional market definition (The Netherlands, Belgium, Northern Germany and Northern France) HSI has a [20-30] % market share in the wholesale of cockles but the Seafood Company in European terms has a very minor presence in the wholesale of these products.

## V. ANCILLARY RESTRAINTS

21. Pursuant to Article 11 of the Share Purchase Agreement of 30 June 2000 the parties have agreed that the sellers of HSI<sup>12</sup> for a period of [...] from the date of the said agreement will not establish a business in the “Prohibited Field” (meaning business in [...]) and will not acquire or hold an interest in any firm engaged in such business. This non-competition clause also includes direct or indirect participation of the sellers in such business with the exception of minor investments of less than 10% not conferring control and investments in a company which has activities which compete with the “Prohibited Field” provided that such competing activities are incidental to the main activities of such company.
22. The non-compete clause can be regarded as ancillary to the present concentration since it is limited to the business of the target company (that is, fishing, processing and wholesale of shrimps and cockles) and the geographical field chosen by the parties covers the areas of activity of the seller at the time of the concentration. The duration of the non-compete clause also seems appropriate since the transfer of assets includes both customer good will and know-how. The non-compete clause, however, cannot be considered ancillary in as far as it concerns purely financial interests of the sellers in competing businesses, even if these interests exceed 10% (see for example Case Comp/M.301-Tesco/Catteau, par. 14).
23. Furthermore, pursuant to 11.2 of the Share Purchase Agreement UBS Capital has agreed with each of the sellers that for a period of [...] from the date of the Share Purchase Agreement the seller shall not actively directly or indirectly hire employees of the target company within the transferred business nor solicit or in any other way use the services of employees or former employees of the target company. “Former” employees means employees that were employed within the target company one year prior to the date of the Shares Purchase Agreement.
24. The non-solicitation clause can be regarded as ancillary to the present concentration given that it is confined to the business of the target and that this obligation is necessary for the transfer of the full value of the business to the buyer including the know-how and expertise represented by human resources. This clause is, however, only directly related and necessary to the present transaction as it covers solicitation by the sellers of persons who are employed by the target company at the date of the Share Purchase agreement.
25. In addition, the sellers under Article 11.4 of the Share Purchase agreement agree not to use or allow to be used any intellectual property rights (including any trade name or trade mark) used by the target company or any other name likely to be confused with that name. The provision on trademarks can be accepted as directly related and necessary to the present concentration since it gives the acquirer the possibility to use the trademark in order to market the goods and services produced by the target.

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<sup>12</sup> The sellers are Heiploeg Shellfish International B.V. as well as a number of private and public companies and foundations [...] and a number of private individuals [...].

26. The provisions relating to the sellers' obligation not to induce business partners of the target company to cancel or change the terms and conditions of their business with the latter (Article 11.2 of the Share Purchase Agreement) and the confidentiality/non-disclosure clause (Article 11.3) are not ancillary to the present operation in the sense that such clauses are covered by national competition law governing unfair competition.

## **VI. CONCLUSION**

27. 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.

For the Commission,